Administrative Law Section Newsletter

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Legislature Considers APA Glitch Bill

by Steve Mathues

As noted by Chairman Bill Williams, a working group has been meeting frequently to address the many unanticipated and unintended results of the recent amendments to the Administrative Procedure Act. The final product of the working group's effort—produced as this issue of the newsletter goes to press—is fondly known as the "APA Glitch Bill." It will venture into legislative waters as SB 1066 under the sponsorship of Senator Charles Williams; in the House of Representatives, the sponsor is Representative Durell Peaden, although the bill was not numbered as this issue goes to press.

The working group was ably chaired by Governor Chiles' Deputy General Counsel Deborah Kearney, and stewarded by Deputy Chief of Staff Dan Stengle. Membership in the working group was quite diversified, but it was anchored by a nucleus of veterans who had been present for the conception, gestation, and birth of the new Chapter 120. Among the regular participants were some who had served previously on the Uniform Rules drafting committee, legislative staff, a sitting administrative law judge, a former hearing officer, state agency attorneys, and private practitioners.

Appearances were also made by lawyers on behalf of the First District Court of Appeal, county school boards, and the community colleges. In addition, Debby Kearney circulated written comments from many sectors for the working group's consideration.

Debate was often spirited among the working group, which often focused on whether a problem was really a "glitch" or was a matter of substantive "policy." When consensus

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From the Chair ...

by William E. Williams

The three primary goals of the effort to reform Florida's Administrative Procedure Act were flexibility, accountability and simplicity. Although it remains to be determined whether the goals of flexibility and accountability have been achieved, everyone involved to any serious degree in the three year revision process must have concluded that nothing is ever as "simple" as it seems. Of course, many of the players in this process failed to understand at the outset the magnitude of the task being undertaken. This effort involved nothing less than the entire manner in which the legislature delegates authority to the executive; the methods by which the executive branch exercises that delegated authority; and the parameters for judicial review of the exercise of legislatively delegated authority.

There were those who thought at the outset that a simple "tweak" here and there would accomplish the desired result, whether that be granting greater "flexibility" to agencies, or limiting agencies' powers under the guise of "accountability." What relative strangers to the APA ultimately realized, however, was that the "impressive arsenal" of APA

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mechanisms was a relatively finely balanced system in which minor tinkering in one area could result in unforeseen consequences in many others.

The people of Florida were extremely fortunate to have legislative and executive branch representatives in this process who became sensitive to these issues, and who consequently involved a large number of participants with widely disparate philosophical views. The three year dialogue that culminated in the 1996 amendments to the APA served the very valuable function of preventing serious harm to the process principally as a result of the ecumenical nature of the reform effort. Thus, although a wide variety of special interest representatives were involved in the process, the result was a (pardon the phrase) "common sense" resolution which required some compromise by all the participants.

Due in large part to the magnitude of the APA reform effort, it was inevitable that oversights would occur despite the best efforts of everyone involved. To deal with this inevitability, the Governor's office has convened an *ad hoc* "glitch bill" working group to identify problem areas in the newly revised APA, and to recommend potential legislative fixes. A variety of problem areas have been discovered by this group, and by the working group responsible for the drafting and adoption of the new Uniform Rules of Procedure.

Among the problems identified thus far in this process are whether agencies should be relieved from publishing notice of their actions in the Florida Administrative Weekly when not required to do so in the rule adoption process; whether agencies administering federal programs should be required to adopt federally imposed requirements as rules; the proper standards to be applied to emergency variance and waiver requests; whether the requirement that all agencies adopt separate rules governing bid protests should be repealed; what are appropriate standards applicable to emergency license suspensions; whether the requirement to divulge *ex parte* communications should be extended to agency heads as well as administrative law judges; the proper method for the handling of stays on appeal of final agency decisions suspending or revoking licenses; and whether the Legislature should clarify the appropriate purpose and scope of "draw out" proceedings under Section 120.54(3)(c)2, Florida Statutes.

An additional problem that will undoubtedly arise in this and later legislative sessions involves agency requests for exemptions from the requirements of Chapter 120. Because the overall effect of the 1996 APA reform was to tighten many procedural requirements, it is anticipated that many agencies will attempt to extricate themselves from these requirements by arguing that their specific set of circumstances justify relieving them from requirements that might be reasonable when applied to others. A couple of groups representing agencies have already approached the "glitch committee" with such requests. Stay tuned for further developments.

On another subject, the final notice of changes for the Uniform Rules of Procedure were published in the February 21, 1997, issue of the Florida Administrative Weekly. It is anticipated that the uniform rules will be filed with the Secretary of State's office around April 1, 1997. Although the filing will bring the rule adoption process to a conclusion, it remains to be seen when all agencies will be required to commence compliance with these rules.

As the result of discussions at our last Executive Council Committee, the Section has undertaken a consideration of changes in the Florida appellate court structure that might facilitate the handling and disposition of administrative appeals. A working group has been appointed, and has held an organizational meeting, to determine the appropriate issues which our Section might like to raise with the court system in this regard. If any of you have any suggestions, observations, or wish to participate, please contact me as soon as possible. We hope to have a final product from the working group approved by the Executive Council no later than May of this year.

Elections for vacant Executive Council positions, and for officers of the Section for the upcoming year will be held at our Section meeting in June. Those of you wishing to either serve in any of these capacities or to nominate someone for those positions need to contact an officer of the Section as soon as possible. Service in these positions or on committee assignments continues to be the life blood of our Section, and each of you are encouraged to become more actively involved.

On the Move

Richard A. Lotspeich, announces the opening of his office in Tallahassee. He will continue his practice in the areas of environmental, administrative, and governmental law. His mailing address is P.O. Box 15347, Tallahassee, FL 32317-5347, telephone 904/668-0061, fax 904/668-5529.

Section Annual Meeting Planned

Plan on joining us for the Administrative Law Section's Annual Meeting on Friday, June 27, 1997, 9:30 - 11:30 a.m., in conjunction with the Annual Meeting of The Florida Bar at the Walt Disney World Dolphin.

Challenging Rule Repeals

by Stephen T. Maher

How do you react when a client informs you that the repeal of an agency rule is adversely affecting its substantial interests? Put aside what you thought you knew and read the First District Court of Appeal's recent decision in *Federation of Mobile Home Owners of Florida, Inc. v. Florida Manufactured Housing Association, Inc.*, __ So.2d __, 21 Fla L. Wkly. D 2447 (1996). In the *Mobile Homes* case, the mobile home owners and the Department of Business and Professional Regulation, Division of Florida Land Sales, Condominiums and Mobile Homes (the agency) sought to repeal an agency rule that they believed had been interpreted by the First District in a manner unfavorable to the mobile home owners. The rule at issue in the case governed the circumstances under which changes could be made to the prospectus, the document that must by law be given to a mobile home owner when the owner moves in to a mobile home park. This is a very important document in owner/park relations. The agency and the mobile home owners were trying to change the existing law by repealing the rule, and the manufactured housing industry association was fighting to keep the rule in place.[1]

The industry association challenged the repeal by filing a Section 120.54(4) rule challenge against the repeal in the Division of Administrative Hearings (DOAH) and by joining that challenge with a section 120.535 challenge. These section numbers have all changed with the adoption of the newest version of the APA in October, 1996, but the substance of the law has not changed.[2] The industry argued that the proposed rule was invalid because it was an invalid exercise of delegated authority in two respects. First, the repeal, in trying to change the law, conflicted with Court interpretations that everyone assumed had established the law in a pro-industry posture. Second, the repeal failed to establish adequate standards for agency decisions and vested unbridled discretion in the agency.

The Court began its analysis by stating:

> While Section 120.52(16), Florida Statutes (1993), provides that the term "rule" "includes the amendment or repeal of a rule," there are no reported Florida decisions addressing whether that provision makes the repeal of any rule subject to a rulemaking challenge, or simply entitles interested parties to seek repeal of a rule in rulemaking proceedings, and to receive notice of amendments and repeals as required by Section 120.54(1), Florida Statutes, thus permitting a challenge when the rule has the corollary effect of creating a new rule. *Cf. All Risk Corp. of Florida v. Florida Dep't of Labor & Employment Sec.*, 413 So.2d 1200 (Fla. St.. DCA 1982)(rule challenge based upon a rule repeal and simultaneous substitution of new proposed rules).

21 Fla L. Wkly at 2449. The suggestion that rule repeals are not clearly rulemaking under the act, subject to *all* the procedural requirements and protections of the act, including the ability to file proposed rule challenges against repeals, is not only unprecedented, it is contrary to the plain language of the act and to the policies that underlie the act. The language of the act is clear. The statutory definition of the term rule states that the term includes amendments and repeals. Also, there is clear direction, outside this definition section, that repeals are to be treated in the same procedural manner as rule adoptions. New section 120.54(3)(d)5. states: "After a rule has become effective, it may be repealed or amended only through the rulemaking procedures specified in this chapter." The policy behind including repeals within the term rule and treating both in the same procedural manner is strong. An agency's decision to repeal a rule can have as much, or more, impact on a substantially affected person than the decision to adopt a new policy. The same concerns about accuracy, acceptability and efficiency that underlie all rulemaking are concerns in the repeal of rules. There is no logical reason to limit the assurance of procedural regularity that the act requires in rulemaking to rule adoptions. It should be equally required in all rulemaking activity. To my knowledge, never before has anyone suggested that any rule repeals do not have to be noticed, processed and adopted in the same way that all rules are.[3] To my knowledge, for twenty three years everyone has acted as if all rule repeals are subject to the Florida Administrative Procedure Act (APA) in all respects.

The Court continued:

> To constitute "rulemaking" a rule repeal is required to satisfy independently the remainder of the definition of a "rule" in section 120.52(16): "agency statement of general applicability that implements, interprets or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency . . ." A repeal that does not have the effect of creating or implementing a new rule or policy is not a rule subject to challenge.

21 Fla L. Wkly at 2449. How can the Court require a repeal to independently satisfy the requirements within the definition of a rule when the definition itself states that the term rule "*includes* the repeal of a rule"? The quoted analysis is clearly wrong. The Court suggests that the "includes" language might have some lesser effect than making the repeal a rule. It explains that the "includes" language "simply entitles interested parties to seek repeal of a rule in rulemaking proceedings, and to receive notice of amendments and repeals as required by section 120.54(1)." But this analysis gives no effect whatsoever to the "includes" language, because section 120.54(1) and section 120.54(5) (which provides the method for seeking repeal of a rule alluded to by the Court) both mention repeals by name.[4]

Under the Court's interpretation, must repeals of this kind even go through the rulemaking process? The Court has stated that no pro-

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posed rule challenge can be brought against such rules. Must a rulemaking hearing be held upon request? Must any other step be taken to adopt the repeal as a final rule, other than the notice required in section 120.54(1)? Apparently not.[5] The other rulemaking requirements in the APA are for "rules" and do not specifically mention repeals, and the Court has determined that repeals of this kind are not rules.

Thus, it appears that under the Court's interpretation of the statute, rule repeals that do not create or implement a new rule or policy are not rules and therefore cannot be reviewed by the Legislature's Joint Administrative Procedure Committee (JAPC) (which is charged with examining proposed and existing rules), need not be adopted as rules after they are noticed for repeal (because only rules must be adopted), will no longer be the subject of rulemaking hearings of any kind and cannot even be published in the Florida Administrative Code, which is reserved for adopted rules. This is a clear departure from the way rule repeals have been handled by the executive and legislative branches of government for twenty three years.

If agencies follow this precedent, and notice but do not adopt certain repeals, how will the executive and legislative branches respond? The Secretary of State and the JAPC have routinely been involved in the day to day assurance that agencies are following the rulemaking requirements of the act. If called upon to do so, they will find the Court's test a difficult one to enforce. Whether a rule repeal will, or will not, have the effect of creating or implementing a new rule or policy cannot necessarily be determined on the face of the rulemaking materials that are required by statute to be submitted with the rule repeal. The Court in *Mobile Home* reached the conclusion that the repeal there had such an effect after two paragraphs of analysis, with the benefit of a hearing officer's findings, made after a trial. How can the Secretary of State and JAPC hope to determine whether an agency is properly noticing but refusing to adopt its repeal without benefit of such resources? The unworkable situation the Court's construction will create is one more reason for concluding that the Court's analysis is flawed.

This judicial hostility towards statutory protections in rule repeals is not only illogical and unprecedented, it could not come at a worse time. One of the most distinctive features of the administrative law landscape over the past few years has been an unusually large volume of rule repeals. In 1995, for the first time since the Florida APA was adopted in 1974, the majority of rules noticed for adoption were rule repeals, not new rules. To put that fact in clearer perspective, there were 5,777 rules noticed for repeal in 1995 and there had been only 8,627 rule repeals during the previous twenty years.[6] This reversal of a twenty year trend was no accident. Rule repeal has become a political imperative, the politician's way of demonstrating that they are tough on red tape. Both the Governor and Cabinet have established rule repeal quotas and have worked with agencies, by letter and telephone, to make those quotas produce results.[7]

In this respect, the rule repeal at issue in the *Mobile Home* case was not typical of the kinds of repeals that have been common in recent years. Most rule repeals in recent years have not been done to change the law. Rules have been repealed for political reasons, so elected officials could crow about the large number of agency rules they have repealed. These repeals are precisely the kind of repeals that the *Mobile Home* case, if followed, will insulate from challenge. Ironically, after making its analysis, the Court found that the challenger in the *Mobile Home* case properly challenged the repeal under section 120.54. The case hits hardest where protection is needed most: where the administrative process is being manipulated for political reasons.

One area of consistent legal weakness in the flood of rule repeals that we have seen in recent years are the published explanations of why the rules are being repealed that accompany the repeal in the "short and plain explanation of the purpose and effect of the proposed rule" required in the old section 120.54(1). Those statements rarely, if ever, explain the real reasons for the rule's repeal, in many cases, that rules are being repealed to meet Governor and Cabinet imposed rule repeal quotas. They also fail to indicate that the policy expressed in the repealed rule will continue to remain in force as an unpublished rule. Yet that has very often been the reality. Instead, the repeals generally explain that the rule is unnecessary, or something along those lines, even though that conclusion is not legally correct. Legally, where the policy that was in the rule will still remain in effect after repeal, section 120.535, even in its dispersed form in the new act, requires that such unpromulgated rule policy be adopted as a written, published rule. Such unpromulgated rule policy meets the definition of a "rule" in the APA. If an agency is repealing a rule that it intends to continue as an unpublished policy, and explains that fact in its rulemaking materials, the rule repeal would seem, on its face, to be invalid.

Before reading *Mobile Home*, I always assumed that *any* repeal could be successfully challenged pursuant to section 120.54(4) if the materials submitted with the repeal contained inaccurate statements concerning the reasons for the repeal, and could be successfully challenged if accurate statements in the rulemaking materials showed that the agency intended the repeal as a basis for circumventing the rule adoption requirements of the APA, even if no change in policy was intended by the repeal. That assumption was based on the language of section 120.52(8), the definition of an invalid exercise of delegated legislative authority, which is also the operative language of section 120.54(4). Providing inaccurate or untrue information in the rulemaking materials required by section 120.54(1), I had always assumed, was a material failure to follow the rulemaking procedures set out in section 120.54. Section 120.52(8)(a). Similarly, I had always assumed that an admission in those materials that the purpose and effect of the rule repeal was to remove rule policy from the Florida Administrative Code so it could be followed as unpromulgated rule policy was an admission that the repeal was a material failure to follow the

rulemaking procedures in the act, section 120.52(8)(a), the creation of a rule that fails to establish adequate standards for agency decisions (inadequate in the sense that the rule that results from the repeal is unwritten and thus harder to locate and apply), section 120.52(8)(d), and arbitrary and capricious, section 120.52(8)(e).

I still believe that this should be the case. The First District will not allow a section 120.54(4) challenge in cases where the rule repeal does not create or implement a new rule or policy, even in a case where the rulemaking materials accompanying a rule repeal are clearly false, or even in a case where an agency admits in its rulemaking materials that the purpose of the repeal is to circumvent the rulemaking requirements of the act. These are precisely the kinds of cases where a preenforcement remedy like section 120.54(4) is most valuable. Hopefully, some other District Court of Appeal will hear this issue and interpret the statute in a way that will give the Supreme Court of Florida an opportunity to straighten out the law in this area.

In *Mobile Home*, the Court also reminded the bar that, in the First District, there can be no claim that the repeal was invalid under section 120.56 on the theory that the nonrule policy of the agency enlarges modifies, or contravenes the specific provisions of the law the rule was intended to implement, in light of the First District's decision in *Christo v. Florida Department of Banking and Finance*, 649 So.2d 318 (Fla. 1st. DCA 1995).

> In [Christo], the appellant had asserted that unpromulgated agency rules were invalid under both sections 120.535 and 120.56. The hearing officer held that there was no violation of section 120.56 "because the manuals did not enlarge, modify or contravene the specific provisions of law they were intended to implement. *Id.* at 319. However, this court held that "the Legislature, in enacting section 120.535, intended section 120.535 to be used as the exclusive method to challenge an agency's failure to adopt agency statements of general applicability as rules." *Id.* at 321.

21 Fla. L. Wkly at D2450 n.1.

The First District's conclusion that the Legislature intended section 120.535 to be the exclusive method to challenge nonrule policy is certainly not the only way to read the statutes. I argued, in a 1992 law review article,[8] that section 120.56 had not been effectively limited in that way by the legislation that added section 120.535 to the APA.

> While section 120.535(8) provides that "[a]ll proceedings to determine a violation of [section 120.535(1)] shall be brought pursuant to this section," it is still not clear whether relief is also available to challenge unpromulgated rules through section 120.56. It is possible that section 120.535 is not the exclusive remedy available under the APA to respond to an unpromulgated rule. The section 120.56 rule challenge may still be available to invalidate an unpromulgated rule on the basis that it has not been adopted through the formalities of section 120.54. While the Legislature may have intended to make section 120.535 the exclusive method to deal with this problem, it has not made the legislative adjustments necessary to accomplish that result. Section 120.52(8) still defines an "[i]nvalid exercise of delegated authority," the operative language in section 120.56, to include situations where "the agency has materially failed to follow applicable rulemaking procedures as set forth in section 120.54."[9]

In that article, I suggested that there may be a way to read the two sections together and give effect to both.

> Perhaps the section 120.56 rule challenge is still available to invalidate unpromulgated rules, subject to the defense that the challenged policy is not a rule, but rather an incipient policy. Thus, even if section 120.56 has vitality in this area, it has a very narrow reach. Section 120.535 has a broader reach as it is available against all agency policy, even incipient policy.[10]

Such a distinction harmonizes the sections, giving effect to both, leaving the section 120.56 remedy strong but narrow and the section 120.535 remedy broad but weak, since it does not invalidate policy, it merely forces the agency to initiate rulemaking or cease reliance on the policy.

This reading is consistent with the intent of the 1991 amendments that added section 120.535. That legislation was enacted to force recalcitrant agencies into rulemaking, not to give them a new way to avoid being forced to follow legal requirements. Agencies that still rely on unpromulgated but fixed agency rules should know better by now, and should have that policy invalidated. In recent years, agencies have intentionally been creating unpromulgated but fixed agency rules through massive rule repeals. Being thrown into the section 120.535 briar patch is hardly a punishment that agencies will fear enough to think twice when they are told by the Governor and Cabinet to remove all evidence of established rules from the Florida Administrative Code in order to create some impressive statistics for a campaign speech.

The level of repeal that the politicians have sought to achieve, repeal of fifty percent of agency rules, cuts deep into the heart of established rule policy except in those agencies which have been grossly negligent in keeping their published rules up to date. The situation has gotten so bad recently that a former agency lawyer now in private practice told me that he keeps a copy of his old agency's 1994 rules handy so he can easily refer to the policies now in force. Newer volumes of the Florida Administrative Code fail to include many of the rules that still exist in practice. I have described the mass repeals as creating policy icebergs, with large amounts of established rule policy unknown to all but agency staff and agency insiders, ready to sink passing constituents without warning. Ironically, this is the same situation that existed when the act was adopted in the 1970s,[11] the situation that motivated the very rulemaking provisions that the First District has been interpreting as providing no help against this political assault. But the Governor and Cabinet are happy with the results. The people know they are serious about the business of government.

Both the *Mobile Home* and the *Christo* cases limit the challenges that can be brought against rule repeals and the unpromulgated rule policy that results from the kind of repeals we have seen on a weekly basis over the last few years. The real world consequences of these deci-

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sions will be to insulate agencies who ignore the act's rulemaking requirements from challenges to their illegal actions. These consequences could have been foreseen, had the Court paid closer attention to the political climate in Tallahassee. Both decisions were handed down in the midst of the politically motivated rule repeals that they now serve to protect. The courts are the bulwark against the executive branch's refusal to follow the legislative mandate embodied in the APA. They must serve as the protector of the administrative process when it is being manipulated for political reasons. When they fail to provide such protection, the integrity of the process is threatened, and the people are left without an effective remedy.

Endnotes:

[1] As it turned out, the First District found that none of the parties were correct in their interpretation of earlier First District precedent. The Court interpreted its own precedent not to have the pro-industry effect that everyone had assumed. The agency and the owners thus lost the battle (the repeal was found invalid) but won the war (the rule was not in need of repeal for them to prevail, given the Court's reading of precedent).

[2] Section 120.54(4) is now section 120.56(2). Section 120.535 has been dispersed to the four corners of the act, but still remains viable, if harder to find. It will probably continue to be called "the old 120.535" for lack of an easier handle. Parts of the old 120.535 can be found in sections 120.54(1), 120.56(1) and (4) and 120.595(4).

[3] Except those rules that are, by statute, subject to a modified process.

[4] The APA makes specific reference to "repeals" in several rulemaking contexts in the new act. There are specific references to "repeals" in the new 120.54(3)(a)(1)(the old 54(1)), the new 120.54(3)(b)(1) (statement of estimated regulatory cost), section 120.54(3)(b)(2)(the small county, city and business impact consideration), the new section 120.54(3)(d)5 discussed above, and section 120.54(7)(the new 120.54(5))

[5] There is an argument that "intended action" language in the new section 120.54(3)(c)1. includes repeals and would require a rulemaking hearing on all repeals if requested. That language comes from the new 120.54(3)(a)(1), the successor to section 120.54(1), and seems to encompass both adoptions and repeals in that context. That language is repeated in the new 120.54(3)(c)1., the successor to section 120.54(3), the section that governs rulemaking hearings. Thus, a good argument could be made that, despite the *Mobile Home* ruling, there still is a right to a rulemaking hearing in connection with all repeals. However, under the logic of *Mobile Homes*, no further action would be required.

[6] Stephen T. Maher, *The Death of Rules: How Politics is Suffocating Florida*, 8 St. Thomas L. Rev. 313, 328 (1996).

[7] For a more detailed discussion of this topic, *see The Death of Rules*.

[8] Stephen T. Maher, *Administrative Procedure Act Amendments: The 1991 and 1992 Amendments to the Florida Administrative Procedure Act*, 20 Fla. St. U. L. Rev. 367 (1992).

[9] *Id.* at 399-400.

[10] *Id.* at 400-401.

[11] "The proposed act will cut down on the private knowledge of the policies that shape agency decisions which is now possessed only by small groups of agency specialists and agencies' staffs." *Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida*, March 9, 1974 at 2.(c).

***Stephen T. Maher**, Past Chair of the Administrative Law Section, is an author of numerous articles on the Florida Administrative Procedure Act.*

Case Notes, Cases Noted and Notable Cases

by Elizabeth McArthur

This quarter, we begin to fill in the gaps, answer the unanswered, and resolve (or fuel) some fairly heated debates over issues arising from the new APA.

Life Care Centers of America, Inc. v. Sawgrass Care Center, Inc. and Agency for Health Care Administration, 21 Fla. L. Weekly D2487 (Fla. 1st DCA November 21, 1996), is the first appellate decision addressing whether to apply the new APA to a case pending on appeal when the new law became effective.

Life Care involved competing certificate of need applicants. Following an administrative hearing, the Agency for Health Care Administrative entered a final order approving one applicant and denying another. On appeal, the denied applicant argued that the final order should be reversed because it violated section 120.59(2), Florida Statutes (1995), which required that a final order include explicit agency rulings on all findings proposed by a party. However, the requirement of explicit agency rulings on proposed findings was eliminated as part of the APA revision, and the new APA became effective during the pendency of the appeal.

The First DCA, in an opinion written by former DOAH hearing officer Judge Benton, addressed as a matter of first impression whether the new APA applies retroactively. The court compared this APA revision to the last major revision of the APA in 1975, noting that the 1975 revision included express provisions addressing the transition to the new law. By contrast, this APA revision did not have any such provisions. Therefore, the court concluded that the legislative intent was to apply common law standards: the new APA will be retroactively applied when it is found to be procedural or remedial in nature; the new APA will not be applied retroactively when it is found to be substantive, impairing existing rights.

The court then reviewed cases construing the old APA's requirement for explicit agency rulings on proposed findings, and those cases expressly found that requirement to be procedural in nature as a predicate to applying a harmless error test. Since the provision at issue was deemed procedural, the court concluded that the provision could be applied retroactively. The result was that the agency was not held to the requirement that was in effect when the agency entered its final order.

The court in *Life Care* went on to point out that under the new APA, parties still have right to file proposed findings of fact, and to file exceptions to a recommended order, and that agencies remain under a duty to address exceptions taken in a timely fashion. It is unclear what

significance this observation had to the court's decision, since the issue of which law applied was presumably resolved by the procedural-substantive analysis; yet the court seemed somehow to be comforted by observing that agencies would still be under a "duty" to "address" exceptions. But the court cited as authority for that proposition its decision in *Iturralde v. Department of Professional Regulation*, 484 So. 2d 1315 (Fla. 1st DCA 1986), and a review of *Iturralde* makes clear that the *Life Care* court's reference was misplaced.

In *Iturralde*, the court relied on a model rule of procedure that simply repeated the statutory requirement that a final order must include an agency's explicit rulings on parties' proposed findings. The model rules of procedure are being eliminated as part of the implementation of the new APA, to be replaced with Uniform Rules of Procedure that will be binding on all agencies. The proposed Uniform Rules of Procedure do not contain a provision requiring agencies to explicitly rule on parties' proposed findings, nor could they reasonably do so given that the statutory authority for that requirement has been eliminated. Therefore, it is unlikely that a court would find, if pressed, that agencies have an enforceable duty to address proposed findings.

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One of the most interesting debates among administrative practitioners recently arises from the tension between the executive order from the governor's office directing administrative agencies to reduce their rules by 50% and the mandate in the APA that agencies must adopt their policy statements as rules when they meet the definition of a rule. The new APA adds two new ingredients to fuel the tension: first, a big stick to combat agency use of unpromulgated rules; and second, a mandate that agencies can only adopt rules when given specific statutory authority for specific rules (not general rulemaking authority to do whatever necessary and appropriate).

Federation of Mobile Home Owners of Florida, Inc. and Department of Business and Professional Regulation v. Florida Manufactured Housing Association, Inc., 21 Fla. L. Weekly D2447 (Fla. 1st DCA, November 13, 1996), gives some hints as to the headaches yet to come in sorting out this web of conflict. The case involved a challenge to the DPBR's proposed repeal of its rule detailing the process for obtaining approval of amendments to mobile home park prospectuses. DBPR was required by statute to approve prospectuses, and although the statute did not expressly address an amendment process, the court concluded that there must be some procedure for the park owner to obtain approval of amendments when the information required to be in a prospectus changed.

The court first addressed the issue of whether a proposed repeal of a rule constituted rulemaking subject to challenge, and the court concluded that it did when the repeal gave rise to something meeting the definition of a rule. In this case, DBPR's proposed repeal of the rule would give rise to non-rule policies regarding the process of amending prospectuses.

Addressing the merits of the challenge, the court held that the proposed rule repeal was invalid because it would improperly vest the DBPR with "unbridled discretion over the manner of performance of a statutorily mandated obligation to approve prospectuses[.]" 21 Fla. Law Weekly at D2447. The court also held that the proposed repeal would amount to the institution of a non-rule policy that no amendments were permissible, in violation of section 120.535.

Although this decision did not directly address the new APA or the governor's rule reduction efforts, its implications would appear to extend to this perplexing area. Many state agencies have responded to the directive to reduce their rules by proposing to repeal many rules that elaborate on a statutory approval process that is insufficiently detailed in the statute. Just as in the *Federation* case, the standards or procedures detailed in rule may not have been specifically authorized in the statute, but are necessary to allow the agency to implement the statutory approval process. If the rule is repealed, then the agency is vulnerable to an unpromulgated rule challenge. The only potential solution appears to be the "illegal rule list" process, which, in theory anyway, will cause agencies to identify all of their rules that are needed to implement their statutory duties but lacking specific statutory authority, and then the legislature would bestow the missing specific statutory authority upon the agency to legitimize the rules.

The *Federation* case is also noteworthy for its holding that the Federation of Mobile Home Owners had standing to challenge the non-rule policies that would arise from repeal of the rule. The DPBR argued there could be no standing because the asserted non-rule policies had not yet been applied to anyone. However, the court determined that because the prospectus is such a fundamental element of the mobile home business, the uncertainty created by the non-rule policies and by the lack of a rule substantially affected the interests of mobile home park owners, hence the Federation had standing to represent the interests of its members.

* * *

And now, for some more run-of-the-mill notable snippets.

W.T. Holding, Inc. d/b/a Aries Retirement Living v. State of Florida, Agency for Health Care Administration, 21 Fla. L. Weekly D2478 (Fla. 4th DCA November 20, 1996) held that an agency has inherent authority to reissue its final order. In that case, the agency's final order imposing regulatory fines on a licensee was not timely appealed. The licensee asked the agency to reissue the final order so that it could be timely appealed, alleging that the first final order was never received. The agency referred the request to a hearing officer, and the hearing officer concluded that the final order's certificate of service established not only that it was sent as stated, but that it was also received. The agency adopted the recommendation and dismissed the request. On appeal, the Fourth DCA reversed, holding that the certificate of service gave rise to only a rebuttable presumption of receipt. The court remanded for an evidentiary hearing to give the licensee an opportunity to prove the final order was not received, in which

continued...

case the licensee would be entitled to a reissued final order.

* * *

In *Caserta v. DBPR*, 21 Fla. L. Weekly D2576 (Fla 5th DCA, December 6, 1996), the Fifth DCA held that an agency's final order subject matter index is only required for final orders dating from March 1, 1992 forward. The court based its conclusion on the fact that before 1992, the APA provided that agencies had to index all orders from January 1, 1975 forward, but that when the APA was amended in 1992 to eliminate the reference to a beginning date, the intent must have been to impose the indexing requirement from the date of the new law forward. The court did not expressly consider the alternative that it was assumed that agencies had complied with the indexing obligation imposed by the 1975 APA so that there was no longer a need to reference the date that the indexing obligation began.

* * *

In *Cottrill v. Department of Insurance*, 21 Fla. Law Weekly D2630 (Fla 1st DCA December 12, 1996), the First DCA held that the APA requires an administrative complaint against a licensee to not only identify the statutory provisions allegedly violated, but also to allege the specific acts or omissions of the licensee relied on as the alleged violations. The court noted that although its decision was based on the APA, the issue was one of state and federal constitutional import, compelling adequate notice before a person's livelihood can be taken away. The court reversed and remanded for further action predicated solely on those violations both pleaded in the administrative complaint and proven at hearing.

* * *

Lastly, in *Vantage Healthcare Corporation v. Agency for Health Care Administration and Manatee Springs Nursing Center, Inc.*, 22 Fla. Law Weekly D342 (Fla 1st DCA, January 27, 1997), the First DCA suggested that the doctrine of equitable tolling may not be applicable in anything other than a litigation context. In *Vantage*, the Agency for Health Care Administration tried to invoke the doctrine of equitable tolling to excuse Manatee Springs Nursing Center's late filing of a letter of intent, which is a statutory condition precedent to filing a certificate of need application. While the doctrine of equitable tolling has been applied under certain circumstances to allow the filing of a lawsuit or pleading that would be otherwise barred by a limitations period or other deadline, the court noted that the doctrine had never been applied to excuse this kind of deadline. The court went on to conclude that Manatee Springs had not demonstrated the kind of equities that would justify application of the doctrine even if the doctrine could be invoked. Although Manatee Springs had sent the letter by overnight courier the day before it was due, it failed to check the next day to ensure delivery or have a back-up plan in case the package was did not arrive on schedule.

APA GLITCH BILL

from page 1

finally reigned, however, the proposed "fixes" included the following proposals. (*Caveat:* Due to space considerations, some items of limited interest are not included in this overview.)

Agencies considered themselves to be unduly restricted in their rulemaking authority under the new law. It was agreed that both a general grant and a specific grant of rulemaking authority are necessary before an agency is authorized to adopt a rule; however, the working group proposed some language changes that appear to require that both grants appear in the same chapter of law (see, ss. 120.52(8)(g) and 120.536(1), F.S.).

Rule development under s. 120.54(2), F.S. proved a lively topic. First, educational and local units were concerned with the requirement that they publish notice in the *Florida Administrative Weekly*. It was agreed there was no intent in the rewrite of Chapter 120 to change the method of publishing notice by educational and local units. Therefore, clarifications to this effect are proposed for ss. 120.81(1)(c) and (2)(b).

Agencies were concerned with the cost of publishing the full text of proposed rules. An alternative is proposed in s. 120.54(2)(a) to allow agencies to simply publish information on how to obtain the preliminary draft, if one exists. The working group also proposed that agencies which do not have statewide "jurisdiction" need not be required to hold rule development hearings outside their geographic areas (s. 120.54[2][c]).

A new s. 120.54(2)(d)3 is proposed to clarify that an agency's decision to utilize negotiated rulemaking, its selection of the representative working groups, and its approval or denial of an application to participate in the process are not agency action.

A time limit and a tolling period are proposed in relation to the activities of the small business ombudsman in s. 120.54(3)(b)2.b.(II). Extending the time to file rules after publication of a notice of change and adding a tolling provision relating to statements of regulatory cost in s.

continued, page 10

Administrative Law Section
Proposed Budget
1997-98

Revenues	
Dues	$18,000
Dues Retained by Bar	9,000
Affiliate Dues	1,250
Affiliate Dues Retained by Bar	1,000
Total Dues	**$9,250**
Other Revenue	
CLE Courses	$600
Videotape Sales	600
Audiotape Sales	1,500
Interest	2,316
Course Material Sales	100
Section Service Programs	5,500
Contributions	2,400
Total Revenue	**$22,266**
Expenses	
Staff Travel	$428
Postage	800
Printing	350
Newsletter	2,500
Photocopying	275
Officer Travel	2,500
Officer/Council Ofc. Expense	500
Meeting Travel	500
CLE Speaker	100
Writing Contest	2,400
Committees	500
Council Meetings	300
Convention Meeting	1,500
Awards	500
Council of Sections	300
Membership	1,000
Section Service Programs	5,000
Public Utiliites Committee	500
Operating Reserve	1,995
Total Expenses	**$21,948**
Beginning Fund Balance	**$46,315**
Plus Revenues	**22,266**
Less Expenses	**21,948**
Plus Operations from Other Cost Center	**980**
Ending Fund Balance	**$47,613**

120.54(3)(e)2 are proposed.

Some fine tuning of the "draw-out" provision in s. 120.54(3)(c)2 is offered. A person must exercise this option in writing prior to the final public hearing, or expiration of the time to request a hearing. Agencies would have ten days to respond in writing. This determination would not be agency action. If a separate, record-making proceeding were warranted, it could be conducted by the agency or an administrative law judge. The proceeding would be conducted to the extent necessary to protect the person's substantial interests. The presiding officer would transmit the record to the agency, but no recommended or final order would be issued.

There are many suggested changes for the variance and waiver provisions in s. 120.542. In response to concerns expressed by federal agencies, there is language stating that waivers and variances to federal rules are not authorized. Waivers and variances to federal program requirements are allowed only to the extent permitted by the programs. Additional provisions address denial, revocation and duration of waivers and variances. Statutory authority is given for including procedures in the Uniform Rules. Agencies' authority to request additional information is clarified, and the "deemer" clause is amended accordingly.

The working group felt that parts of s. 120.569 were not in total harmony with the concept of informal proceedings under s. 120.57(2). This can be corrected by substituting "proceeding" for "hearing" throughout the section and in the title of s. 120.57(2). A clarification of agencies' discretion to accept either written or oral evidence in informal proceedings is also offered.

The carry-over requirement that agencies adopt rules for bid protest resolution, a true glitch given the Uniform Rules requirement, is offered for repeal in s. 120.57(3). While *dicta* suggests that weekends and holidays are not included in the 72-hour protest windows, the working group decided that this should be stated in s. 120.57(3)(b).

Proposed for inclusion in s. 120.60(3) is a requirement that agencies state the grounds for their actions regarding applications for licenses, except where issuance is a ministerial act. Final orders issued under s. 120.60(5) would contain a specific finding of whether continued practice by the licensee pending appeal presents a probable danger to health, safety, or welfare. Currently s. 120.60(6), s. incorporates by reference portions of s.120.54(4) which are applicable emergency suspensions, restrictions, and limitations of licenses. The working group felt it would be more appropriate to repeat and conform these provisions within the section itself.

A change is offered in s. 120.65 to specify that the Director and any Deputy Directors of DOAH must have the same minimum qualifications as administrative law judges. The Director also serves as the Chief Administrative Law Judge, with similar titles for Deputy Chiefs.

Regarding *ex parte* communications, changes are offered to ss. 120.66(2) and (3) reflecting that the term "presiding officer" includes the agency head and any designee thereof.

An additional exception provision is offered as s. 120.81(15) to prevent applications for waivers or variances relating to rules of the Board of Trustees of the Internal Improvement Trust Fund (Governor and Cabinet), which holds title to state lands, from being deemed approved if not actually denied or approved within ninety days.

Finally, the working group addressed the fact that there are presently two Sections 120.57 on the books. The "old" 120.57 was amended by Chapter 96-423, *Laws of Florida*. Then along came the full rewrite in Chapter 96-159, including the new section. The working group proposes that both be repealed. No, no, just kidding! Rather, the final proposal is to repeal the Chapter 96-423 version which, not incidentally, would repeal the "videotaping" alternative as a means of preserving testimony in administrative proceedings.

As this issue goes to press, these "fixes" were included in the legislation. By adjournment *sine die* of the 1997 Legislature, they may be simply historical footnotes, or on their way to becoming the law as they relate to administrative procedure in Florida.

Steve Mathues *is an assistant general counsel representing the Department of Management Services. He generalizes in communications, purchasing, building construction, intellectual property and admini-strative law. He and his fellow attorneys in the Office of General Counsel encourage inquiries from practitioners needing information about DMS' statutes and rules.*

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

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The Florida Bar Administrative Law Section
Public Utilities Law Committee
presents

Current Ethics Issues for the Public Service Commission Practitioner

COURSE LEVEL: INTERMEDIATE

May 9, 1997

Eatz Cafe, State Capitol Complex, 4055 Esplanade Way, Tallahassee, FL

Course No. 2345 7

COURSE SYNOPSIS

The Florida Public Service Commission has initiated the implementation of mediation in Commission proceedings. The seminar is designed to explore ethics problems associated with practice and procedure before the Florida Public Service Commission in mediation proceedings. This will be a group problem-solving seminar instead of a traditional lecture seminar. Participants will be provided with common facts and a problem and then divided into small groups, each group having its own unique facts. Each group will explore the relevant legal and ethical issues from the perspective of the Commission Staff, Public Counsel, Utility, and Intervenors. The conclusions of the small groups will be presented to the total group for a comparison and evaluation of the results.

The seminar will begin at 11:00 a.m., with a luncheon (included in registration fee) to follow at 12:00 noon.

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Register me for "Current Ethics Issues for the Public Service Commission Practitioner"
May 9, 1995 — Eatz Cafe, Tallahassee

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