Administrative Law Section Newsletter

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Court Aims Six-*Schluter* at Unpromulgated Policy

by Stephen T. Maher

In *Department of Highway Safety and Motor Vehicles v. Schluter,* 705 So.2d 81, (Fla. 1st DCA 1997), the department admitted in a stipulation filed in Section 120.56(4)[1] proceedings brought by Schluter that it had five policies that had not been adopted as rules. After hearing, the Division of Administrative Hearings (DOAH) Administrative Law Judge (ALJ) found that a sixth unpromulgated policy existed. All the policies related to the investigatory measures used in connection with the investigation of State Troopers. Schluter was a State Trooper who filed the Section 120.56(4) challenge as a trooper under investigation, and the Florida Association of State Troopers joined the challenge. They argued that the six investigatory policies could not continue to be agency policy because they had not been promulgated as rules in the manner required by the Florida Administrative Procedure Act.[2] The DOAH ALJ agreed and the department appealed.

The Court unanimously reversed on three of the policies. It found that since the stipulation indicated that those three policies were applicable "in certain circumstances," which were not specified, they could not be rules. The Court reasoned that the department's "first three declarations cannot be said to have been 'intended by their own effect to create rights, or otherwise have the effect of law'"quoting *McDonald v. Department of Banking and Finance*, 346 So.2d 569, 581 (Fla, 1st DCA 1977). The Court's conclusion seems to turn on the language of the stipulation, which did not specify the circumstances under which the policy applied. It does not appear that the Court intends to suggest a broad requirement that challengers must

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From the Chair ...

by Robert M. Rhodes

Thanks to everyone who wrote me to share views on legislative review of rules under the revised APA. The interest meter is escalating.

I previously observed that based on experience, legislative review of rules may not be a substantive priority during the 60 day 1998 regular legislative session. Consequently, legislators and committees may be hard-pressed to study carefully each rule and determine whether it appropriately reflects specific legislative authority required under the new APA. Well, this may not be a problem, at least in the Florida Senate. To its credit, the Senate reportedly will tackle its new responsibility by reviewing and taking appropriate action on each rule identified by legislative staff as lacking specific legislative authority. Appropriate action apparently will be taken in **individual** bills that must be limited to a single subject; i.e., provide statutory authorization for a rule or a related rule. This means that diverse rules addressing unrelated subjects will not all be lumped together in a single "legislative train", but instead will receive particular attention. Forget the additional load on the legislative docket.... This could be a landmark.

If nothing else, the ongoing legis-

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prove all the circumstances in which a challenged policy applies and does not apply in order to establish it is an unpromulgated rule. Such a requirement, if adopted, would serve to insulate policy from challenge to some degree, because it is the rare policy that is absolute, and the more proof required to bring a challenge, the less likely that challenges will succeed.

The Court split 2-1 on whether the three remaining policies should be invalidated. The majority opinion, authored by Judge Ervin and joined by Judge Davis, held that the policies should be invalidated. Judge Benton dissented. The majority opinion essentially argued that the three stipulated policies that were not only applicable in certain circumstances were on their face "rules" as that term is defined in Section 120.52(15), Florida Statutes, since they were "agency statements of general applicability that prescribe the Department's procedure or practice requirements pertaining to officers under investigation." Finding that these three unpromulgated policies met the definition of a rule in the act, the Court turned to the issue of whether the policies fit within the internal management memorandum exception to the requirement of rulemaking. The majority found that since the private interests of the state troopers were affected by these policies, the exception was unavailable.

The dissent did not take issue with the inapplicability of the exception;[3] it challenged the decision that the policies were rules. The dissent argued that the threshold question is "whether any of the policies at issue found expression as agency statements (attributable to appellant's collegial head [Section] 20.24(1), Fla. Stat. (1995), or some duly authorized delegate) intended to have the preclusive effect of law." "Absent other proof of comprehensive dissemination, the failure to formulate the challenged policies in writing (before the prehearing stipulation was drafted) requires the conclusion that these policies were not agency statements intended to have the force and effect of law."

The majority responded to the dissent's argument by noting on the that the case law has not specifically required policy to be in writing in order to be considered a rule. It further concluded that requiring a writing would be contrary to the legislative history of the act, citing the Reporter's Comments, the initial legislative history of the act, and quoting from them at some length. The Court also noted that the case law relied on by the dissent was part of a discarded judicial gloss on Chapter 120. The majority acknowledged that the 1991 amendments had rejected case law that had given agencies discretion to develop policy through adjudication or rulemaking, and that the Legislature had done so "in no uncertain terms." The majority went so far as to state that "[b]y enacting section 120.535, Florida Statutes, the legislature clearly disapproved the judiciary's interpretation of the Act, which had indicated that rulemaking was primarily a matter of agency discretion." This is an important pronouncement, and this case marks an important milestone in the history of required rulemaking in Florida.

On the policy level, *Schluter* evidences the continuation of an old and fundamental debate in administrative law. The dissent's implicit concern is perhaps best expressed by Justice Felix Frankfurter in 1927:

> In administrative law we are dealing pre-eminently with law in the making; with fluid tendencies and tentative traditions. Here we must be especially wary against the danger of premature synthesis, of sterile generalizations unnourished by the realities of 'law in action.'

Felix Frankfurter, *The Task of Administrative Law*, 75 U.Pa.L.Rev. 614 (1927). The federal courts have created a system that places higher emphasis on these values than on the benefits of rulemaking. While the federal Administrative Procedure Act is silent on the subject, the United States Supreme Court has decided to allow agencies broad discretion to develop their policies through either rulemaking or adjudication. *NLRB v. Bell Aerospace Co., Division of Textron, Inc.*, 416 U.S. 267 (1974). In Florida, the Legislature has chosen the opposite course. In 1991, it amended the Florida APA to add Section 120.535, now renumbered and dispersed through the act but still in force. The 1991 amendments require rulemaking unless the agency can prove that it is not "feasible" or "practicable"[4] to adopts its policies as rules. Thus, the Legislature has chosen to value the benefits of rulemaking over concerns about premature policy synthesis.

The reason that it is possible to say that the majority is "correct" in its resolution of this case is because that policy choice, for good or ill, [5] has been made by the Legislature. As the majority correctly points out, the Legislature has rejected the judicial decisions that have allowed agencies to prefer incremental policy development to rulemaking. This was done despite the courts' expressed view that rulemaking without such development is "folly." *McDonald* at 580.[6]

The law now requires that all agency policy be adopted, through the rule adoption procedures set out in the act, as written, published rules. The only exceptions are nar-

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rowly drafted, and apply only to cases where the agency can prove that rule promulgation is not feasible or practicable. I read the 1991 amendments as a rejection of the *McDonald* philosophy and an attempt to overrule the judicially created doctrine of incipient policy because the statute on its face does not permit the kind of refinement of policy over repeated adjudication that the incipient policy case law describes.[7] In any such adjudication, a party can file a *Schluter*-like challenge raising the failure to promulgate the policy being developed as a rule, and unless rulemaking is begun before the petitioner prevails, the policy will not be allowed to be applied. Thus, I believe that the old "incipient policy" exception to required rulemaking, announced in *McDonald* and followed for years after that, no longer exists. It has been superseded by the statute.

I recognize that the cases may not be in complete agreement with this conclusion. In *Christo v. State, Department of Banking and Finance*, 649 So.2d 318, 320 (Fla. 1st DCA 1995), the Court continued to use the phrase "incipient policy" years after the 1991 amendments, explaining that:

> policy is incipient or evolving when an agency has not yet solidified its position on policy in a particular area, and instead seeks to exercise its authority on a case-by-case basis until it has focused on a common scheme of inquiry derived through experience gained from adversary proceedings. *Florida League of Cities, Inc, v. Admin. Comm'n*, 586 So.2d 397, 406 (Fla. 1st DCA 1991). In providing for defenses to rulemaking in section 120.535(1)(a), Florida Statutes, the Legislature appears to have recognized that true incipient policy should be exempt from rulemaking, and therefore, not subject to challenge under section 120.535.

The problem that I see with this analysis is that I read the "not feasible or practicable" exceptions as intended to be much narrower than the description of incipient policy given in *Christo*. I do not believe that the statute describes "true incipient policy" if that means the "exercise its authority on a case-by-case basis until it has focused on a common scheme of inquiry derived through experience gained from adversary proceedings." I believe that the statute replaces the *McDonald* vision of evolving policy that matures into rules with a requirement that rules be adopted without waiting for policy to mature, because the benefits of rulemaking outweigh the benefits of waiting.[8] The incipient policy exception of the past is dead.[9]

I see the dissent's proposed requirements, if adopted, as creating a successor to the now deceased "incipient policy" exception. The purpose of the "incipient policy" exception was to insulate policy from required promulgation in order to "allow agencies to 'structure their discretion progressively by vague standards, then definite standards, then broad principles, then rules.'" *McDonald* at 580. The dissent's proposed test, which I will characterize as the "unrecognized policy" exception, has a purpose similar to the "incipient policy" exception: to permit agencies more flexibility to develop their policies free of the strictures of rulemaking. The difference is that the "unrecognized policy" exception focuses, not on the degree of policy development that has occurred, because that is flatly precluded, but on the degree to which policy is recognized by the agency as its official policy. The exception, as explained in the dissent, would require a Section 120.56(4) challenger to prove 1) that the policy came from the agency head or a delegate, 2) that the policy was intended to have the preclusive effect of law, rather than serve as a guideline for decision making and 3) that the policy was comprehensively disseminated or, in the alternative, that it was written down. The dissent finds these requirements implicit within the definition of a "rule." If the policy does not meet these three requirements, then, the dissent concludes, it is not an "agency statement of general applicability that implements, interprets or applies law or policy." Section 120.52(15). The dissent suggests that, since the definition of a rule was not changed in 1991, this interpretation of the act is not precluded by the 1991 amendments.

The dissent's argument seems contrary to the functional approach to rule definition in the act. The Section 120.52(15) definition of a rule, an "agency statement of general applicability that implements, interprets or applies law or policy," puts function over form, and finds rules not only in statements that the agency identifies as rules, but also in statements that have the effect of rules.[10] The statute suggests that agency actions will be allowed to speak louder than agency words where decisions about what is a rule are concerned. This seems inconsistent with the argument that for something to be considered a rule, the agency must be shown to have "authorized, intended and communicated" the policy, because those requirements seems to put form over function. It also seems contrary to the dissent's argument that agency actions may not be considered in determining what agency rules are.

The dissent contends that "'[u]nstated policy implicit in agency action does not amount to an administrative rule just because it has been consistently applied. *Home Health Professional Services, Inc. v. Department of Health and Rehabilitative Services*, 463 So.2d 345 (Fla. 1st DCA 1985).' *Hill v. State, Dep't of Natural Resources*, 7 F.A.L.R. 5236, 5241-42 (Fla. Div. of Admin. Hearings 1985)." *Home Health* and *Hill* were cases decided under the now abandoned case law that allowed agencies to prefer rulemaking if they could show "record foundation" for their policies when those policies were applied. *See, e.g., Florida Cities Water Company v. Public Service Commission*, 384 So.2d 1280 (Fla. 1980). There is no doubt that the precedential value of such cases has been swept away by the 1991 amendments, which now only allow adjudication instead of rulemaking where an agency can prove that rulemaking is not feasible or practicable. In addition, *Home Health* did not hold that unstated policy implicit in agency action does not amount to an administrative rule just because it has been consistently applied. In *Home Health*, the agency was trying to "prove up" its policy to meet the record foundation requirement. The Court found that the agency had proven record foundation for its policy through testimony to

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the effect that HRS consistently interpreted the statute and acted in a consistent manner, even in the absence of an adopted rule. If it stands for anything, *Home Health* should stand for the proposition that proof of practice shows policy. Testimony that the agency always acted the same way when faced with the same factual situation showed that it had what was, under the old case law, a proper substitute for a rule. The same proof should be allowed to prove, under present law, that an unpromulgated rule exists. The other cases cited by the dissent for the proposition that unstated policy implicit in agency action does not amount to an administrative rule just because it has been consistently applied are not District Court of Appeal decisions and are cases from the bygone era when proof of record foundation was a substitute for rule adoption. As the majority notes, case law "largely motivated by the court's expressed preference for adjudicative processes over rulemaking," is a judicial gloss that has been rejected by the Legislature in "no uncertain terms."

The effect of the combination of this pronouncement and application of the "authorized, intended and communicated" test would be to give the agency more control over what can be challenged as an unpromulgated rule. This approach emphasizes the probative value of what the agency says its rules are, and it de-emphasizes the probative value of what the agency is actually doing. There is a substantial question whether, even if the law supported the dissent's position, the course it proposes would be a good one to follow. The 1991 amendments were necessary because the exception to required rulemaking created in *McDonald* soon "swallowed the rule." Patricia Ann Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 Fla.St.U.L. Rev. 437 (1991). The exception became "a license for agencies to avoid rulemaking by exercising their unbridled discretion...." *Id.* at 448. *Accord* Johnny C. Burris, *The Failure of the Florida Judicial Review Process to Provide Effective Incentives For the Rule Making Process Under the Administrative Procedure Act*, 18 Fla.St.U.L.Rev. 662 (1991). In light of the history of abuse that characterized the use of the prior exception, the creation of a new exception, even if it were warranted, would not seem wise.

The dissent's attempt to divide policy into policy and pre-policy and to make the latter immune from rulemaking requirements does raise the interesting question: Is there anything before "policy" under the act? If policy, unlike the universe, is not infinite, what lies outside its boundaries? If policy is not preceded by "incipient policy" or "unrecognized policy" or some yet to be created category of pre-policy, is everything the agency does "policy" that must be adopted as a rule? I believe that the answer to this question is that everything the agency says and does is policy, but no judicially created "rulemaking free zone" needs to be created to protect agencies from this fact. Section 120.56(4)(e) provides the agency confronted with a challenge to its unpromulgated policy with statutory protection: it can adopt policies challenged pursuant to Section 120.56(4) as rules in response to such a challenge, and thus avoid the statutory consequences of its failure to adopt them as rules.

Schluter is an unusual case because it was decided on a stipulation where the agency admitted to what the dissent categorizes as a "virtually unstated" policy. The majority found "[g]iven the form of the evidence" that "the Department has an established policy that had been systematically communicated to the agency personnel with the intention that it be implemented with the force of law." This was not proven, it was "manifest in the language" that the department "'has a policy.'" In other words, if an agency has a policy, we can assume that it has been systematically communicated to the agency personnel with the intention that it be implemented with the force of law, because that is what having a policy means. "The word 'policy,'... is not a term of art. It has a commonly understood meaning. It is defined [in Webster's Dictionary] as 'a principle, plan, or course of action, as pursued by a government, organization or individual, etc.'"

Agencies may find a simple three word rule in the *Schluter* case: "do not stipulate." Challengers may be encouraged by the fact that the First District, in *Schluter*, has finally clearly acknowledged the primacy of the 1991 amendments over its old case law in this area. But challengers are left with the question of how they can prove that what they are challenging is indeed a policy, assuming that from now on it will be difficult to obtain a stipulation. The problem of proving a policy, that is the existence of "a principle, plan or course of action," and not the requirements proposed in the dissent, is not insurmountable. However, proof of what an agency has in fact been doing seems important to any such case. If such an inquiry is limited or not permitted, the usefulness of the Section 120.56(4) remedy will be impaired.

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Endnotes:

[1] "Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a)." This section was part of Section 120.535, Florida Statutes (1995) prior to the 1996 amendments to the APA.

[2] Section 120.56(4)(d) provides: "When an administrative law judge enters a final order that all or part of an agency statement violates s.120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action."

[3] This is significant in light of cases like *Department of Highway Safety and Motor Vehicles v. Florida Police Benevolent Association*, 400 So.2d 1302 (Fla. 1st DCA 1981), which held that general orders prescribing standards for physical fitness for patrolmen and prescribing guidelines for supervisors in assessing discipline were effective only as guidelines, subject to the discretion of the enforcing officer, and thus qualified for the "internal management memoranda" exception to the definition of a rule. The fact that the Court unanimously rejected this rationale shows how much things have changed in this area in recent years.

[4] Section 120.54(1)(a), Florida Statutes. Rulemaking is presumed feasible and practicable unless specific statutory showings can be made by the agency.

[5] I am on record favoring the Legislature's required rulemaking approach. My support for this position is clear from many of my recent writings on the Florida APA. *See, e.g., How the Glitch Stole Christmas: The 1997 Amendments to the Florida Administrative Procedure Act*, 25 FLA. ST. U. L. REV. 235 (1998); *The Death of Rules: How Politics is Suffocating Florida*, 8 ST. THOMAS L. REV. 313-347 (1996); *Getting Into The Act*, 22 FLA. ST. U. L. REV. 277-306 (1994); *The 1991 and 1992 Amendments to the Florida Administrative Procedure Act*, 20 FLA. ST.U.L. REV. 367-439 (1992); *Patricia Ann Dore and The Florida Administrative Procedure Act*, 19 FLA. ST. U. L. REV. 951-956 (1992).

[6] *McDonald* feared that requiring policy to be adopted as a published rule "would immediately stifle Department policymaking and ultimately destroy the APA." These dire predications have not proven true since rulemaking was clearly required by statute in 1991.

[7] The argument could be made that Section 120.54(1)(a)1.a., which provides rulemaking is not feasible if "[t]he agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking" provides latitude for agency policy development by adjudication before rulemaking, but too broad a reading of this exception risks a return to the problems that motivated this legislation in the first place.

[8] It was, after all, the courts' willingness to wait for policy to mature that prompted the passage of the 1991 amendments that added Section 120.535. *See* Patricia Ann Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 Fla. St. L. Rev. 437 (1991); Patricia Ann Dore, *Seventh Administrative Law Conference Agenda and Report*, 18 Fla. St. L. Rev. 703 (1991).

[9] Some might argue that the reports of the death of incipient policy are greatly exaggerated. *Exclusive Investment Management & Consultants, Inc. v. State, Agency for Health Care Administration*, 699 So.2d 311 (Fla. 1st DCA 1997)(the same majority as in *Schluter* applying *McDonald's* incipient policy explication requirements).

[10] "It does not matter what the agency calls the statement. If it fits the definition of a 'rule' it is subject to rulemaking...." Arthur Earl Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 Fla.St.U.L.Rev. 617, 621 (1991).

FROM THE CHAIR

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lative review effort underscores the need for legislators to provide rule makers and the public with clear and more precise rulemaking standards and direction as part of the legislative drafting process. Front end attention and clarity would obviate much of the need for after the fact legislative review.

Turning to Section activity, our February 6 CLE program on legal and policy issues surrounding retail electric regulation was very successful. The program attracted 130 attendees who heard spirited and diverse presentations on this significant public policy issue. Thanks to Jim Rossi, Doc Horton, Floyd Self and Booter Imhof and the Florida State University College of Law.

On May 1, 1998, the Section will offer a CLE program that will present law, policy, and practical advice on administrative litigation. Jon Sjostrom is chairing this event, which will be held at the Center for Professional Development in Tallahassee. The program will address issues under the new APA such as discovery, public records, open meetings, bid protests, challenges to rules and non-rule agency policy, and stays pending appeal.

The Section's Public Utilities Law Committee on May 8, 1998, will offer its third ethics seminar for Public Service Commission practitioners. This hands-on, small group, problem solving program will also offer one hour ethics credit. It is being organized by Doc Horton, Everett Boyd, Ron Vandiver, and Floyd Self.

Finally, we're excited the Section will sponsor a writing competition in the area of administrative law in honor of Professor Pat Dore. Students enrolled in Florida law schools will be eligible to enter. We will award cash prizes and the first place winner's article will be published in The Florida Bar *Journal*. Submissions must address some aspect of Florida administrative law, including constitutional issues related to Florida administrative process. We hope to start the contest in Fall, 1998. We're now raising money to fund the prizes. We are halfway to our goal, and invite contributions from firms and individuals who would like to help establish this worthwhile competition in Pat's honor. Checks should be made out to The Florida Bar and sent to Jackie Werndli, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399. We appreciate your help.

I again invite all of you to participate in your section and contact me or section officers with program ideas or other comments or suggestions.

Section Executive Council/Annual Meeting

Friday, June 19, 1998
2:30 - 5:30 p.m.
Buena Vista Palace Resort & Spa

Case Notes, Cases Noted and Notable Cases

by Seann M. Frazier

District Courts of Appeal

First District

In a decision rendered by the First DCA on the subject of rulemaking, modern interpretations on rulemaking requirements were set forth in *Dept. of Highway Safety and Motor Vehicles v. Schluter*, 705 So.2d 81 (Fla 1st DCA 1997). The Department appealed a decision of an ALJ that found six individual policies each constituted a rule never adopted in compliance with Section 120.54, Florida Statutes (Supp. 1996). The Court agreed with the Department that three of the six did not constitute rules. However, the remaining three would be defined by the majority as "rules" which must be set forth in Florida's Administrative Code.

The first three policies applied only in "certain circumstances" (*Dept. of Highway Safety and Motor Vehicles v. Florida Police Benevolent Ass'n*, 400 So.2d 1302 (Fla. 1st DCA 1981)), and were not "intended by their own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law." *McDonald v. Dept of Banking and Finance* 346 So.2d 569, 581 (1st DCA 1977). The latter three, the majority of Justice Ervin and Davis would find, constituted the APA's definition of a rule because they were generally applicable and prescribed the Department's procedure or practice requirements pertaining to officers under investigation.

To further support its opinion, the majority reviews the history of the 1974 Administrative Procedures Act. The majority strings together a number of cases to support the proposition that the Appellate Courts have favored adjudicative processes over rulemaking. *McDonald v. Dept of Banking and Finance*, 346 So.2d 569, 581 (Fla. 1st DCA 1977); *Dept. of Highway Safety and Motor Vehicles v. Florida Police Benevolent Ass'n* 400 So.2s, 1302, 1303-04 (Fla. 1st DCA 1981); and *Barker v. Board of Medical Examiners*, 428 So.2d 720, 722 (Fla. 1st DCA 1983). However, the majority recognizes that the Legislature has overruled this judicial preference, perhaps because of the long-standing efforts of APA advocates such as the late Patricia A. Dore. [The court cites Ms. Dore's *Florida Limits Policy Development through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 Fla.St.U.L.Rev. 437-38 (1991)]. The adoption of Section 120.535, Florida Statutes (now renumbered and found in 120.54) clearly stated that rulemaking was no longer a matter of Agency discretion. It was the will of the Legislature to encourage rulemaking as soon as feasible and practicable.

In a well-researched dissent, Judge Benton argues that none of the six policies constituted agency "statements of general applicability," or rules. Judge Benton argues that none of the policies was "enunciated as an 'Agency statement' intended to have the force and effect of law" as required by the definition of the rule. In a position criticized by the majority, Judge Benton suggests that petitioners must demonstrate the existence of a *writing* intended to bind an agency behavior. The policies at issue were first enunciated, Judge Benton surmises, when the parties prepared a prehearing stipulation. Otherwise, the challenged policies were "unwritten policy" which can never amount to a rule according to Judge Benton. Citing *Department of Corrections v. McCain Sales of Florida, Inc.*, 400 So.2d 1301 (Fla. 1st DCA 1981).

Comment:

New revisions to the APA may make us rethink whether the Legislature favors rulemaking over administrative adjudication. The 1996 revisions to Florida's APA removed judicial opinions which had allowed rules to withstand challenge so long as they were "reasonably related" to organic legislation. Section 120.536, Fla. Stat. (Supp. 1996). New rules will no longer be valid simply because they are "reasonably related" to underlying statutes. Also, the burden for proving newly proposed rules are valid has now shifted to the agencies' side of the court. Section 120.56(2)(a), Fla. Stat. (Supp. 1996). These two changes would appear to demonstrate a legislative preference against rulemaking. Nevertheless, the former requirement to adopt rules "as soon as feasible and practicable" found at 120.535 remain in today's APA (now 120.54). These other, more recent, changes to the Florida APA were not addressed in *Schulter*. It will be interesting to see how the courts balance these apparently contradictory instructions, on the one hand favoring rulemaking, on the other hand discouraging it.

* * *

Sometimes, form rules over substance when challenging an existing rule. In *Beverly Health and Rehab. Serv. v. Agency for Health Admin.*, 23 Fla. L. Weekly D 644, 1998 WL 94158 (Fla. 1st DCA 1998), the First District dismissed an appeal without prejudice when a nursing home challenged an existing rule pursuant to Section 120.56(1), Florida Statutes (1995). The Appellants cast their petition as a challenge to a published, existing rule. However, the Courts reading of the petition demonstrated that the Appellant was actually attempting to challenge an unwritten and unadopted rule. Because the Appellant named subsection (1) rather than subsection (4) as the flag under which they sailed, the Court dismissed without prejudice to return flying new colors.

* * *

The Board of Veterinary Medicine found out that the Equal Access to Justice Act had some teeth in *Helmy, D.V.M. v. Dept. of Bus. and Prof. Reg.*, 23 Fla. L. Weekly D 554, 1998 WL 60497 (Fla 1st DCA 1998). Dr. Helmy had been suspended by the Department, but still performed occasional tasks at his clinic. The Department investigated those tasks and eventually filed a formal administrative complaint against Dr. Helmy for the unauthorized practice of veterinary medicine. They later dismissed the complaint. Dr. Helmy thereafter filed for attorneys' fees and costs pursuant to Section 57.111, Florida Statutes (1991). Because Dr. Helmy demonstrated he was a prevailing small business, the Department bore (boar?) the burden of demonstrating that the proceeding it started was "substantially justified."

The Court's review of the transcript to the probable cause hearing demonstrated that the Board's examination was somewhat flea-bitten. Because those odd jobs Dr. Helmy performed around his clinic were done under the "immediate supervision" of a licensed doctor, no licensure statute was violated and the action brought against the good Doctor was not substantially justified. The cause was remanded, thereby demonstrating that every dog has his day.

* * *

The sun also rises for *Sunrise Community, Inc. v. Agency for Health Care Admin.*, 704 So.2d 1135 (Fla. 1st DCA 1998). In this case, Sunrise Community submitted interim rate increases which were denied by the Agency's Medicaid program despite competent, substantial evidence that the Agency's Office of Developmental Services had taken the position that the rate increases must be approved. At one point, the Agency criticized Sunrise for not obtaining prior approval of the rate increases from the Agency's Office of Developmental Services. The Agency later argued that the Medicaid Program's approval was needed.

An Administrative Law Judge found that competent, substantial evidence supported a finding that the Agency had offered previous approval and that their rate increases should therefore be approved. On Final Order, however, the Agency refused to admit the sufficiency of the evidence and argued that only the Medicaid Program of the Agency could render approval of the proposed rate increases. Repeating the old maxim that an agency may not reject or modify findings of fact which are based on competent, substantial evidence, the Court reversed the Final Order after a review of the record revealed ample testimony supporting the ALJ's position. *Id. citing Crawley v. Dept. of Highway, Safety and Motor Vehicles*, 616 So. 2d 1061 (Fla. 1st DCA 1993).

The Court did not render a far-sweeping opinion regarding equity or otherwise overturn the line of cases which suggests that regulated industries may not rely on erroneous statements of law by an agency. *Dept. of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla.1981). Instead, the Court criticized the Agency for inconsistently arguing that approval was needed from its Office of Developmental Services, and then arguing that its Medicaid Program must provide approval.

* * *

The Public Service Commission was ordered to "go with the flow" unless it explained a change in its prior practice in *Florida Cities Water Company v. Florida Public Service Commission*, 23 Fla. L. Weekly D238, 1998 WL 5407 (Fla. 1st DCA 1998). Florida Cities fought a rate order in which the PSC disallowed expenditures the water company intended to include in its rate base. Despite a flood of precedent suggesting a certain method of calculating "used and useful" expenditures could be recovered through approved rates, the Public Service Commission in this case adopted a new methodology, but didn't explain this "policy shift."

Upon review, the dam of Section 120.68(7)(e)3, Fla. Stat. (Supp. 1996) pushed the PSC back through reversal and remand for a reasonable explanation. See also *Martin Mem'l Hosp. Ass'n v. Dept of Health and Rehabilitative Servs.*, 584 So. 2d 39, 40 (Fla. 4th DCA 1991). The policy shift must have been supported by expert testimony, documentary opinion, or other evidence appropriate to the nature of the issue involved, but it was not. *Manasota-88, Inc. v. Gardinier, Inc.*, 481 So.2d 941, 950 (Fla. 1st DCA 1986). So, despite the statutory presumption that the Commission's orders were reasonable and just, Florida Cities successfully overcame these presumptions by demonstrating a departure from essential requirements of law. *Florida Interexchange Carriers Ass'n v. Clark* 678 So.2d 1267, 1270 (Fla 1996). And the waters parted.

* * *

When the First District invalidates a fixed need pool, it intends to hear no more on the subject. So, in *St. Joseph's Hospital, Inc. v. Agency for Health Care Admin.* 23 Fla. L. Weekly D248, 1998 WL 5413 (Fla. 1st DCA 1998), the Court reminded the Agency for Health Care Administration of what it thought it had already been clearly stated. The Court's prior decision in *Health Care and Retirement Corp. v. Tarpon Springs Hospital Foundation*, 671 So.2d 217 (Fla. 1st DCA 1996) invalidated prior fixed need pools established under a successfully challenged rule. As the Court noted in *Agency for Health Care Admin. v. Mt. Sinai Medical Center of Greater Miami*, 690 So.2d 689, 693 (Fla. 1st DCA 1997), and as is strongly pointed out by Judge Kahn's dissent in this case, the determination of need is an issue to be decided without interference by the former calculation of a fixed need pool which was calculated through the use of the now invalidated rule. In the *St. Joseph's* case below, evidence of the invalidated fixed need pool (which suggested that no additional programs should be approved) was among the factors considered. Upon Final Order, St. Joseph's application was denied. Nevertheless, the majority found other competent, substantial evidence which demonstrated that there was no need for additional beds sought by St. Joseph's and the decision was upheld.

* * *

If a tree falls in the forest, will its LEAF have standing? In *Legal Envi-*

continued...

ronmental Assistance Foundation (LEAF) v. Dept. of Environmental Protection, 702 So.2d 1352, DEP and the First District Court agreed that the LEAF fell as well. Without a single mention of the oft-cited *Agrico Chemical Co.* case, the First District Court found that LEAF had no standing under the "substantial interest" test of Section 120.57, Florida Statutes (1995), or under the liberalized provisions of Section 403.412(5), Florida Statutes. LEAF is a non-profit corporation organized under the laws of Alabama, though it has a Certificate of Authority to do business in Florida. Given these facts, the court found that LEAF was not a "citizen of the state" entitled to standing under the applicable organic statute. Justice Benton dissented. He noted the constitutional problems that might sprout up by treating foreign and domestic corporations disparately.

Second District Court of Appeal

The wheels of administrative adjudication may need some lubrication. A state agency allowed nearly four years of delay before decision making, and still the District Court could offer little relief in *J.H. Williams Oil Co., Inc. v. Department of Environmental Protection*, 23 Fla. L. Weekly D637, 1998 WL 95340 (Fla. 2nd DCA 1998). Williams Oil had requested reimbursement from the Department for environmental clean-up costs in 1994. Finally, in 1997 Williams Oil filed a petition to force the agency to decide whether reimbursement was justified under Florida's "Good Samaritan Statute" or not. Section 376.305(6), Fla. Stat. (1991), *repealed by* ch. 96-277, Laws of Fla. The Agency claimed it was still investigating the reimbursement at the time of Williams' filing , and thus denied the petition to initiate proceedings. When the Second District addressed the appeal of that denial, no action had yet been taken by the agency, though there are some indications that a decision may finally have been reached. The Court affirmed the denial of the petition until the agency had concluded its long-running investigation. The Court also rejected an argument that prolonged inaction on Williams Oil's request would estop the Department from denying relief. It makes one wonder when a point of entry should be afforded, especially when organic legislation sets no limits on when a decision must be made.

* * *

When a $15,000 civil penalty became a $134,000 hole because of late charges, the Second District Court of Appeal demanded remand in the case of *126 Avenue Landfill, Inc. v. Department of Environmental Protection*, 23 Fla. L. Weekly D 373, 1998 WL 23258 (Fla. 2nd DCA 1998). In this case, the landfill had entered into a Consent Order with the Department outlining certain payment of penalties. When the landfill failed to meet its obligations, the Department sued for payment including significant late charges. The lower court did not believe that Section 120.69, Florida Statutes (1995) applied because the penalties were based on an agreed Consent Order, the appropriateness of which could not be questioned. *Metropolitan Dade County v. Edol Corp.*, 661 So.2d 422 (Fla. 3rd DCA 1995). *Morales v. Metropolitan Dade County*, 652 So.2d 925 (Fla. 3rd DCA 1995). The landfill cited cases which question the appropriateness of penalties, but only in administrative order settings, not involving consent orders. *Browning v. Dep't of Bus. Reg., Div. of Florida Land Sales, Condominiums and Mobile Homes*, 574 So.2d 188 (Fla. 1st DCA 1991) and *Dep't of Envmt'l Reg. v. Brown*, 449 So.2d 908 (Fla. 3rd DCA 1984). Eventually, the Second District Court of Appeal remanded the case because the Consent Order itself referenced Section 120.69, Florida Statutes (1995) which allows the "inappropriateness of the remedy sought by the Agency" to be litigated in any enforcement proceeding.

* * *

Third District Court of Appeal

Though the Court noted the doctrine of administrative *res judicata* is applicable to rulings of administrative bodies, it found a circuit court's reversal of a zoning authority's finding to be a departure from the essential requirements of law in *Miller v. Booth*, 702 So.2d 290 (Fla. 3rd DCA 1997). Noting that Administrative *res judicata* should be applied in zoning cases only with great caution (*City of Miami Beach v. Prevatt*, 97 So.2d 473, 477 (Fla. 1957), *cert. denied*, 355 U.S. 957 (1958), the Court concluded that whether a substantial change in circumstance had occurred was primarily within the discretion of the zoning authority. *Gunn v. Board of County Commissions, Dade County*, 481 So.2d 95 (Fla. 3rd DCA 1986). To reverse the zoning authorities because of a purported "substantial change in circumstance" was a departure from the essential requirements of law.

Fourth District Court of Appeal

The show must go on, even if operating under a temporary license. In *Silver Show, Inc. v. Dep't. of Bus. and Prof. Reg.*, 23, 1998 WL 64058 (Fla. L. Weekly D488a Fla 4th DCA 1998) the Department issued temporary licenses for alcoholic beverages while processing a full application. When the application was denied, the Department took the position that the temporary licenses were invalid as of the date of a "Notice of Disapproval." However, the notice provided its recipients with information concerning their ability to seek an administrative hearing pursuant to Section 120.569 and 120.57, or judicial review pursuant Section 120.68. Because of this notice, and because the underlying licensure statute contemplated administrative litigation, the Fourth District Court of Appeal held that denial of a license would not be a show stopper until that denial reached final agency action either by expiration of the time to file a petition, or by the issuance of a final order following administrative adjudication. See also, *Surf Café, Inc. v. Dep't of Bus. and Prof. Reg.*, 1998 WL 75054 (Fla. 4th DCA 1998).

* * *

The School Board of Broward County received a clear education in the rules governing bid protest pleadings in *Optiplan, Inc. v. School Board of Broward County*, 23 Fla. L.

Weekly D331, 1998 WL 27310 (Fla 4th DCA 1998). A bid protestor sought to amend its pleadings after discovery demonstrated new issues which the protestor had not raised in its Formal Written Protest. Optiplan noted the difficulty of pleading every possible issue the evidence may uncover when forced to draft its petition within only ten days of an agency's notice of decision. Section 120.53(5)(b), Fla. Stat. (1995). The Court agreed with Optiplan and adopted suggestions made in a recent dissent in *Silver Express Co. v. District Board of Lower Tribunal Trustees of Miami/Dade Community College*, 691 So.2d 1099 (Fla 3rd DCA 1997). That line of reasoning would allow a bid protestor to amend its petition at any time prior to the Agency's designation of an Administrative Law Judge or presiding officer, or at any time with approval of the Administrative Law Judge once one is assigned. Model Rules 28-5.202, 60Q-2.004(4), Fla. Admin. Code. Absent a showing of prejudice, the Court would allow amendments of pleadings. *Id, citing Key Biscayne Council v. Dept. of Natural Resources*, 579 So.2d 293, (Fla 3rd DCA 1991). However, the Court would not allow the bid protestor to raise complaints regarding the bid specifications if those specifications were not challenged within seventy-two (72) hours of their publication. *Id, citing, Capaletti Bros., Inc. v. Dep't of Transp.*, 499 So.2d 855, 857 (Fla 1st DCA 1986).

Fifth District Court of Appeal

Stumbling into an *informal* administrative proceeding may feel like taking your first steps without a walker in *Walker v. FL Dept. of Bus. and Prof. Reg.*, 23 Fla. L. Weekly D 292, 1998 WL 20674 (Fla. 5th DCA 1998). Walker was accused of obtaining a real estate license by means of fraud, misrepresentation, or concealment. After being served with an Administrative Complaint, Ms. Walker elected an *informal* administrative proceeding pursuant to Section 120.57(2), Florida Statutes (1995). Though she submitted some evidence to rebut the Department's circumstantial case, Ms. Walker admitted that she had just made a "really dumb mistake." The Department entered a Final Order revoking her license.

Ms. Walker appealed, but the Fifth District found that even circumstantial evidence can demonstrate intentional acts and be considered competent, substantial evidence. *Id. citing, Ellis v. State*, 425 So.2d 201 (Fla. 5th DCA 1983), *app'd* 442 So.2d 213 (Fla. 1983) (for the proposition that circumstantial evidence may sufficiently prove intent). Ms. Walker also appealed because she believed a formal administrative proceeding should have been conducted. The Court noted that Ms. Walker had waived those rights by electing an informal hearing.

One dissenting judge felt that the evidence did not rise to the competent, substantial standard. Judge Sharp argued that the Department had failed to meet their burden of demonstrating clear and convincing evidence. See *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987) and *Dept. of Banking and Finance v. Osborne Stern & Co.*, 670 So.2d 932, 935 (Fla. 1996) (demonstrating clear and convincing evidence is the proper standard under Chapter 120 and in licensure revocation proceedings).

* * *

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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 8, 1998

Public Service Commission • Training Room #171
State Capitol Complex • 4055 Esplanade Way • Tallahassee, FL

Course No. 1790 8

This seminar is designed to explore ethics problems associated with practice and procedure before the Florida Public Service Commission. This will be a group problem-solving seminar instead of a traditional lecture seminar. Participants will be provided with common hypothetical 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 parties involved in the hypothetical situation. The conclusions of the small groups will be presented to the total group for a comparison and discussion of the results.

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

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Ethics Component Expanded
Important CLER Notice

The ethics component of the continuing legal education requirement was recently expanded and mandates that: "Five of the hours must be in the area of legal ethics or professionalism, including approved substance abuse programs." RRTFB 6-10.3(b) As before, these hours are not in addition to, but included in, the 30-hour requirement.

The rule, which went into effect July 1, 1997, does not impact reporting dates that fall prior to July 30, 1998. Beginning with reporting dates of July 30, 1998 and forward, the five hours /professionalism/substance abuse (any combination) are required.

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PRIOR PROFESSIONAL EXPERIENCE: Deputy Chief Judge, Division of Administrative Hearings since 1990; Deputy Attorney General, State of Florida (1987-89); Partner, Rumberger, Kirk, Cabaniss, Caldwell, and Burke, P.A., in Orlando (1985-87); General Counsel, Florida Sheriff's Association (1982-84); Executive Director, Florida Department of Highway Safety and Motor Vehicles (1982); Executive Director, Florida Department of Law Enforcement (1979-82)
RELEVANT PROFESSIONAL ACTIVITIES: Member, Administrative Law Section, The Florida Bar

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