ADMINISTRATIVE LAW SECTION NEWSLETTER

Vol. XIV, No. 3 May 1993

Veronica E. Donnelly, William L. Hyde, Co-editors

From the Chair

by Steven Pfeiffer, Chair

"Rulemaking is not a matter of agency discretion.

Each agency statement defined as a rule under s. 120.52(16) shall be adopted as a rule as soon as feasible and practicable. . . ." F.S. Sec. 120.535(1).

With these two sentences, and ten paragraphs that follow, the 1991 Florida Legislature sought to answer the question that had raged since the Administrative Procedure Act was adopted: When must an agency adopt its policies as rules? The effort may be succeeding.

You all know the controversy. It began when Pat Harvey applied for a job at the Department of Administration and was determined unqualified because she did not meet criteria applied by the Division of Personnel in a "statement of minimum requirements." She challenged the action in a rule challenge proceeding under Section 120.56, contending that the "statement" was a rule that was invalid because it had never been promulgated as a rule. The Hearing Officer and the Court agreed, and Ms. Harvey succeeded in getting the "statement" declared invalid.*Department of Administration v. Harvey*, 356 So 2d 323 (Fla. 1st DCA 1977). I do not know whether Ms. Harvey got the job, but she really started something.

The controversy reached its intellectual zenith when Judge Robert Smith issued the now famous and much quoted decision *McDonald v. Department of Banking and Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977), appeal after remand 361 So. 2d 199. Judge Smith treated many issues that arise in administrative law. He determined that under some circumstances an agency need not adopt policies as rules so long as the agency was developing policy on an "incipient" or case-by-case basis.

Thereafter, litigation over the issue was frequent, See: *Florida Digest 2d*, "Administrative Law" Key 389; decisions often contradictory *Cf. Cape Cave Corporation v. Department of Environmental Regulation*, 498 So. 2d 1309 (Fla. 1st DCA 1986), with *Department of Transportation v. Blackhawk Quarry Co.*, 528 So. 2d 447 (Fla. 5th DCA 1988); and it appeared that the issue would be a permanent fixture. Indeed, half of the program offered at the Sixth Administrative Law Conference conducted in 1988 was devoted to the issue.

Section 120.535 changed the context of the debate. The Section leaves no room to question whether there is a legislative preference

continued . . .

INSIDE:

Legislative Update 4
Florida Administrative Practice (4th Ed.) Dedicated to Patricia Dore 5
Stating the Obvious in Agency Rule 6
The Case Against Specialized Hearing Officers 8
The ELMS III Legislation: Revising Florida's Growth Management Act 11
Case Notes 16
Minutes 18

CHAIR

from page 1

for establishing policies through rules rather than through case-by-case adjudications. It also establishes a process for challenging agency policies that have not been promulgated through the procedures long established for adopting rules under Section 120.54. While the Section was adopted in 1991, it did not become effective until April 1, 1992. Delayed implementation provided agencies with a full year to clean up their policy making acts, and to promulgate rules in order to meet the legislative intent. Agencies responded with an almost unprecedented avalanche of new rule adoptions. On average during the past ten years, agencies have proposed about 4,200 new rules annually. In 1992 the total exceeded 7,000 new rules. I am confident that most agencies responded in the manner of my client, the Department of Community Affairs. We undertook a systematic program-by-program analysis of existing rules, procedures that had been followed that were not part of any rule, and policy approaches that were being followed without the benefit of rulemaking. The result was development of packages of rules in every division within the department. We certainly did not want the honor of being the first agency popped with an adverse order under Section 120.535.

Many administrative lawyers (I was one) predicted a lot of litigation under the new Section. That has not occurred although the provisions have now been in effect for more than a year. There have been very few cases decided at the Division of Administrative Hearings, none at the level of the district courts. The first decision at DOAH regarding the Section was in a rule challenge proceeding filed pursuant to Section 120.56. The hearing officer determined in *Sigma International, Inc. vs. Marine Fisheries Commission*, ER FALR 92:200 (DOAH 1992), that there must be a rule in existence in order to initiate a 120.56 challenge. Despite the fact that earlier cases, including *Harvey* and *McDonald*, were initiated as rule challenges under Section 120.56, the Hearing Officer decided that the only means now available to challenge a policy on the grounds that it was not properly promulgated as a rule is the one set out in Section 120.535. He found ample support for this position in the language of Section 120.535(8). The Hearing Officer went on to hold that the agency statement being challenged did not meet the definition of a rule, and that a proceeding under Section 120.535 would not be available.

In *Martin Luther King Economic Development Corporation, Inc. v. Department of Community Affairs*, ___ FALR ___ (DOAH 1992), Petitioners contended that DCA's decision to follow intent language in the 1992-93 Appropriations Act in determining which of a competing group of community development corporations to fund during the fiscal year was a rule that had not been properly promulgated. The Hearing Officer disagreed, holding that DCA's decision was not a statement of general applicability, but was instead an order with discreet temporal limitation, citing *Department of Commerce v. Matthews Corporation*, 358 So. 2d 256 (Fla. 1st DCA 1978). The Hearing Officer went on to hold that even if the decision were considered one of general applicability, it would not have been feasible or practicable for the Department to initiate rulemaking to implement it because by the time a rule could become effective, money would no longer have been available to fund any of the competing groups.

In *Indigo Manor Nursing Home v. Department of Health and Rehabilitative Services*, 15 FALR 883 (DOAH 1993), the Hearing Officer did conclude that DHRS had a policy that was a rule that had not been properly promulgated. He further determined that the agency failed to demonstrate that it would not have been feasible to adopt the policy as a rule and "advised" the agency that it must cease to rely on the statement as a basis for agency action. The "statement" at issue was the Department's construction of a rule that had been properly promulgated. The Hearing Officer agreed with petitioner's contention that the agency's interpretation should have been adopted as a rule because the interpretation was not obvious from the language of the rule itself. The Hearing Officer noted that the Department's policy was a reasonable one, clearly within its authority to adopt, but that it did need to be properly promulgated. DHRS

thereafter settled issues with Indigo on terms favorable to Indigo, and initiated rule adoption proceedings.

The most recent decision under Section 120.535 is *Board of County Commissioners of Nassau County v. Department of Natural Resources*, ER FALR 93: 037 (DOAH 1993). Petitioners were opposed to a "beach access information sheet" developed by the Department of Natural Resources. The information sheet had the effect of establishing where traffic would and would not be allowed on Amelia Island, a barrier island in northeast Florida. The information sheet was not promulgated as a rule. Petitioners challenged the information sheet under Section 120.535. They also filed a rule challenge, in an apparent abundance of caution, under Section 120.56; and a proceeding under Section 120.57 (1), asserting that if the statement was neither a policy nor a rule than it was certainly an order. The cases were consolidated. The Hearing Officer ruled in favor of DNR in all three. He determined that the information sheet was not a rule because it implemented a presumably valid, existing DNR rule, albeit one that DNR had not previously been enforcing, even though the rule only authorized DNR to set limits on where parking could occur while the information sheet set specific locations. He held that the information sheet merely informed the public of DNR's intent to enforce existing law and policy. He did not address the issue of whether the information sheet was a rule or "merely a management decision," as argued by DNR on the grounds that the issue had not been raised in Petitioners' pleadings.

It is somewhat difficult to reconcile the *Indigo Nursing Home* and *Nassau County* decisions. The DNR rule at issue in the latter case does not appear to demand the specific decisions implemented by DNR with its information sheet anymore than the policy statement followed by DHRS was a necessary implication of its existing rule. Perhaps there will be some judicial elucidation. Petitioners have appealed the *Nassau County* decision to the First District Court of Appeals. This is the first appeal taken to the Courts regarding Section 120.535.

The question arises, why have there been so few cases? I believe there are two primary reasons. First is the explosion of rulemaking activity that followed enactment of Section 120.535. Agencies do endeavor to implement legislative intent, and the legislative preference for rulemaking could not be clearer. It is not likely that agencies will thoughtlessly support decisions by reference to policies that have not been promulgated as rules. Second, the remedy itself, while very effective from the perspective of identifying policy statements and determining whether rulemaking is required, may not be effective in getting a party what it wants. Most citizens seeking a decision from an agency are not interested in the aesthetic issue of whether policies have been properly promulgated as rules. They want specific action: a dock approved, a saloon licensed, a contract signed. It is possible to win a case under Section 120.535, only to have the agency expeditiously proceed to adopt the offending statement as a rule. This will allow the agency to continue to pursue the policy course during the course of the rule adoption process. Section 120.535(5). Indeed, that is precisely what DHRS did following the Hearing Officer's decision in *Indigo Nursing Home*, although it did first reach an accommodation with Indigo. The rulemaking process does allow a citizen an opportunity to address the policy issue with the agency, perhaps change the agency's mind, and, if unsuccessful at that, to challenge the proposed rule under Section 120.54 (4). Nonetheless, the prospect that victory in a Section 120.535 proceeding will be followed by defeat in a rule adoption proceeding is a factor a party must consider.

Section 120.535 has clearly succeeded in changing the manner in which the issue of when an agency must adopt rules is addressed. It has also succeeded in moving agencies toward adopting more policies through the open, accessible rule adoption processes. Where the Section may be most successful, however, is in the fact that it has reduced rather than increased the amount of litigation involving whether an agency did or did not follow proper rulemaking processes.

Keep the letters, columns, and comments rolling in. This Newsletter is rapidly becoming the best of its kind. It is your forum. Your thoughts are what we need.

Legislative Update

by Bob L. Harris
Ackerman, Senterfitt and Eidson, P.A., Tallahassee

By the date of completion of its regular session, the 1993 Florida Legislature had considered but failed to pass any significant legislation amending Chapter 120. All the changes made to the Administrative Procedures Act over the last two years will be given a chance to work. However, Governor Lawton Chiles continued his efforts to streamline government with his proposals to combine the Departments of Natural Resources and Environmental Regulation, and to abolish the Department of Professional Regulation. What follows is a summary of the major items which did pass, and descriptions of the items which failed to obtain necessary support, but that may reappear next year.

In its final days the legislature created a new "Department of Environmental Protection," combining the Departments of Natural Resources and Environmental Regulation (House Bill 1751). One-stop permitting and savings in administrative costs were touted as the leading arguments for the merger. These one-stop permits shall be known as "single environmental resource permits." Former DNR Secretary and newly-appointed DER Secretary Virginia Wetherell stands to be named as head of this new agency. Also contained in the legislation was a transfer of the Marine Fisheries Commission to the Trustees of the Internal Improvement Trust Fund. Practitioners in the areas related to environmental permitting need to carefully review this legislation.

In addition, legislation was passed which reassigned certain functions of the Department of Health and Rehabilitative Services to the Agency for Health Care Administration, for example, with home health agencies. The Department of Health and Rehabilitative Services and the new Agency for Health Care Administration received a lot of attention following passage of implementing legislation last year. Finally, as a result of a merger, there is now one agency to be known as the Department of Business and Professional Regulation (House Bill 1487). The Secretary will be appointed by the Governor. The guess is at this time it will be former Senator and Gubernatorial candidate George Stuart, who is of course the current Secretary of the Department of Professional Regulation.

In measures relating to Chapter 120, the Florida Administrative Procedures Act, a number of bills were filed, however, a few of the measures ultimately passed both houses. The items which did pass included a bill which requires the DHRS to establish a "technical advisory panel" to assist the Department in rule adoption, for rules relating to sewage treatment and disposal systems (Senate Bill 158), and a major piece of legislation which made numerous changes to growth management and comprehensive planning statutes (House Bill 2315). Also passing was House Bill 2007, which made the legislature subject to Chapter 119, the public records law. Unfortunately however, the legislation was written with so many exemptions it is unlikely much more than a legislator's resume would be available for public inspection.

The impetus for several pieces of legislation which attempted to amend Chapter 120 were agencies trying to recover from budget squeezes. One of the pieces considered by the legislature included a bill which would have authorized agencies to assess fees and costs to unsuccessful challengers to agency rules. Fortunately, that did not pass. A list of the other items which were considered but which did *not* pass were:

1. Legislation which would have awarded prevailing parties in section 120.57(1) proceedings, including the agency, attorneys fees and costs.

2. Legislation which would fine an agency up to $5000 for having one of its existing rules found invalid as having exceeded its grant of rulemaking authority.

3. Legislation which would require agencies to file notices of changes to proposed rules or notices of no changes with the Secretary of State and JAPC.

4. Legislation which would provide a number of changes to Chapter 120, including definitions for agency "orders," consideration of rule impacts on small businesses, altering the burden of going forward and burden of persuasion in agency decisions to grant or deny licenses, and consolidation of proceedings before the various district court appeal.

5. Legislation which would give hearing officers the final decision in actions against licensed professionals, rather than hearing officer decisions coming back before the professional boards.

The Florida Legislature is scheduled to return to work soon for a special session. A number of issues will be on the agenda, including health care, prisons, workers compensation and others. There should not be any issues discussed which would impact the administrative law practitioner, however, stay tuned.

Florida Administrative Practice (4th Ed.) Dedicated to Patricia Dore

The Florida Bar CLE Publications Department recently has completed work on an updated and expanded edition of FLORIDA ADMINISTRATIVE PRACTICE. This 13-chapter, 710-page manual was a cooperative effort of CLE Publications and the Administrative Law Section.

At the section's request, the manual has been dedicated in memory of Patricia Dore in recognition of her many contributions to Florida administrative law and "to ensure that her work will not be forgotten." Ms. Dore, a former professor of law at Florida State University, contributed to previous editions of the manual as both an author and steering committee member.

Administrative Law Section members who provided advice on the manual's organization and content and authored and reviewed chapters included Linda M. Rigot, Ralf G. Brookes, Alfred W. Clark, Johnny C. Burris, F. Scott Boyd, Thomas G. Pelham, Robert T. Benton II, G. Steven Pfeiffer, Katherine Castor, Charles Gary Stephens, Veronica E. Donnelly, Robert S. Cohen, Daniel S. Manry, Jr., and Cynthia S. Tunnicliff.

The manual provides a convenient desk reference for attorneys practicing administrative law in Florida. Chapters provide in-depth discussion of the Administrative Procedure Act, procedures for rulemaking and administrative adjudication, and practice before specific state agencies. The fourth edition has added a chapter on attorneys' fees and an appendix containing the full text of *F.S.* Chapter 120, and Florida Administrative Code Rules 28-1-28-8 and 60Q-1-60Q-4.

The manual will be available in April 1993 from CLE Publications for $80. Purchasers of previous editions should receive a notice of prepublication discount and will be mailed the new manual under the bar's automatic supplementation procedure. Others wishing to order it may contact CLE Publications at (904) 561-5843.

see page 22 for details and order form . . .

Stating the Obvious in Agency Rule: The Hidden Dangers in Non-Controversial Procedural Rules

by David Dagon, Editor, FSU Journal of Land Use & Environmental Law

Comparing agency rules to their enabling statutes reveals a bewildering practice. It seems that in implementing regulatory statutes, agencies often do little more then parrot the chapter law created by the Legislature. For example, when a statute makes a statement of public policy, the declaration often appears in rule—sometimes verbatim. What valid purpose is served by having the agency merely repeat this statement in rule? Certainly the statute has as much validity even without a rule mirroring its language. One has to wonder what role the agency serves (aside from ministerial) if it recites through rules the policy expressed in statute. A cynic might say that such agency rules merely state the obvious.

There are, of course, several possible explanations for an agency's preference for a "plain vanilla" rules that merely copy the enabling authority. The most obvious explanation is that agencies find rules a preferable means of enforcement. Although many enabling statutes allow an agency to sue directly in circuit court, Chapter 120 provides more flexibility, and may offer the agency a better forum since they can craft appropriate procedural rules.

A more sinister explanation comes from the suspicion that agencies intentionally avoid the strictures of rulemaking by creating vague rules that do not expand upon the enabling statute. Adhering to a broad statute—one presumed constitutional upon challenge—lets the agencies freely engage in adjudications without the need to further refine agency practice through rulemaking. Of course, Section 120.535 provides a limit to this sort of practice. Nonetheless, agencies may be tempted to create broad rules to reach the full extent of their statutory power. Any modifications to the express language of the legislature may be construed as a reticence on the part of the agency to exercise their full authority.

A third motivation for the creation of these types of agency rules comes from the combined effects of Florida's nondelegation doctrine and legislative requirements for prompt rulemaking. Many organic statutes specifically require agencies to create rules within a specific time frame. Even without such a requirement, Section 120.535 mandates rulemaking "as soon as feasible and practicable." These legislative commands for prompt rulemaking may guarantee timely public participation in important issues; however, it also deprives agencies of their ability to tinker and develop rules through successive adjudications. *See McDonald v. Department of Banking & Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977).

The structure of Chapter 120 recognizes that if agencies are not judicially coerced into rulemaking, they may more effectively tailor a rule to meet the public need. Organic requirements for immediate rulemaking and Section 120.535 work at cross purposes to this policy. Since agencies must rush into rulemaking, they are often unprepared and too inexperienced with the substantive area of law to offer any changes to the direct, express language of the statute. The willingness of courts to strictly police the delegation of authority, therefore, effectively prevents agencies from wandering far from the explicit language in the organic statute. Without the time to develop policy through repeated adjudications, cautious agencies may parrot the instructions given in statute. Thus, although Chapter 120 may tolerate some degree of incipient policy, agencies ultimately do not enjoy this luxury. In this sense, Section 120.535 indirectly reinforces judicial statements that agencies are creatures of statute, and cannot expand their jurisdiction.

The requirement that an agency quickly develop rules that do not exceed their delegated authority explains to some extent why so many rules merely repeat their enabling statute. To the casual observer, these plain

vanilla rules seem harmless enough. If a rule tracks the statute verbatim or otherwise states the obvious, there is little chance that an agency has impermissibly "exceeded its grant of rulemaking authority," and "enlarg[ed], modifi[ed], or contraven[ed] the specific provisions of law implemented." §120.52(8), Fla. Stat. (1991 & Supp. 1992) (defining invalid exercise of delegated legislative authority). The requirement that rules cite to specific provisions implemented gives further assurances that such rules are proper instances of the exercise of delegated authority.

This self-policing function of Chapter 120, however, breaks down when agencies attempt to adopt procedural rules that do not originate with a substantive, organic statute. Section 120.53(1) requires agencies to create rules of procedure for hearings. This broad authority, unchecked by Section 120.535 or similar organic rulemaking requirement, appears to lend itself to some abuse.

One common agency procedural rule illustrates this point. Many agencies have a procedural rule stating that the burden of proof shall be on the party asserting the affirmative of an issue. *See, e.g.*, Rule 10-2.060(2); Rule 40D-1.544 (Southwest Florida Water Management District); Rule 40C-1.545 (St. John's River Water Management District); Rule 40B-1.545 (Suwanee River Water Management District); Rule 40A-1.544 (Northwest Florida Water Management District); *see also* Rule 38B-3.022 (governing the burden of production in worker's compensation hearings); Rule 4-121.067(10). To the practitioner trained in civil court, these rules are completely innocuous. In fact, it has long been the rule in civil courts that the party asserting the affirmative of an issue bears the burden of proof. *See Balino v. Department of Health & Rehabilitative Services*, 348 So. 2d 349 (Fla. 1st DCA 1977) ("The general rule is, that as in court proceedings, the burden of proof, apart from statute, is on the party assuming the affirmative of an issue before an administrative tribunal."); *see also Irvine v. Duval County Planning Com'n*, 466 So. 2d 357, 364 (Fla. 1st DCA 1985) (Zehemer, J., dissenting) (collecting cases).

These rules, however, do more than state the obvious. Unlike substantive rules that merely parrot their enabling statute, they codify the common law. This clearly makes the rules substantive, and not the procedural rules sanctioned by Section 120.53. A recent opinion of the First District Court of Appeal noted as much when it held that agencies cannot allocate the burden of proof by rule. In *McDonald v. Department of Professional Regulation*, 582 So. 2d 660 (Fla. 1st DCA 1991), a panel reviewed a decision by the Board of Pilot Commissioners that a pilot was negligent in allowing the stern of his vessel to be towed into a bank. The Board relied on a prima facie presumption of negligence created by agency rule, and presented no other evidence. The First District reversed the disciplinary order, stating that "[a]n agency of the executive branch of our government has no authority to formulate an evidentiary presumption." *Id.* at 663 (quoting *B.R. v. Department of Health & Rehabilitative Services*, 558 So. 2d 1027, 1029 (Fla. 2d DCA 1989), *rev. denied*, 567 So. 2d 434 (Fla. 1990). The *McDonald* court relied on a strict construction of Chapter 120 as well as other opinions noting that legal presumptions can only be created by the judiciary and legislature.

Thus, agency rules that codify the common law (such as those allocating the burden of proof on the party asserting the affirmative) may run afoul of the *McDonald* opinion. Although Section 120.53 does require the creation of procedural rules, the allocation of the burden of proof is an inherently equitable power. *See Balino, supra.* Given its common law pedigree, the burden of proof can be allocated only by a hearing officer or reviewing court (absent a statutory directive). Although many would disagree, one could make a good argument that the above rules exceed delegated authority. Undeniably, the party asserting the affirmative of an issue bears the burden of proof as a matter of equity (absent a statute), not because of the operation of agency rule. There may be, after all, other equitable concerns in the allocation of proof.

Assuming these rules do exceed delegated authority, what should be done about them? Wouldn't it be better, after all, to have these rules removed from the Florida Administrative Code to avoid potential conflicts with a

continued . . .

STATING THE OBVIOUS

from preceding page

hearing officer's equitable powers? It seems unlikely that any party would ever challenge them. The statutory infirmity of these procedural rules may never come up because like their substantive counterparts, they merely state the obvious. It is hard to imagine a case where these rules would affect the outcome of a case, or could even determine a particular issue. Since they merely track a maxim of the common law, there is no harm done. No hearing officer would fail to apply the rule, and no party would take offense.

A more practical answer, however, is to let the rules stay on the books because they serve a useful purpose. For the time being, they function as helpful signposts for busy practitioners. They also instruct qualified representatives unfamiliar with the common law. It should be remembered, however, that these rules are superfluous and may impermissibly encroach on a hearing officer's quasi-judicial powers. Given the suspect origins of these types of rules, practitioners should be watchful for instances when they no longer serve such a useful purpose.

The Case Against Specialized Hearing Officers

by Diane D. Tremor
Rose, Sundstrom and Bentley, Tallahassee

A recurring theme often surfaces in the debate over whether DOAH Hearing Officer orders should achieve the status of finality. That theme is the "specialization" of Hearing Officers with regard to the subject matter of the hearing. It has been suggested that a DOAH Hearing Officer should not only possess the knowledge and skills associated with the procedural and evidentiary conduct of the hearing, but should also be a "specialist" or an "expert" in the subject matter of the dispute.

This article expresses no opinion as to whether Hearing Officer orders in Section 120.57 proceedings should be final or recommended in form. The status of Hearing Officer orders is, in this writer's opinion, irrelevant to the issue of specialization. Whether the end product of the hearing is "final" or "recommended" in form, a requirement that the trier of fact be a "specialist" or an "expert" in the subject matter contradicts and constitutes a move toward the erosion of two important concepts envisioned by the Florida APA—an independent and impartial corps of Hearing Officers and a result based solely upon the record.

The creation of DOAH promised citizens (as well as governmental agencies) a body of independent and impartial triers of fact (attorneys with the same legal qualifications as Circuit Judges), a fair hearing and an end result based solely upon the record developed during the proceeding. These promises are the cornerstones of Florida's APA. Mandated specialization of Hearing Officers, or breakdown of the DOAH by subject area, represents a giant step backward in Florida's unique system of providing an independent corps of impartial Hearing Officers to resolve disputes between citizens and the State. Indeed, the concept of specialization comes frighteningly close to a system wherein the Hearing Officer is housed within the decision-making agency itself.

Continuous and exclusive exposure of the Hearing Officer to the same legal issues, the same witnesses (whether agency personnel or those within the industry) and the same attorneys (whether governmental or private) can only result in a lesser quality of justice and end product than that provided by a system of random assignment of cases among the Hearing Officers. Based upon human nature, it would be reasonable to expect Hearing Officer "burn-out" resulting from repeatedly presiding over cases involv-

ing the same legal issues, the same attorneys and the same witnesses. It is further reasonable to expect that the intellectual efforts, preparation and presentation on the part of the Hearing Officer, the attorneys and the witnesses would be greatly diminished if "expert" Hearing Officers were mandated. With each succeeding and consecutive hearing, it is reasonable to expect that the "expert" Hearing Officer will be a little less attentive, less open-minded, less receptive to facts which might distinguish one case from another and, perhaps, less apt to require each party to meet their burden to prove the elements necessary to prevail. Knowing that the same Hearing Officer has recently heard the substance of the evidence in previous proceedings, the attorneys and witnesses will expend less time and effort in preparing and presenting their case. While this might result in shortened hearing time, where will one find the record basis for the Hearing Officer's determination? Is it contained within the record of a prior proceeding? To which document or portion of the transcript is the appellate court to be directed to find the fact or opinion relied upon and possessed by the "expert" Hearing Officer?

In addition to a degradation in the quality of the results produced by both the Hearing Officer and the attorneys, a system of specialized Hearing Officers could well result in an impairment of the fairness of the proceeding, or, at the very least, lead to an appearance of unfairness. Observant attorneys who constantly appear before the same Hearing Officer will begin to "play" to that Hearing Officer's previously indicated strengths, weaknesses, likes, dislikes, and prior procedural and evidentiary rulings. While this might constitute legitimate trial strategy, the opportunity for its exercise presents an unfair advantage which could be prejudicial to the private citizen who (hopefully) does not have the opportunity to appear in numerous administrative proceedings. An additional consideration is the constant physical proximity between the Hearing Officer, the attorneys and the witnesses. This can breed an unhealthy familiarity and place a tremendous strain upon all concerned, and often leads to an appearance of, if not a factual, impropriety.

One of the goals of seeking an administrative hearing is "to change the agency's mind." This is accomplished through the presentation of evidence to an independent and impartial Hearing Officer and a demonstration on the record that the agency initially misapplied the law to the evidence. An "expert" hearing officer dealing exclusively in one subject area is going to form opinions and thereby have some preconceived notion as to what the end result should be. This is not conducive to a system of fair and impartial hearings, and litigants may often be faced with the burden of not only changing the agency's mind, but also the burden of changing the Hearing Officer's mind.

The disadvantages of having specialized Hearing Officers far outweigh any perceived advantages. This was the conclusion of the Final Report rendered in early 1986 by Governor Graham's Special Committee to Study and Recommend Revisions to the Operation of the Division of Administrative Hearings. Executive Order Number 85-191, which created the Special Committee, acknowledged the growing number, complexity and difficulty of the cases submitted for determination to the DOAH. Among the charges made to the Special Committee were to study and make recommendations concerning the reorganization of DOAH into appropriate Divisions, and analyze the need for specialized Hearing Officers. The 18-member Committee concluded that no mandated specialization of Hearing Officers or breakdown by subject area is desirable, emphasizing that the flexibility of assignment is desirable from a management standpoint and enhances fairness.

The oft-touted "advantages" claimed in support of specialization are administrative ease and speed in the assignment of cases, ease to the parties in "educating" the Hearing Officer in complicated factual matters, ease to the Hearing Officer in understanding the facts and law underlying the dispute and "consistency" of Hearing Officer orders. At first blush, such considerations may appear attractive. Upon reflection, however, the achievement of such "advantages" could well be destructive of Florida's administrative hearing process and purpose.

It is difficult to imagine a system with greater administrative ease or speed than

continued . . .

HEARING OFFICERS

from preceding page

the random assignment of cases to Hearing Officers. Such a system promotes efficient scheduling of cases, cost effective travel and a balanced caseload among Hearing Officers. With some exceptions, the current method of assigning cases gives consideration to the location of the hearing (approximately nine Hearing Officers are assigned to each of three different geographical regions), as well as the current workload and calendars of the individual Hearing Officers. The Hearing Officer's workload and calendar would still require consideration if subject matter "expertise" were a requirement for assignment. Unless there were several "expert" Hearing Officers assigned to the same subject area, travel would be statewide, thus increasing travel costs and presenting numerous scheduling difficulties. Many agencies have only a few attorneys who handle administrative hearings. The private bar is often "specialized" in certain areas. Requiring these attorneys to prepare for back-to-back hearings so that the Hearing Officer's schedule is efficient or delay their hearing until the "expert" becomes available would be unfair and counterproductive. The availability of a large pool of Hearing Officers to accommodate scheduling and a manageable caseload promotes the efficient and timely administration of justice.

The process of "educating" the Hearing Officer concerning the subject matter of the hearing, and simultaneously building a record for further review, is equivalent to the parties' burden and responsibility to prove their case. The alleviation of this burden on the basis that the Hearing Officer already possesses knowledge of the subject matter would severely compromise the integrity of the formal hearing process. Upon electing to utilize the formal proceeding envisioned by Section 120.57, a party is both entitled and has the responsibility to limit the facts presented in support of or in opposition to a particular issue and thereby to control the record developed in the proceeding. A party should have assurance that a determination of the issues presented will be based solely upon the record developed at the hearing.

The APA affords citizens of Florida the opportunity to obtain a fair and impartial presiding officer to hear their disputes with actions of state government. This fairness/impartiality concept means that the presiding officer enters the proceeding with no preconceived notion as to the ultimate facts to be presented or the outcome of the proceeding. Instead, the Hearing Officer relies upon each party to present, in a logical manner, the facts and law essential to the desired result. If a party fails in that burden, that party is not entitled to prevail. The "knowledge" or "expertise" of the Hearing Officer, gained through the conduct of other administrative hearings concerning the same subject matter, is irrelevant to the result. A party should not have to bear the burden of "de-educating" the Hearing Officer and second-guessing the non-record knowledge which will form the basis for a determination.

The "consistency" required of Hearing Officer orders is a consistent effort to apply the law, both procedural and substantive, to the facts presented by the parties in each individual proceeding. The parties, both private and governmental, are entitled to develop the record in the manner in which they deem fit and to know that *that* record alone will form the sole basis for the Hearing Officer's application of the law. The law includes the pertinent statutes, regulations, judicial caselaw and, where applicable, prior administrative orders. It does not require a subject matter "expert" to perform the legal task of applying that law to the facts or issues in dispute.

Proponents of specialization point to the fact that Circuit Court Judges are often assigned to divisions. However, such divisions are generally defined in terms of the *procedural rules*, and not the substantive law, which govern the proceeding. A Circuit Court Judge assigned to the criminal division does not "specialize" in rape or murder and a civil division Judge does not specialize in automobile accidents or dog bite cases. Likewise, a Hearing Officer should not specialize in banking cases, Certificate of Need cases, environmental permitting cases, professional disciplinary matters or any other substantive subject area. The "expertise" required of a Hearing Officer is a thorough

knowledge of the basic rules of evidence and the procedures applicable to all administrative proceedings.

The very rationale heard in support of final order authority for Hearing Officers negates the concept that a Hearing Officer be an expert with "special insight" into factual questions and legal determinations. An "expert" Hearing Officer will likely draw the exact same criticism which "expert" or "special insight" agency heads now draw—disregard of the record made during the proceeding and substitution of the Hearing Officer's own "knowledge" and "expertise" for the facts presented.

The personal knowledge or "expertise" of the individual Hearing Officer over the subject matter of the hearing should play no role either in the conduct of the hearing or in the decision making process. Indeed, a Hearing Officer who perceives that he or she has become an "expert" or "specialist" in the subject matter has ceased to be an impartial trier of fact and probably should recuse himself/herself from the case. Just as an appellate court is bound by the record presented on appeal, so must the Hearing Officer consider only those facts apparent on the record of the proceeding at issue.

My own experience of presiding over administrative hearings over an almost fourteen-year period resulted in the conclusion that each proceeding painted a fresh factual scenario and required a unique application of the existing law to those facts. Had my case assignments been based upon a single or very limited subject area, it is doubtful that such a conclusion could have been drawn.

The Elms III Legislation: Revising Florida's Growth Management Act

By Tom Pelham
Holland & Knight, Tallahassee

The 1993 Florida Legislature significantly revised Florida's growth management laws. A new planning and growth management act (CS/CS/HB 2315) (hereinafter the "Act"), based largely on the Final Report and Recommendations of the ELMS III Committee, was passed by overwhelming margins in both the House and Senate in the closing days of the 1993 session. Among the provisions in the 180-page Act are some major changes relating to state planning, regional planning, the DRI process, local planning and concurrency and infrastructure funding.

State Planning

Pursuant to the recommendations of ELMS III, the Act seeks to strengthen the state planning process in two ways. First, it provides that the State Comprehensive Plan must be reviewed and analyzed biannually by the Governor's Office. On or before October 1 of every odd numbered year, beginning in 1995, the Governor must submit a written report to the Administration Commission recommending any necessary revisions in the State Comprehensive Plan, or explaining why no changes are needed. As under existing law, the recommended changes must be submitted first to the Administration Commission and then to the Legislature for approval.

Second, in order to provide more detailed and strategic state policy guidance, the Office of the Governor is required to prepare and recommend to the Administration Commission by October 15, 1993, a proposed new growth management portion of the State Comprehensive Plan. The Administration Commission is required to submit the proposal to the Legislature by December 15, 1993. Among other things, the new proposed growth management portion shall be strategic in nature and shall provide guidance for state, regional and local actions necessary to implement the State Comprehensive Plan; identify metropolitan and urban

continued . . .

ELMS III LEGISLATION

from preceding page

growth centers; establish strategies to protect identified areas of state and regional environmental significance; and provide guidelines for determining where urban growth is appropriate and should be encouraged.

This planning effort is a refinement of the ELMS III recommendation to create a Strategic State Growth and Development Plan which would be binding on state agencies, regional planning councils, and local governments. Rather than determine in advance the legal status of the new document, the Act requires the Governor's Office to make recommendations as to whether and to what extent local comprehensive plans, state agency strategic plans, and strategic regional policy plans must be consistent with the new growth management. The new growth management document will not become effective until adopted by the Legislature as general law and will only have the effect given to it by the Legislature.

Regional Planning

Closely tracking the ELMS III recommendations, the Act substantially changes the role and powers of the regional planning councils. It recognizes the regional planning council as the only multi-purpose regional entity equipped to plan and coordinate intergovernmental solutions to multi-jurisdictional growth-related problems. Consistent with this planning and coordinating function, the Act changes the nature of strategic regional policy plans, curtails the regulatory powers of regional planning councils, and strengthens their coordination and mediation roles.

Strategic Regional Policy Plans

Regional policy plans will now be required to address only affordable housing, economic development, emergency preparedness, natural resources of regional significance, and regional transportation. However, a council may address any other subject which relates to the particular needs and circumstances of the region. Regional plans must identify and address significant regional resources and facilities. Further reducing the role of the regional plans, the Act provides that inconsistency with a strategic regional policy plan cannot be the sole basis for a determination by the Department of Community Affairs that a local plan or plan amendment is not in compliance with state law. In addition, the power of regional planning councils to appeal local DRI development orders is terminated.

Regulation v. Planning

The standards in strategic regional policy plans will be limited to use as planning standards and cannot be used for permitting or regulatory purposes. Regional planning councils are expressly prohibited from setting binding level of service standards for public facilities or services provided by local government. Other state and regional agencies are authorized to preempt regional planning councils from adopting planning standards which differ materially from standards adopted by rule by the preempting state or regional agency.

Coordination and Mediation

Regional planning councils are given the power to perform a coordinating function among other regional entities, to coordinate land development and transportation policies in order to foster region-wide transportation systems, and to establish and conduct a cross-acceptance negotiation process to resolve inconsistencies between applicable local and strategic regional policy plans. Each regional planning council is required to establish by rule a dispute resolution process for reconciling differences on planning and growth management issues between local governments, regional agencies, and private interests. The adopted dispute resolution process must provide for voluntary meetings, voluntary mediation, and initiation of arbitration or administrative or judicial action if voluntary efforts fail. However, the dispute resolution process cannot be used to address disputes involving environmental permits or other regulatory matters except upon request of the parties.

The DRI Process

Probably the most controversial issue addressed by ELMS III was the future role of the DRI process. The Committee finally re-

solved this issue as a part of a compromise proposal which also dealt with the role of the regional planning councils. The Act basically adopts the compromise with a few significant exceptions. It provides for the termination of the DRI process in large jurisdictions upon compliance with certain requirements. Compliance with the new requirements and the resulting termination of the DRI process is to be accomplished by December 31, 1997, rather than by December 31, 1995, as recommended by ELMS III. Small local government jurisdictions have the option of retaining the DRI process; however, even in these jurisdictions the DRI process will be significantly revised.

Termination

The DRI process shall terminate in all counties with 100,000 or more residents and all municipalities in those counties with 2,500 or more residents upon compliance by these jurisdictions with new intergovernmental coordination requirements. All other local governments—counties with fewer than 100,000 residents, the municipalities within those counties, and municipalities with fewer than 2,500 residents in counties of more than 100,000—will have the option of retaining the DRI process after they adopt the new intergovernmental coordination requirements. These requirements, which are discussed in detail under the section on local planning hereinbelow, include local mini-DRI processes for resolving multijurisdictional impacts. However, even in those jurisdictions in which the DRI process terminates, DCA, as well as the owner or developer, will still have the authority to appeal local development orders for projects that otherwise would have been DRIs.

Revisions to the DRI Process

The Act makes significant revisions in the DRI process for those jurisdictions which elect to retain the process. First, it significantly increases the DRI thresholds for certain categories of development. Second, the Act provides for expedited DRI review if the proposed development is consistent with the adopted local comprehensive plan. Third, regional planning councils are allowed to address only state and regional resources or facilities and impacts on adjacent jurisdictions unless the local government requests regional council review of local issues. Fourth, in conducting their reviews of DRI applications, the regional planning councils will now consider only whether the development will have a favorable or unfavorable impact on state or regional resources or facilities identified in the State Comprehensive Plan, State Land Development Plan, and the applicable regional plan; whether the development will significantly impact adjacent jurisdictions; and whether the development will favorably or adversely affect the ability of people to find adequate housing that is reasonably accessible to places of employment.

DCA is required to adopt by December 31, 1993, rules establishing uniform statewide standards for DRI review. However, upon the request of a regional planning council, DCA may adopt different standards for a particular region if it finds that the statewide standard is inadequate for that region.

Local Planning

The Act makes a number of substantial changes in the local comprehensive planning process which were recommended by ELMS III. These changes involve the plan amendment review process, sanctions, intergovernmental coordination, and evaluation and appraisal reports. In addition, the Act goes beyond the ELMS III recommendations to incorporate a compromise regarding DCA's power to require local governments to adopt permitting programs.

Plan Amendment Review Process

The plan amendment review process has been streamlined. DCA will issue a report of its Objections, Recommendations and Comments (ORC Report) on plan amendments only if a regional planning council, an affected person, or the transmitting local government requests such a review and report or if DCA desires to conduct such a review. If no review of a proposed plan amendment is requested or initiated by DCA within 45 days after transmittal from the local government, the local government may proceed to adopt the proposed plan amendment. Even if a review of a proposed plan amendment is conducted, the time for conducting the review and issuing the ORC

continued . . .

ELMS III LEGISLATION

from preceding page

Report is reduced by approximately two months.

All adopted plan amendments will continue to be reviewed by DCA for compliance with state law. Plan amendments will not become effective until DCA or the Administration Commission issues a final order determining the adopted amendment to be in compliance or, if the Administration Commission determines the adopted amendment to be not in compliance, the local government elects to effectuate the plan amendment and accepts the sanctions imposed by the Administration Commission.

Sanctions

The Act effectively abolishes retroactive sanctions for failure to adopt plan amendments that are in compliance with state law. If it finds a plan amendment to be not in compliance, the Administration Commission is required to specify the sanctions which will be imposed on the local government if it elects to make the amendment effective notwithstanding the noncompliance determination. A local government is authorized to make the plan amendment effective if it is willing to be subject to the prospective sanctions specified by the Administration Commission.

Intergovernmental Coordination

Each local government must adopt amendments to its intergovernmental coordination element to comply with new requirements established by the Act. These plan amendments, which are to be adopted in accordance with a schedule established by DCA, must expressly provide for (1) a process for determining if development proposals would have significant impacts on other local governments or state or regional resources or facilities; (2) a process for mitigating extra jurisdictional impacts; and (3) a dispute resolution process "for bringing to closure in a timely manner" disputes pertaining to development proposals that would have extra jurisdictional impacts or impacts on state or regional resources or facilities.

To implement the new intergovernmental coordination requirements, the Act requires DCA to promptly prepare model plan elements to assist local governments; to adopt a rule by December 31, 1993, that establishes minimum criteria for complying with the intergovernmental coordination requirements; and to adopt a rule which establishes a schedule for phased completion and transmittal of the new intergovernmental coordination element amendments by December 31, 1997. If a local government elects to retain the DRI process, it may adopt amendments to its intergovernmental coordination element at the time it submits its evaluation and appraisal report.

Evaluation and Appraisal Reports

The Act significantly changes and strengthens the evaluation and appraisal report requirements of the original growth management legislation. DCA is authorized to adopt a rule establishing a phased schedule for the submittal of the reports which must be submitted not later than six years after adoption of the local comprehensive plan and then every five years thereafter. Among other things, the report must address the effect of changes in state law on the local plan; the identification of actions that are taken or needed to address the planning issues that have arisen during implementation of the local plan; and proposed or anticipated plan amendments needed to implement identified changes. The report may include a local vision that could serve as a basis for revising a local comprehensive plan.

DCA is required to conduct a sufficiency review of each report to determine if it has been submitted in a timely fashion and contains the required components, but no compliance review is to be conducted. DCA may delegate the sufficiency review of the reports to an appropriate regional planning council if requested by a local government. The Administration Commission is authorized to impose prospective sanctions against any local government that fails to implement its report through plan amendments.

Planning Relief For Small Local Governments

If requested by an eligible local government in its evaluation and appraisal report,

DCA is authorized to enter into a written agreement with a county with less than 50,000 residents and a municipality with less than 5,000 residents to allow the local jurisdiction to focus its planning resources on selected issues or elements when updating its local plan. Approval of such a request does not authorize the local government to repeal or render ineffective any element or portion of its existing local plan. In addition, every local government must update the future land use element, intergovernmental coordination element, conservation element, and capital improvements element of its local plan. The Act establishes statutory criteria which DCA must consider in evaluating a request for such an agreement, and DCA's decision to grant, modify or terminate a written agreement is subject to a Section 120.57(1) administrative hearing upon petition by an affected person as defined in Section 163.3184(1), Florida Statutes.

Concurrency and Infrastructure Funding

A troublesome feature of the original Growth Management Act was its failure to provide any specific guidance as to the meaning and implementation of concurrency. The Act seeks to remedy this omission by providing detailed statutory guidelines for the implementation of this requirement. Essentially, the Act codifies DCA's existing concurrency rule and policies and provides for additional flexibility in achieving transportation concurrency. The Act incorporates DCA's rule provisions regarding the categories of facilities which are subject to concurrency as a matter of state law and the minimum standards for achieving concurrency for each facility category.

To avoid conflicts with other state planning goals, the Act authorizes local governments to provide an exception from transportation concurrency requirements in areas designated in local comprehensive plans for urban in-fill development, urban redevelopment, or downtown revitalization. This exception is also applicable to developments located within such designated urban in-fill, urban redevelopment, existing urban service, or downtown revitalization areas which pose only special part-time demands on the transportation system.

The Act also authorizes local governments to designate in their local comprehensive plans one or more transportation concurrency management areas in order to promote urban in-fill development and redevelopment and expressly authorizes the use of areawide level of service standards within such designated areas. DCA is directed to amend its existing rule to be consistent with the new statutory provisions.

Consistent with previous DCA practice, the Act provides that a local government may adopt ten or fifteen year planning periods for specially designated districts with significant transportation backlogs in order to achieve transportation concurrency. These plans may establish interim level of service standards on certain transportation facilities and may rely on the local government schedule of capital improvements for up to ten years as a basis for the issuance of development permits.

To resolve one of the major disputes between the state and local governments, the Act provides that local governments must adopt level of service standards established by the Department of Transportation for roadways included in the Florida Intrastate Highway System as defined in Section 338.001, Florida Statutes. However, for all other roads on the state highway system, local governments must establish an adequate level of service standard which does not have to be consistent with DOT's adopted level of service standards for such roads.

Finally, the Act authorizes local governments to adopt a "pay-and-go" system for transportation concurrency. Essentially, this option provides that a local government may permit a landowner to receive a development permit, notwithstanding the failure of the development to satisfy transportation concurrency, if the local government has an adopted and state-approved local comprehensive plan; the proposed development is consistent with the plan; the plan includes a financially feasible capital improvements element that provides for transportation facilities to serve the proposed development; the local government has established an impact fee or other system requiring the developer to pay its fair

continued . . .

ELMS III LEGISLATION

from preceding page

share of needed transportation facilities; the landowner has made a binding commitment to pay the fair share; and the local government has still failed to provide the necessary transportation facilities.

A major complaint about Florida's growth management system has been the lack of adequate infrastructure funding. In response, the ELMS III Committee recommended that the State adopt 10 statewide gasoline tax in addition to providing additional sources of local revenues. Not surprisingly, the Legislature declined to adopt the statewide gas tax. However, the Act does authorize an additional local option gas tax of up to 5 which may be imposed either by an extraordinary majority vote of the local governing body or by referendum. In addition, the Act removes the referendum requirement from the existing local option 9 gas tax which may now also be imposed by extraordinary vote of the County governing body or by referendum.

Tom Pelham is a partner in the Tallahassee office of Holland & Knight and was a member of the ELMS III Committee.

Case Notes

4/1/93

by Jeffrey L. Frehn
Aurell, Radey, Hinkle, Thomas & Beranek, Tallahassee

The entire PSC decision-making process is now reviewable on appeal. The Supreme Court receded from its prior position in *Occidental Chemical Co. v. Mayo*, 351 So. 2d 336 (Fla. 1977), by holding in *Citizens of the State of Florida v. Beard*, 17 Fla. L. weekly S738 (Fla. December 3, 1992), that the transcript of the conference at which a PSC Commission panel deliberates on its final decision is a part of the appellate record. Although the agency's decision conference is "akin to the discussion of appellate judges in conference", the Court made it part of the record because the meeting was public and the transcript of the meeting was a public document. The Court also said that any memorandum from Commission staff that participated in a hearing in some fashion is also a proper part of the record. Sections 120.57(1)(b)(6)(g) and 120.66, Florida Statutes, are not relevant to this issue, the Court stated, because they relate to cases heard by hearing officers and not commission panels.

Can a person that may be affected by an agency's proposed lawsuit settlement challenge the settlement in a Section 120.57(1) proceeding? Not until the agency tries to implement the settlement, according to the court in *Florida Sugar Cane League, Inc. v. South Florida Water Management District*, 18 Fla. L. Weekly D798 (Fla. 4th DCA March 24, 1993). In that case the SFWMD denied the 120.57(1) petition of the Florida Sugar Cane League contesting the defendant district's proposed settlement of a federal lawsuit. No one disputed that the settlement terms required future agency actions that could affect the League's substantial interests. Nonetheless the Court concluded the petition was premature and that the League would not have a "point of entry" into an administrative hearing until the "District seeks to honor its obligations under the settlement agreement through rule making or other regulatory powers." Significant to the Court was the League's failure to demonstrate that it would be prejudiced by not having a point of entry now or that a later point of entry would not be meaningful.

A licensure application is filed, then the statute by which the application is reviewed is amended. Does the agency apply the new or old law? In *Lavernia v. Department of Professional Regulation*, 18 Fla. L. Weekly D717 (Fla. 1st DCA March 11, 1993), the court held that DPR must apply the law as changed, not as it existed when the licensure application was filed. The agency had

no authority to apply the old statute at the time the decision was made. The Court conceded that sometimes the prior law should be applied—like when an agency repeatedly denies successive applications before the law changes, when an agency unreasonably delays its decision waiting for the new law to become effective, or when an agency bases its decision on the old law but then tries to apply the new law on appeal—but found none of the exceptions applicable to its case.

The right to a formal versus informal hearing was at issue in *Campbellton-Graceville Hospital v. Department of Health and Rehabilitative Services*, 18 Fla. L. Weekly D48 (Fla. 1st DCA December 14, 1992). The HCCB certified to HRS that a hospital owed a $25,000 assessment under 395.101(2), Florida Statutes. HRS tried to collect the assessment from the hospital's current licensee, Campbellton-Graceville Hospital Corporation, but the Hospital Corporation refused to pay because it had acquired the hospital after the assessment period. HRS withheld the hospital's Medicaid reimbursement pending payment of the past due assessment. HRS gave the Hospital Corporation an informal hearing, but refused its request for a formal hearing, asserting its duty to collect HCCB certified fees was ministerial and did not require the resolution of any fact issues. The Court disagreed, concluding a formal hearing was necessary (1) to identify the proper payor by defining "hospital" under 395.101(2) and (2) to clarify HRS' authority to "withhold Medicaid reimbursements as a collection procedure."

How much notice is due in administrative cases? Not very much, if you are a student. The Court in *Student Alpha Id Number Guja v. School Board of Volusia County*, 18 Fla. L. Weekly D597 (Fla. 5th DCA February 26, 1993), concluded that a high school student had fair notice that she might be suspended for marijuana "possession" when she was told before the disciplinary hearing that she was "charged" with marijuana "distribution." Due process was not offended, the Court reasoned, because the "possession" and "distribution" related to the same "marijuana incident."

But the framed issues could not be expanded in a bid-protest, according to *Feimster-Peterson, Inc. v. Florida A&M University*, 18 Fla. L. Weekly D267 (Fla. 1st DCA December 31, 1992). FAMU rejected all bids for repainting its stadium after discovering lead was present in the existing coat. The decision was protested. FAMU accepted the hearing officer's recommendation that the lead presence was an insufficient reason to reject every bid *and* that the winning bidder assumed the obligation to remove the lead at its expense. The Court agreed with the winning bidder that there was no authority to decide who assumed the cost of removing the lead because it was not an issue before the hearing officer.

Compare *University Community Hospital v. Department of Health and Rehabilitative Services*, 18 Fla. L. Weekly D178 (Fla. 1st DCA December 29, 1992). HRS approved Winter Haven Hospital's construction plans for a neonatal intensive care unit ("NICU") without a certificate of need ("CON"). Later HRS promulgated a rule requiring hospitals operating a NICU to have either a CON or an existing program meeting certain grandfathering conditions. Winter Haven did not comply with the rule. HRS nonetheless included its beds in the bed inventory because it had HRS-approved construction plans. Other NICU providers challenged the decision. HRS agreed with the hearing officer that it was wrong to expand the rule via nonrule policy, but granted Winter Haven's exception that the facts showed it was estopped to exclude the beds from the inventory. Estoppel had not been pled as an issue. The Court held that Winter Haven properly raised this mixed law-fact question for the first time in its exceptions "similar to a motion to amend the complaint to conform to the evidence in a court proceeding," but HRS then erred in not remanding the case back to the hearing officer to give the other parties an opportunity to address the issue before the fact-finder.

A remand to the hearing officer for additional findings was also required in *Intelligence Group, Inc. v. Department of State*, 17 Fla. L. Weekly D2774 (Fla. 2d DCA December 11, 1992). In that case the Division of Licensing sought to revoke a private investigator's license. The hearing officer did not address certain complaint allegations after he incorrectly concluded that the investigator had immunity against disciplinary

continued . . .

CASE NOTES

from preceding page

actions. The department disagreed and, based on its own findings, concluded there was misconduct. The Court reversed. A hearing officer's failure to resolve a factual dispute does not give the agency original fact-finding authority, so the case must be remanded back to the hearing officer to make the necessary findings.

The Chapter 373 zone of protection for standing purposes was narrowly construed in *City of Sunrise v. South Florida Water Management District*, 18 Fla. L. Weekly D572 (Fla. 4th DCA February 24, 1993). The Court held that an economic injury by itself does not confer standing on a competitor to challenge a decision granting a consumptive water use permit. An economic interest is not within the zone of protection of the permitting law, Chapter 373, Florida Statutes, which "addresses problems of water supply, not economic injuries".

Minutes

Administrative Law Section Executive Council Meeting

January 15, 1993
8:30 a.m.
Miami, Florida

I. **Call to Order**

The meeting was called to order by the Section Chair, G. Steven Pfeiffer.

Members Present: G. Steven Pfeiffer, Stephen T. Maher, Linda M. Rigot, Johnny C. Burris, Katherine A. Castor, Betty J. Steffens, Ralf G. Brookes, William R. Dorsey, Carol A. Forthman, M. Catherine Lannon

II. **Preliminary Matters**

A. *Consideration of the Minutes, November 13, 1992*

The minutes of the November 13, 1992, meeting were approved with minor corrections

B. *Treasurers Report*

Treasurer Linda Rigot reported a current balance of $27,171 and that the account is in good shape.

C. *Chair Report*

Deferred until new business.

III. **Committee Reports**

A. *Long Range Planning Committee—Steve Maher*

Steve Maher suggested the Administrative Law Section sponsor a Spring, 1994 Law Conference. This conference would be in addition to the regular Administrative Law Conference. The conference would serve to:

1. Provide a goal—(Pat Dore's 50th Birthday) as a final point for fundraising, April 1994
2. Have an event in Pat Dore's name and interest. Steve suggested the topic be the Florida Constitution. 1994 would be 5 years prior to Constitutional Revision Commission; Group discussion of the idea. Pfeiffer requested a more detailed proposal and suggested a budget amendment. There was consensus of support in the council for Steve Maher to take the idea to the Council of Sections on 1/16/93 for further discussion. This issue will be brought back at the next Executive Council meeting.

Q—What is connection between Administrative Law and the Florida Constitution? Steve Maher (1) Constitutional Issues of Separation of Powers; (2) Relationship of Pat Dore to Administrative Law/Florida Constitution. There was a consensus to have Steve Maher continue.

B. *CLE Committee—Bill Dorsey*

Bill Dorsey reported on next CLE course March 12, 1993, focusing on Rulemaking and JAPC. Scott Boyd of JAPC has been instrumental in planning. Cathy Lannon, reported on the Bar CLE Committee. She reported on other CLE courses; other CLE Committee issues include voting procedures by CLE members; a suggestion to have the CLE representative be appointed for two years, rather than one year.

C. *Publications—Linda Rigot*

The newsletter was being printed and should be out momentarily. The Journal column is coming out in March. Other articles are in the works. Question by J. Burris: Will the newsletter accept advertisement? Gene Stillman advised it is up to Editor and Section, however, there is a page limitation for the publication. Linda Rigot. Editor, was favorable to accepting advertisement. It was suggested to tie receipts to the Pat Dore Fund. Cathy Lannon moved to authorize L. Rigot to work out advertising issue and set price in consultation with Finance Committee. No objections were heard and the motion carried.

D. *Finance Committee—Linda Rigot*

See previous budget report.

E. *Legislative Committee—Betty Steffens*

Betty Steffens reported that there is a House Select Committee on Agency Rules which appeared to be concentrating on legislative oversight, particularly in Growth Management areas. She also reported that the Senate Gov-Ops Committee had produced a report concerned with legal research tools available to State Agencies. This report discusses the Attorney General's proposed Florida Center for Legal Resources; DOAH's computerization of orders; and a proposal to utilize a Department of Management Services computer for administrative legal documents.

F. *Pat Dore Endowed Professorship Committee — Vivian Garfein*

Vivian was not in attendance, however, Carol Forthman presented a letter on her behalf. Fundraising letters have been sent and there will be follow-up calls to get surplus campaign funds. Letters are also being targeted to former Dore students. Vivian is also working on a "Big Gifts" Steering Committee and needs volunteers. Cathy Lannon suggested getting "pledges" over time. Cathy Lannon reported there was another Tallahassee organization fundraising for a separate Pat Dore Fund.

G. *Task Force Reports—Gary Stephens was not present.*

H. *Florida Bar Liaison—Stephen Maher*

Steve Maher presented the Council of Sections report. There was a decision that the Bar (not sections) was obliged to buy staff computers. Steve reported on other general Issues discussed: Law schools "training students" and the Bench-Bar report about to come out. Steve Maher will follow and report back.

I. *First DCA Mediation Advisory Committee—Gary Stephens*

No Report.

J. *Membership Committee—Katherine Castor*

Katherine reports that invitational letters are being set to other sections, then letters to government attorneys.

K. *Model Rules Revision Committee—Steve Pfeiffer*

Meetings to be scheduled by Steve Pfeiffer, with an expected conclusion by the summer.

L. *Administrative Law Conference—Bill Williams*

Bill Williams was unable to attend. There was a discussion regarding possible speakers.

continued . . .

MINUTES

from preceding page

IV. Old Business

A. *Report on Retreat—Ralf Brookes*

The issue of whether a retreat was needed at this time was discussed. One idea was to facilitate substantive committee meetings and also Task Forces, which haven't met recently. There was no consensus to hold a retreat.

B. *Glitch Amendments to Section Bylaws—Linda Rigot*

Linda Rigot's report was presented by letter dated December 3, 1992, and attached Bylaws. The technical changes and substantive changes concerning the Legislative Committee and the Public Committee were unanimously approved following Steve Maher's motion. The Public Utilities Committee issue was carried forward to the next meeting. Steve Pfeiffer expressed the Council's gratitude to Linda Rigot for her work on these much-needed changes.

C. *Hurricane Manual — Steve Maher*

Steve Maher as Project Director reported on the great cooperation of the Miami Review and Florida Bar. It became a project for all the sections and Steve has sought contributions from each section to cover the costs. 60,000 copies were distributed. The total cost was less than $20,000. Steve Maher requested the Administrative Law Section to donate $2,000. (There was $13,000 collected to date)

Johnny Burris moved a budget amendment authorizing a $1,000 contribution to the cause; seconded; Carried without objection.

V. New Business

A. *Designation*—Correspondence from Bar Committee. The Bar seems to be moving toward eliminating designation. Motion was made to authorize Steve Pfeiffer to write to the Board of Governors to express the section's objection to eliminating designation.

John Rossman, who is working on Pat Seitz' task force on the solo-small practice lawyers, advised the council on the issues they were addressing.

B. *The 1993-94 revised budget* was distributed and discussed. The Budget, as presented, was approved.

C. *Public Utilities Committee Merger.* Steve Pfeiffer reported that this Committee has less than 50 members. The Bar proposes to merge it with the Administrative Law Section. Steve Pfeiffer has told the Committee we will provide the administrative home, but not "absorb" them. The P.U.C. voted 1/14/93 to merge with the Administrative Law Section. The following needs to be done: amend By-laws, grandfather existing members into Administrative Law and require future membership in Administrative Law.

It was moved to provide Complimentary Section membership until end of fiscal year, get By-law changes underway with P.U.C. to be asked to participate in drafting.

Visit by Alan Dimond & Pat Seitz—The section was paid a visit by Alan Dimond & Pat Seitz and asked about Section issues. Steve Pfeiffer expressed opposition to abolishment of designation; Alan Dimond invited Steve Pfeiffer to speak at February Board of Governor's meeting and invited written comment.

D. *Next Meeting date*—Thursday April 29, 1993; 1:00 p.m.; Tallahassee

E. *Election of Officers*—Steve Pfeiffer raised this as a reminder to the council members. Steve Pfeiffer appointed a nominating Committee: Steve Pfeiffer, Chair-Elect, Steve Maher and Vivian Garfein to report back in April. Members are encouraged to contact Steve with any

ideas. Notice to be placed in Newsletter.

F. *Other Issues*

Johnny Burris raised issue of student "complimentary" membership for students taking Administrative Law. Motion to allow Johnny Burris to contact other law schools regarding complimentary memberships was carried.

Betty Steffens asked that the section take action to lobby for an administrative lawyer on the 1st DCA. Steve Pfeiffer to prepare letter.

Carol Forthman was designated to serve on Public Relations Committee.

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

G. Steven Pfeiffer . . . . . Chair
Tallahassee

Stephen T. Maher . . . . . Chair-elect
Coral Gables

Vivian F. Garfein . . . . . Secretary
Tallahassee

Linda M. Rigot . . . . . Treasurer
Tallahassee

Veronica E. Donnelly . . . . . Co-editor
Tallahassee

William L. Hyde . . . . . Co-editor
Tallahassee

Gene Stillman . . . . . Program Administrator
Tallahassee

Lynn M. Brady . . . . . Layout
Tallahassee

Coming up:

Annual Meeting of The Florida Bar

June 23-26, 1993
Walt Disney World
Dolphin

See the special section in your April 15 Florida Bar *News* for details and registration forms.

Reception

sponsored by
Administrative Law Section
and
Environmental and Land Use Law Section

Thursday
June 24, 1993
6:30-7:30 p.m.

Administrative Law Section Executive Council Meeting and Election of Officers

Friday
June 25, 1993
8:30-11:30 a.m.

The Florida Bar

In your case . . . we try harder!

Members' guide to benefits:

• **Association Insurance Program** —For information on group disability, term life, hospital income, accidental death and dismemberment, and comprehensive major medical underwritten by *North American Life*, call 1-800-220-3032.

• **Individual Long Term Disability Plan** — For information on this plan underwritten by *Monarch Life Insurance Company* call 1-800-282-8626.

• **Professional Liability Insurance** — Call *Florida Lawyers Mutual Insurance Company* at 1-800-633-6458 for application and information.

• **Liability Insurance Applications** — For every major carrier in Florida by completing one questionaire. For information or references call *APPLI, Inc.* at 1-800-352-7754.

• **Car Rental**

		ASSN #
ALAMO	1-800-354-2322	93718BY
AVIS	1-800-331-1212	A/A421600
NATIONAL	1-800-227-7368	5650262

• **Civil Court Bonds/Employee Fidelity Bonds** — For information and assistance call *JurisCo* at 1-800-274-2663.

• **Computer Products and Services** — Provided by *Bay Resources, Inc.* Call Jim Powell at 800-330-4229 for information.

• **Computerized Legal Research** — For the latest association rate and information call Jenny Kinsey at *LEXIS*, 1-800-356-6548.

• **Affinity Credit Card** — *Maryland Bank N.A.* — The Florida Bar credit card. Call 1-800-847-7378 for information.

• **Express Shipping Discounts** — Call *AIRBORNE Express* at 1-800-443-5228 for information and refer to association code #N82.

• **Eyeglasses and Contact Lens Discount** — *Eckerd Vision Group* — see phone book listings.

• **Long Distance Telephone Service** — Call *LDDS* at 1-800-226-8888 for information on the Association Savers Program.

• **Magazine Subscription Program** — Substantial discounts. To obtain a current price list, call The Florida Bar Magazine Program at 1-800-289-6247 or (516) 676-4300.

• **Office Supplies** — *Penny•Wise* offers 18,000 brand name products at discounted prices. Call 1-800-942-3311 for your free full color catalog.

• **Walt Disney World Magic Kingdom Club** — Call (904) 561-6603 and leave your name, Bar number and address. Your membership card will be mailed.

3/93

B031093A

THE FLORIDA BAR
650 APALACHEE PARKWAY
TALLAHASSEE, FL 32399-2300