Administrative Law Section Newsletter

Vol. XXIV, No. 4 Elizabeth W. McArthur, Editor June 2003

From the Chair

by Lisa S. Nelson

Whenever I come to the end of something, I always find myself dealing with a host of "coulda woulda shoulda." I could have gone in a different direction; I would have done a better job if I were more organized; I should have gotten more accomplished.... Through each rendition of this exercise, I remind myself that learning from mistakes is positive but dwelling on failures is destructive. While my goal is always to build on successes, the evaluation process is always a sobering reminder of how much growth remains.

This year as Chair brings these same feelings. I started the year with grand ambitions of things to accomplish. As most lawyers can attest, despite the best of intentions, sometimes the press of "real work" gets in the way of much we intend to do. One of my goals was to start an "agency" column in the newsletter to provide practical insight on each agency's mission and contact information that administrative practitioners could use. However, with the many changes that took place in agency leadership after the fall election, it seemed best to put that project on hold so that the information would not be obsolete when issues were printed. Likewise, I had great hopes of the Section working to address needed changes to the Uniform Rules, but for a variety of reasons that too has been delayed. More work needs to be done on our web page and I know that project is one that will be ongoing. Each of these projects fall in my "coulda woulda shoulda" category.

Continued, page 9

Dark Fiber Revisited: Plus, Coming Attractions

by Joe Allan McGlothlin

The extensive fault lines that comprise the interface between federal and state regulatory regimes are shifting again. Responding to forces from many directions, the Federal Communications Commission and the Federal Energy Regulatory Commission have signaled significant modifications to their prior policies. As a result, the regulatory frameworks governing the telecommunications and electric utility industries are about to undergo important changes — changes that will involve the Florida Public Service Commission.

As I prepare this article in mid-April, the signals take the form of preliminary glimpses: much of what will soon be in play has not been revealed. Any temptation I feel to try to extrapolate from these early indications and predict the future is disciplined by knowledge of the ease with which you could compare my predictions with details which will have emerged by the time this article appears. Still, it is possible — without going too far out on a limb, and hopefully without writing a piece that will become stale before anyone

Continued, page 2

INSIDE:

DARK FIBER REVISITED

from page 1

reads it — to describe the sweep of events and convey the flavor of what is to come.

Let's start with telecommunications. In the Telecommunications Act of 1996 (1996 Act), (Pub. L. No. 104-104, 110 Stat. 56 (codified as amendments to the Communications Act of 1934 in scattered sections of 47 U.S.C.)), Congress devised a framework designed to accomplish, on a national level, a complete paradigm change. Congress' intent was to move from a regime of segmented markets (featuring mutually exclusive long distance providers and local exchange monopolies) to a single market in which all carriers can compete to provide all services.

As a first step, Congress required the incumbent providers of local exchange services to allow new entrants to access and employ certain components of the incumbents' existing networks.[1] Under Section 251(d)(2) of the 1996 Act, in the case of a *proprietary* network element an incumbent local exchange company (ILEC) must permit a new competitive entrant to obtain the element if it is *necessary*. More generally, an incumbent is obligated to make a particular element available to a new entrant if the unavailability of the element would *impair* the ability of the competitive carrier to furnish the service it seeks to provide.

Congress gave to the FCC the job of fleshing out these concepts. Obviously, the FCC's interpretations of the statutory necessary and impair standards are central to the implementation of the law's unbundling requirement. The FCC's early interpretations of the standards were the subject of extensive litigation, which culminated in separate remands by the United States Supreme Court (*AT&T v. Iowa Utilities Board*, 1525 U.S. 366 (1999)) and the United States Court of Appeals for the District of Columbia (*U.S. Telecom Association v. FCC*, 290 F.3d 415 (D.C. Cir. 2002)).[2] In their opinions, each court in turn admonished the FCC to address deficiencies in its treatment of the statutory standards. In the more recent of the two remands, the D.C. Circuit criticized the FCC's uniform, all-or-nothing national approach to a finding of impairment.

In February 2003, the FCC concluded a contentious rulemaking docket in which it considered further the statutory standards, as well as the role that individual states will play in determining which network elements the incumbent local exchange companies must make available to new entrants. As of mid-April, the FCC has not issued its written order. In a press release and an accompanying summary of its decision,[3] the FCC articulated the following definition of impairment:

> Impairment Standard - A requesting carrier is impaired when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, which are likely to make entry into a market uneconomic. Such barriers include scale economies, sunk costs, first-mover advantages, and barriers within the control of the incumbent LEC. The Commission's unbundling analysis specifically considers market-specific variations, including considerations of customer class, geography, and service.

Based on the available summary, in its decision the FCC did not apply this definition to determine definitively whether individual elements should be unbundled. Instead, it created a national *presumption* of impairment or no impairment for certain elements, and established a mechanism under which state regulatory commissions may, based on analyses of conditions in their respective states, either affirm or rebut the FCC's presumption for a particular element.

Some readers may recall an article that I wrote about two years ago in which I used the example of dark fiber (fiber optic cable that the ILEC has installed in its network but has not yet turned on) to illustrate the extent to which the subject of the incumbents' unbundling obligation had been litigated to that point. To recap, initially the FCC left the status of dark fiber to the states to determine. Predictably, some states categorized dark fiber as an unbundled network element, while others did not. When MCI presented the issue to the Florida Public Service Commission, it ruled that BellSouth was not obligated to allow MCI to lease dark fiber. On review, the U.S. District Court, Northern District of Florida, reversed the PSC's finding — but not before the FCC had changed its own stance. On remand from the United States Supreme Court of its first decision regarding the extent of the unbundling obligation, the FCC placed dark fiber on its national list of unbundled network elements. At the time the article appeared, three incumbent local exchange companies had petitioned the FCC to delist several UNEs, including dark fiber.

Now is a good time to pick up the story, for dark fiber continues to pro-

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

Lisa S. Nelson, Tallahassee (lilawnelson@aol.com) ..... **Chair**
Donna E. Blanton, Tallahassee (dblanton@radeylaw.com) ..... **Chair-elect**
Robert C. Downie, II, Tallahassee (robert.downie@dot.state.fl.us) ..... **Secretary**
Deborah K. Kearney, Tallahassee (deborah.kearney@laspbs.state.fl.us) .. **Treasurer**
Elizabeth W. McArthur, Tallahassee (emcarthur@radeylaw.com) ..... **Editor**
Jackie Werndli, Tallahassee (jwerndli@flabar.org) ..... **Program Administrator**
Colleen P. Bellia, Tallahassee (cbellia@flabar.org) ..... **Layout**

Statements or expressions of opinion or comments appearing herein are those of the contributors and not of The Florida Bar or the Section.

vide a good, representative illustration of the overall unbundling issue. In its recent decision, the FCC established a presumption that the ability of new entrants to provide service would be impaired without access to dark fiber, but authorized state commissions to assess the FCC's presumption in light of a route-specific review designed to identify available wholesale facilities and/or where competing carriers are able to provide their own facilities. Based on the FCC's summary of its recent decision, it appears likely that the dark fiber issue will continue its odyssey throughout the country for some time to come.

It is safe to assume that, as I write this article, stakeholders are scouring the bullet points of the FCC's cryptic, 4-page initial summary and overview of its decision in efforts to divine the extent to which the decision will affect the industry. By the time you read this article, the FCC most likely will have issued the written order. However, while the order will provide many more details, its release will be — not an end point — but a beginning. The order will set in motion (in addition to possible appeals) a time-sensitive process that will move to the state regulatory agencies, including the Florida Public Service Commission, the next round of the ongoing exercise of identifying and determining the availability of unbundled network elements.

Contrary to the principal theme of this article, on rare occasions an issue is finally resolved. This is true of one subject that was left dangling in the 2001 dark fiber article. To recount briefly, pursuant to the 1996 Act a dispute between an incumbent local provider and a new entrant regarding terms of interconnection agreements mandated by the statute is to be arbitrated by (if it chooses to participate)[4] the state regulatory commission. Under the statute, the state agency's determination is reviewable by the federal district court. When in an early arbitration proceeding, the Florida Public Service Commission refused to require BellSouth to include access to dark fiber in the parties' agreement (in the case to which I alluded earlier), MCI filed a complaint with the United States District Court for the Northern District of Florida. The PSC asserted it was immune from suit by virtue of the Eleventh Amendment to the United States Constitution. Citing *Ex Parte Young*, 209 U.S. 123 (1908), the district court rejected the argument. (*MCI Telecommunications Corp. v. BellSouth Telecommunications,* 112 F.Supp.2d 1286 (N.D. Fla. 2000)). The issue of the Commissioners' claimed immunity from suit was one of several that were appealed to the United States Court of Appeals for the Eleventh Circuit, where the matter was pending at the time the 2001 dark fiber article appeared.

By no means was the Eleventh Amendment issue a novel one. Numerous courts had encountered the question in the context of the review of interconnection agreement determinations, dealing as they did so with claims that the criteria of *Ex Parte Young* were not present, and/or that the state agency had submitted to the court's jurisdiction by participating voluntarily in a federal scheme — thereby waiving immunity in return for an opportunity to participate in a federal process from which it otherwise would have been excluded. Most, but not all, of the courts that considered the question rejected the claims of Eleventh Amendment immunity.

While the question was pending (in the form of the Florida PSC's appeal) in the Eleventh Circuit, the United States Supreme Court considered an analogous situation in *Verizon Maryland, Inc. v. Public Service Commission of Maryland,* 535 U.S. 635 (2002). In the case below, *Bell Atlantic v. MCI WorldCom,* 240 F.3d 279 (4th Cir. 2001), the Fourth Circuit had determined — in contrast to other circuit courts that had considered the question — that Eleventh Amendment immunity applied to protect the Maryland regulators from suit. In reaching this conclusion, the Fourth Circuit rejected both the applicability of *Ex Parte Young* and the argument that Maryland's agency had waived its immunity.

With respect to the waiver argument, the Fourth Circuit was decidedly unsympathetic. It quoted with approval the following statement of the district court: It is beyond this Court's imagination how Congress' offer to the States to participate as regulators in the very federal scheme that divested them of their local power can be considered a gift. *(Bell Atlantic*, 240 F.3d at 287).

Reaching back as far the *The Federalist,* the court then constructed an elaborate rationale for the proposition that the doctrine of *Ex Parte Young* did not apply to avoid Eleventh Amendment immunity in the case before it. The facts of the case supplied ammunition for the effort. Recall that in *Ex Parte Young,* the Supreme Court held that a state officer can be sued in his or her official capacity to enjoin prospective, ongoing violations of federal law. In *Bell Atlantic*, the Maryland agency was asked to interpret the provisions of an interconnection agreement that it had approved previously. Specifically, the agency was asked to determine whether calls made to an internet service provider (ISP) were local calls. The issue related to the provision of the approved interconnection agreement that required each carrier to compensate the other for costs that the other carrier incurred in terminating local calls (to customers on its network) that originated on the compensating carrier's network. The Maryland agency interpreted the contract and ruled the parties intended to treat ISP-bound calls as local in nature, meaning costs associated with completing such calls would be included in the reciprocal compensation formula. Subsequently, taking into account the manner in which many calls to ISPs are relayed to distant computers, the FCC issued an order finding such calls were largely interstate. The Maryland agency refused Verizon's petition to alter its decision in light of the FCC's order. Its refusal was the violation of federal law to which Verizon pointed in support of the application of *Ex Parte Young.*

In its order, the FCC did not prevent parties to interconnection agreements from voluntarily regarding ISP-bound calls as local and subject to compensation. The FCC also stressed that state commissions, not the FCC, would be the arbiters of whether existing contracts treated ISP-bound calls as local or non-local. The order of the FCC on which Verizon relied to demonstrate

continued...

DARK FIBER REVISITED

from page 3

an ongoing violation of federal law was vacated by an appellate court before the issue reached the Fourth Circuit. Also, the Maryland agency's decision to construe the contract in terms of the definition of local that existed at the time the contract was entered rather than in light of definitions that developed later was governed by principles of state contract law, not federal law. Based on these considerations, the Fourth Circuit concluded that Verizon had not demonstrated an ongoing violation of federal law, and the doctrine of *Ex Parte Young* was therefore inapplicable.

On review, the Supreme Court reversed the Fourth Circuit's decision. It made short work of the lower court's carefully developed rationale. The flaw in the Fourth Circuit's analysis, said the Supreme Court, was that it mistakenly assumed that the merits of the allegation of a violation of federal law were relevant to the Eleventh Amendment issue:

> In determining whether the doctrine of *Ex Parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective. The prayer for injunctive relief — that state officials be restrained from enforcing an order in contravention of controlling federal law — clearly satisfies our straightforward inquiry. . . . (*Verizon Maryland*, 535 U.S. at 645).

> It may (or may not) be true that the FCC's since-vacated ruling does not support Verizon's claim; it may (or may not) also be true that state contract law, and not federal law as Verizon contends, applies to disputes regarding the interpretation of Verizon's agreement. But the inquiry into whether suit lies under *Ex Parte Young* does not include an analysis of the merits of the claim. (*Verizon Maryland,* 535 U.S. at 646). [5]

Subsequently, when ruling on the Florida Public Service Commission's appeal, the Eleventh Circuit said simply, "The present case cannot be distinguished from *Verizon Maryland*; we hold the Eleventh Amendment provided no bar to the district court's adjudication." *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.* 298 F.3d 1269, 1272 (11th Cir. 2002). Given the liberal nature of the Supreme Court's application of *Ex Parte Young* in *Verizon Maryland*, it appears that the issue of a state utility commission's claim of Eleventh Amendment immunity in a case involving its functions under the 1996 Act has been settled.

Turning now to the energy side, the Federal Energy Regulatory Commission is pushing the electric utility industry toward the formation of regional transmission organizations (RTO). In an RTO, member transmission owners would transfer either ownership or operational control of their transmission lines and related assets to the organization. In its Order 2000, 18 C.F.R. Section 35, the FERC embraced RTOs as the means with which to implement further its policy of enabling all generators to gain access to the transmission grid on fair and non-discriminatory terms. By placing control of the transmission system in the hands of an entity that does not also market electricity, said the FERC, the formation of an RTO would remove the potential for favoritism that could discourage the development of a vibrant wholesale market for power. The FERC's objectives include supplanting parochial decisionmaking with a regional approach and dismantling the multiple, owner-specific transmission toll booths that expensively characterize the present situation. The FERC's concept of the scope and function of an RTO encompasses the framework and rules that will govern wholesale power transactions within the RTO's boundaries.

While the desirability of many of its goals has been widely acknowledged, aspects of the FERC's push for the voluntary[6] formation of RTOs have created controversy. Early on, the FERC envisioned the formation of four large, and largely uniform, RTOs. State regulators observed that the FERC's one size fits all approach provided no ability to take differences in local conditions into account. They also raised concerns regarding the perceived impact of RTO formation on the respective jurisdictional powers and functions of the federal and state agencies. Individually and collectively, state regulatory commissions took issue with the FERC's RTO initiative.

The response to the FERC was not limited to comments and pleadings in FERC dockets. In response to Order No. 2000, Tampa Electric Company, Florida Power & Light Company, and Progress Energy of Florida sought the FERC's approval of GridFlorida, their proposed RTO. Having already opened ratemaking dockets (in which it determines the expenditures that utilities subject to its ratemaking jurisdiction may recover from retail customers through rates) for Florida Power & Light and Progress Energy, the Florida Public Service Commission gave notice of its intent to review the prudence of the utilities' actions and expenditures associated with the formation of GridFlorida. Facing the FERC's near-insistence on RTO formation, on the one hand, and the indication that the PSC might not allow them to recover related costs, on the other, in June 2001, the GridFlorida applicants suspended their RTO activities and asked the PSC to expedite its review of the prudence of their actions.

Following an evidentiary hearing, on December 20, 2001, the PSC issued Order No. PSC-01-2489-FOF-EI, in which it determined that the utilities' initial RTO formation activities had been prudent under the circumstances; concluded that an RTO holds the potential to deliver benefits to retail customers; approved the GridFlorida applicants' intent to focus on a Florida-specific RTO pending more information regarding the possible benefits of a larger organization; and prescribed significant structural changes to the RTO designed to prohibit members from conveying ownership of their assets to the organization.[7] Following a workshop on the utilities' subsequent compliance filing, on September 3, 2002, the Commission issued Order No. PSC-02-1199-PAA-EI, in which it disposed of certain RTO governance, planning, and rate structure issues

through final agency action. It gave notice of proposed agency action on other items, and scheduled a public hearing on the market design portion of the GridFlorida proposal.

The hearing was postponed when the Office of Public Counsel appealed Order No. 02-1199 to the Florida Supreme Court. At the time of this writing, the appeal is still pending. There is space here for only a cursory, boiled down treatment of the issues and arguments involved. In addition to its claim that the PSC's hearing was procedurally deficient, OPC contends an RTO is inconsistent with Florida statutes. OPC essentially contends that in Order No. 02-1199, the Commission exceeded its statutory authority by supporting the FERC's policy of promoting wholesale competition. OPC argues the Florida PSC effectively delegated to the FERC its ratemaking and grid oversight powers under Chapter 366, Florida Statutes. In response, the PSC (supported by other appellees) asserts it is performing its traditional, fundamental statutory role of reviewing the prudence of utility expenditures for the protection of ratepayers. The PSC argues that the decision to approve or disapprove GridFlorida will be made by the FERC, and that the FERC's decision will not affect the PSC's jurisdiction. It also contends OPC's appeal is an untimely effort to challenge determinations that the PSC first made in its December 2001 order.

OPC's pending appeal adds a Florida-specific wrinkle to an already dynamic situation. The FERC appears to be subjecting its RTO campaign to an important mid-course modification. In response to the protests and objections it has received, FERC has slowed the pace of its RTO initiative. FERC also announced that it intends to release in April 2003 a new white paper on principles of RTO design and operation that will become the vehicle for further input. Again, by the time you read this article, the FERC most likely will have issued its document. As is the case with the FCC's order, the release of the FERC's white paper will commence the next wave of activity.

To summarize all of the above: Stay tuned.

[1] The acquisition of unbundled network elements constitutes one of three entrance strategies envisioned by the 1996 Act. The others are the construction by a new entrant of its own network facilities and the purchase, for resale, of the incumbent's *services*.

[2] The 1996 Act also established the basis for the prices which incumbents may charge for network elements. The regulators' implementation of the statute's pricing standard has also been litigated extensively and has been the subject of separate appeals.

[3] FCC's Triennial Review Press Release, Docket No. CC01-338, February 20, 2003.

[4] The 1996 Act calls for the FCC to arbitrate a dispute if the state agency declines to do so.

[5] The 1996 Act provides for a state commission to approve interconnection agreements reached through negotiations and to arbitrate disputes when negotiations fail to produce an agreement. In *Verizon Maryland*, the state agency was asked to interpret an agreement it had already approved, a function not explicitly delineated in the statute. This feature of Verizon's suit gave rise to an issue of subject matter jurisdiction. The Supreme Court held that the district court had federal question jurisdiction under 28 U.S.C. §1331, because Verizon claimed the FCC's order preempted the Maryland agency's decision.

[6] While in Order 2000 the FERC did not attempt to mandate the formation of RTOs, the FERC has brandished the considerable leverage it possesses over the utilities subject to its jurisdiction.

[7] The energy field has an unbundling issue of its own. The FERC claims ratemaking jurisdiction over transmission service that has been separated or unbundled from the package of generation and transmission services that comprise electric service. Such services are unbundled, for example, in states that allow multiple providers to compete to provide service to retail customers: a customer may receive generation from one entity that is delivered via transmission service from another. The Florida PSC directed GridFlorida applicants to structure the RTO in a manner that did not allow a transfer of ownership of any utility's transmission wires to GridFlorida to avoid a possible argument that such a transfer would also effect a transfer of ratemaking jurisdiction.

Joe McGlothlin *received his B.S. degree from Davidson College and his J.D. degree from FSU College of Law. A former Director of the Florida Public Service Commission's Legal Department, he joined the law firm of McWhirter Reeves in 1982. In 1988 he opened the firm's Tallahassee office, where he now practices. He submits this article on behalf of the Public Utility Law Committee. He can be reached at* jmcglothlin@mac-law.com.

Join the Public Utilities Law Committee

The Public Utilities Law Committee of the Administrative Law Section is concerned with the legal, technical and economic issues related to regulated providing electric, gas, water, wastewater, and telephone services. If you are a member of the Administrative Law Section and would like to become a member of this committee, please complete and return the form below:

_____ I would like to become a member of the Public Utilities Law Committee. (AL709)

Name: _____ Fla. Bar No. _____

Address: _____

City/State: _____ Zip Code: _____

Telephone: (____) _____ Telecopier: (____) _____

Please return completed form or a copy to: Jackie Werndli, Program Administrator, The Florida Bar, 651 E. Jefferson St., Tallahassee, Florida 32399-2300.

APPELLATE CASE NOTES

by Mary F. Smallwood

Licensing

Ellinwood v. Board of Architecture and Interior Design, 28 Fla. L. Weekly 381 (Fla. 1st DCA 2003)

Ellinwood challenged a decision of the Board of Architecture and Interior Design following an informal hearing denying his request for licensure by endorsement. Section 481.213(3), Fla. Stat., sets forth the requirements for licensure by endorsement. It provides that the Board shall certify an applicant for licensure if, in part, he holds a valid license in another jurisdiction where the requirements for licensure were substantially equivalent to Florida's (481.213(3)(b)) or where the applicant has passed the licensing examination and holds a valid certificate issued by the National Council of Architectural Registration Boards (481.213(3)(c)). Paragraph (c) further provided that: [f]or purposes of this paragraph, any applicant licensed in another state or jurisdiction after June 30, 1984, must also hold a degree in architecture and such degree must be equivalent to that required by s. 481.211. The provisions of Section 481.211 require a five-year architecture degree. Ellinwood's degree was a four-year degree.

At the informal hearing, Ellinwood argued that the requirement for a five-year degree applied only to paragraph (c), not paragraph (b). He claimed entitlement to a license under paragraph (b). The Board rejected that argument and held that the requirement for a five-year degree applied to both paragraphs.

On appeal, the court reversed. While the court recognized that an agency is entitled to deference with respect to its interpretation of a statute it administers, it held that the Board's interpretation in this situation was clearly erroneous. The court noted that the five-year requirement was contained in paragraph (c) and stated specifically that it applied to that paragraph. Moreover, the two paragraphs were joined by the disjunctive term "or." That must be interpreted to create two separate alternatives for the applicant to demonstrate entitlement to licensure by endorsement.

Adjudicatory Proceedings

Foley v. Department of Health, 28 Fla. L. Weekly 638 (Fla. 4th DCA 2003)

Foley appealed a final order of the Department revoking his paramedic's license without a hearing after his failure to timely file an election of rights form. Foley had filed the form after the Department's counsel filed a motion for default based on the failure to file an election of rights form. The attorney subsequently withdrew the motion and advised Foley that his form would be accepted and he would be afforded a hearing to present evidence of mitigating factors. Despite that fact, the agency head entered the final order of revocation *sua sponte*.

On appeal, the Department confessed error, and the court reversed the final order. It noted that the Department was equitably estopped from denying Foley a hearing after indicating that it would accept the late filing.

Spuza v. Department of Health, 28 Fla. L. Weekly 644 (Fla. 2d DCA 2003)

Spuza appealed a final order of the Department revoking his license to practice medicine. He argued that the Board of Medicine had erred in denying his request for a formal administrative hearing on its charges that he violated Section 458.331(1)(c), Fla. Stat., which provides that being found guilty of any crime which directly relates to the practice of medicine is grounds for disciplinary action.

Although Spuza filed an election of rights form requesting a formal administrative hearing, the Board concluded that there was no dispute regarding his conviction in federal court of defrauding the Medicare program and receiving kickbacks for referrals. The federal appellate court affirmed the conviction but vacated the sentence, finding that Spuza had not harmed the Medicare program as he had not fraudulently billed Medicare or falsified any records.

On appeal from the final order of the Department, Spuza argued that that his conviction did not relate directly to the practice of medicine. The Department relied on *McGraw v. Department of State*, 491 So.2d 1193 (Fla. 1986), to assert that a formal hearing is not justified where a respondent is simply trying to relitigate his guilt in an administrative forum.

The court reversed the final order and remanded for a formal administrative hearing. It held that the certified copy of the conviction did not, in itself, establish that Spuza was guilty of a crime related to practice of medicine. The court further noted that factual disputes arose at the informal hearing regarding imposition of a penalty since some Board members seemed to tie the penalty to the amount of restitution required in the federal case. The court did not find *McGraw* to be applicable to this situation.

Brookwood-Walton County Convalescent Center v. Agency for Health Care Administration, 28 Fla. L. Weekly 935 (Fla. 1st DCA 2003)

Brookwood requested an interim rate adjustment to reflect substantial increases in its liability insurance premiums for the 2000 policy year. The premium increases occurred too late in the preceding year to be used to calculate the 2000 Medicaid reimbursement rates. The Florida Title XIX Long-Term Care Reimbursement Plan (Plan) allows an interim rate change where increased costs arise from the need to comply with an existing state or federal rule, statute, law or standard. Following an administrative hearing, the administrative law judge found that a prudent health care provider was expected to carry insurance under the Federal Medicare Program's Health Insurance Manual (HIM-15), which was incorporated into AHCA's rules by reference. That finding was based on the HIM-15 provisions that disal-

lowed liability damages that were not insured and allowed the costs of obtaining insurance coverage. AHCA rejected that finding of fact.

In the conclusions of law, the administrative law judge concluded that the HIM-15 provisions were clearly standards as that term is used in the Plan. AHCA rejected that conclusion of law, holding that the determination of what constitutes a standard is one infused with policy implications for which the agency can substitute its determination. At the hearing, Brookwood contended that AHCA had previously allowed rate increases based on an increase in insurance premiums. However, AHCA's witnesses simply contended that those instances had been a mistake or a one-time event.

The court reversed and remanded. It held that AHCA did not have the authority to reject the finding of fact of the administrative law judge. To the extent AHCA rejected the administrative law judge's conclusions of law, the court held that AHCA failed to comply with Section 120.57(1)(l), Fla. Stat., requiring an agency to state with particularity its reasons for rejecting a conclusion of law and demonstrate that its substituted conclusions are more reasonable. The court found AHCA's argument that nursing homes were not required to carry liability insurance disingenuous, as failure to carry insurance clearly resulted in significant adverse consequences (failure to obtain reimbursement for assessed damages). Moreover, the court found that AHCA had failed to explain its change in policy when evidence showed that it had previously allowed the same type of increase sought by Brookwood in two other cases.

Coleus v. Florida Commission on Human Relations, 28 Fla. L. Weekly 981 (Fla. 5th DCA 2003)

Coleus appealed that portion of the final order of the Commission denying his request, at the final hearing, for a continuance to obtain counsel. On appeal, the court upheld the final order. It noted that the standard of review was whether the agency abused its discretion in denying a continuance. In this case, the court found that Coleus had sufficient notice of the date of the hearing so that a request for a continuance could have been filed in advance. The court further noted that Coleus was represented by counsel in a related worker's compensation case.

Exhaustion of Administrative Remedies

Florida Fish and Wildlife Conservation Commission v. Pringle, 28 Fla. L. Weekly 603 (Fla. 1st DCA 2003)

Pringle and Crum sought a declaratory judgment in circuit court that a net they had designed was acceptable under rules of the Commission or, in the alternative, that the rules of the Commission were unconstitutional. The Commission had adopted rules pursuant to Art. X, section 16 of the Florida Constitution, prohibiting the use of a seine net with a mesh size larger than two inches stretched. The plaintiffs argued that their net was a rectangular net, not a seine net.

The Commission moved to dismiss on the grounds that the plaintiffs had failed to exhaust administrative remedies. The court denied that motion. The court then held that the net was allowable under the Constitutional provision; it further held that the rules were unconstitutional if they denied use of the plaintiffs' net as the rules deprived plaintiffs of their right to make a living.

On appeal, the court reversed. It held that the plaintiffs had not exhausted administrative remedies and offered no valid reason why the doctrine of exhaustion should not apply. In addition, the court found that the issues presented were of a highly technical nature and required the expertise of the agency to resolve. For that reason, the court concluded that the doctrine of primary jurisdiction required the trial court to dismiss the case.

Government in the Sunshine and Public Records

Department of Children and Families v. Sun-Sentinel, Inc., 28 Fla. L. Weekly 510 (Fla. 4th DCA 2003)

The Sun-Sentinel brought suit in Palm Beach County under the Government in the Sunshine Act to obtain certain records in a criminal proceeding against parents charged with neglect. Service of process on the Department was by facsimile transmission. The Department challenged the sufficiency of service of process and filed a motion for change of venue to Leon County. The trial court held that the Department had waived its objections to service and denied the motion for change of venue.

On appeal, the court affirmed. The Fourth District held that the Department waived in right to challenge the sufficiency of service by appearing before the court to seek change of venue. It further held that the Department was not entitled to the judicially-created home court privilege in the circumstances of this case. The court noted that the privilege was created to protect public agencies from undue expense in defending lawsuits away from their home offices. In this case, the only issue in dispute was access to the public records which were all maintained in the Department's office in Palm Beach County.

Media General Corporation, Inc. v. Feeney, 28 Fla. L. Weekly 547 (Fla. 1st DCA 2003)

Media General sought to obtain the cellular phone records of five staff members of the Florida Legislature where the phone bills were paid for by the Republican Party and the phones were used for both private and government calls. While the Republican Party argued that billing records arose out of party business, not government business, counsel for the House of Representatives voluntarily provided redacted copies of the records to Media General. Those records contained the calls determined by staff members to be made for business reasons but did not include the actual number called. Instead, the name of the person or entity called was substituted for the number.

On appeal, the court agreed that the record of private calls made was not a record made or received in the course of official business or required by law or ordinance. The court noted that the Second District in *Times Publishing Co. v. City of Clearwater*, 830 So. 844 (Fla. 2d DCA 2002), had held that private or personal e-mails received or sent by City employees were not public records.

However, the court held that the full record of business calls, includ-

APPELLATE CASE NOTES
from page 7

ing the number of the person or entity called, must be disclosed. While recognizing the sensitivity of releasing private telephone numbers, the court did not agree with the House that such release would result in unreasonable consequences.

SePRO Corporation v. Department of Environmental Protection, 28 Fla. L. Weekly 492 (Fla. 1st DCA 2003)

SePRO sought injunctive relief to prevent the Department from releasing certain documents it claimed as trade secrets under Sections 403.111 and 812.081, Fla. Stat. Initially, these documents had been provided to the Department to demonstrate the efficiency of a particular substance in controlling hydrilla. At the time they were submitted to the Department, SePRO did not claim the trade secret privilege in writing, although there was testimony that a request for confidentiality had been made to a Department employee verbally. The trial court held that the trade secret privilege for the documents could not be claimed after the fact. However, it held that those documents for which the privilege had been alleged in advance were protected.

On appeal, the court affirmed. It held that a verbal request for confidentiality was not sufficient to invoke the trade secret provision. Further, it agreed with the trial court that the request for confidentiality must be made in advance, not asserted after the fact. It also affirmed the trial court's determination that the documents for which the claim was timely asserted were exempt from disclosure under the Public Records Act. Although Section 812.081 is presently codified under the chapter in the Florida Statutes titled Computer Related Crimes, the court held that it applied to any trade secret, whether transmitted electronically or contained in a computer system. The court noted that the provision had originally been contained within Chapter 119, Fla. Stat.

Elders v. State of Florida, 28 Fla. L. Weekly 791 (Fla. 2d DCA 2003)

Elders, who was convicted of committing lewd and lascivious acts on children, sought post-conviction relief from the court pursuant to Rule 3.850, Fla. R. Crim. P. Originally, Elders sought access to investigative reports of the Department of Children and Family Services that he alleged contained exculpatory material. The appellate court granted that request after denial by the trial court. Subsequently, Elders sought further relief after the trial court refused to expand its in camera review to all documents related to Elders in the Department's possession.

On appeal, the court upheld the trial court's denial of access to the additional records. The court held that under Section 39.202(2), Fla. Stat., records regarding child abuse may be obtained for any purpose where such documents are related to the protective investigation. However, other confidential documents may be released to a court for in camera review if necessary for resolution of an issue pending before it. In this case, there was no indication the documents Elders sought were related to any issue before the court.

Mary F. Smallwood *is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is Past Chair of the Administrative Law Section and a Past Chair of the Environmental and Land Use Law Section of The Florida Bar. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to* Mary.Smallwood@Ruden.com.

FROM THE CHAIR
from page 1

On the other hand, there were accomplishments this year for which I think we should all be proud. The Pat Dore Administrative Law Conference was a great success, and Booter Imhof worked with a wonderful team of people, along with the Florida State College of Law to provide a thoughtful, insightful program. Andy Bertram and Kathy Kasprzak also did a wonderful job on The Nuts and Bolts of Administrative Practice, a program designed to provide sound, practical information for practitioners. The Administrative Law Section has enjoyed a reputation for solid continuing legal education programs, and thanks to the hard work of these fine folks, this year is no exception.

Likewise, Elizabeth McArthur has continued her tireless effort to provide this Newsletter. Only those who have performed this task know just how many hours an editor contributes, and she does it as a labor of love to our Section. I stand in awe of her dedication and her ability. As usual, our Administrative Practice Manual is an invaluable tool that is shepherded through the revision process by the able Linda Rigot. Without Linda, there would be no updated manual, and I appreciate her efforts to keep us well informed.

A wonderful addition to our Executive Council this year has been the work of Natalie Futch, the Chair of the Public Utilities Law Committee. Natalie has dived in with great enthusiasm and has made tremendous strides in revitalizing the Section's involvement with the public utilities practitioners within our ranks. I look forward to her columns in our Newsletter and appreciate all of her hard work.

Finally, the efforts of Bill Williams and Linda Rigot to monitor any proposed legislative changes must be addressed. This year brought some unique challenges in that regard, as proposals were floated that were charged with controversy and had the potential to bring out the worst in each of us. For those who don't know, Linda takes on the daunting task of tracking each bill that mentions Chapter 120, while Bill dons his flak jacket to represent our legislative positions as the need arises. I am proud to say that during this particularly odd year, Bill and Linda were able to work, not only with legislative staff, but with people in both the public and private sector to achieve important compromises where possible for the good of the administrative process as a whole. I thank them for their untiring efforts at what is sometimes a thankless task.

As I turn over the reins of the Section to Donna Blanton, I regret the things left unfinished. However, in my effort to build on the positive, it is essential to remember that one need not be an officer or an Executive Council member to be active in the Section or to contribute to its success. As she takes over as Chair, Donna brings to this Section the same qualities she brings to everything in which she is involved: professionalism, competence, dedication, and most of all, common sense. We are in excellent hands. In the meantime, I plan to follow-up on my "coulda woulda shoulda" list and contribute in any way I can to the success of the Section. I encourage all of you to do the same.

Lisa "Li" Shearer Nelson *is the Chair of the Administrative Law Section. She is a director of the firm Holtzman Equels, P.A., and is in charge of its Tallahassee office. Li can be contacted at 850-222-2900 or through* Lilawnelson@aol.com.

Please share this with a colleague

ADMINISTRATIVE LAW SECTION MEMBERSHIP APPLICATION

This is a special invitation for you to become a member of the Administrative Law Section of The Florida Bar. Membership in this section will provide you with interesting and informative ideas. It will help keep you informed on new developments in the field of Administrative Law. As a section member you will meet with lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

To join, make your check payable to "THE FLORIDA BAR" and return your check in the amount of $20 and this completed application card to ADMINISTRATIVE LAW SECTION, THE FLORIDA BAR, 650 APALACHEE PARKWAY, TALLAHASSEE, FL 32399-2300.

NAME _____ ATTORNEY NO. _____

OFFICE ADDRESS _____

CITY / STATE / ZIP _____

PHONE NUMBER _____ FAX NUMBER _____

EMAIL ADDRESS _____

Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues covers the period from July 1 to June 30.

Administrative Law Section Executive Council Meeting – April 4, 2003

MINUTES

I. Call to Order

The meeting was called to order at 9:05 a.m. by Executive Council Chair Li Nelson.

Present: Lisa Nelson, Paul Rowell, Linda Rigot, Charles Stampelos, William Williams, Seann Frazier, Donna Blanton, Natalie Futch, Clark Jennings, Elizabeth McArthur, Robert Downie, Christiana Moore and Jackie Werndli.

Absent: Catherine Lannon, Cathy Sellers, Mary Ellen Clark, Deborah Kearney, Allen Grossman, Patrick "Booter" Imhof, Richard Ellis, David Watkins

II. Legislation

The meeting was called primarily to discuss Senate Bill 562 dealing with revisions to administrative proceedings involving certain medical boards. Bill Williams reviewed the Section's legislative positions relevant to the changes proposed to Chapter 120.

The bill allows medical boards to appoint their own administrative law judges, and allows the boards to review findings of fact by reweighing evidence. The bill changes the burden of proof in medical license discipline cases to a preponderance of the evidence from clear and convincing evidence. The basis for the bill is the report from the Governor's task force on health care and the *Gross v. Department of Health* decision handed down last year.

There followed discussion among Li Nelson, Clark Jennings and Bill Williams regarding other agencies' heads being able to serve as ALJs or appoint ALJs. It was pointed out that agencies have not been able to appoint independent (non-DOAH) ALJs since 1979.

Clark Jennings and Bobby Downie reported that William Large, General Counsel from the Department of Health, had contacted them separately the previous evening, and relayed the substance of their conversations.

Donna Blanton suggested that even if other entities are opposing the bill, the Section should take an active role in opposing it, also. Li Nelson stated that Legislators do not like to be surprised late in the process with new positions from interested parties.

There was further discussion by Li Nelson and Bill Williams regarding due process issues raised by the bill with respect to the changes proposed to Chapter 120.

Donna Blanton moved that the Section authorize Bill Williams to oppose Senate Bill 562 based upon the Sections' legislative positions. Elizabeth McArthur seconded the motion. At the request of Clark Jennings, Bill Williams reviewed how he typically presents the Section's position concerning legislation. Clark Jennings then asked that the motion be amended to avoid comment on issues relating to whether the standard of care determination in medical license cases should be a finding of fact or conclusion of law. After discussion, Donna Blanton amended the motion accordingly. The motion passed without opposition.

Li Nelson reviewed HB 1713 relating to assessment of fees and costs in final orders in medical license discipline cases.

Bill Williams discussed HB 23 (SB 1584), this year's APA reform bill. Among the changes are removal of the "competent substantial evidence" provision from rule validity determinations, a requirement that petitions detail how the disputed facts relate to the rules and statutes involved, clarification of the burden of proof in rule challenges, provisions relating to abatement of non-rule policy challenges pending rulemaking, specific authorization for parties to request initial scheduling orders, changes to the meaning of "arbitrary and capricious in s. 120.57, requirements for valid exceptions to recommended orders, application of s. 57.105 to administrative hearings, amendments to default license issuance, and moving authorization to petition directly to district courts of appeal in emergency rule cases from s. 120.57 to s. 120.68. Bill praised Larry Sellers' forthrightness during negotiations on the bill, and promised not to give him a hard time at the next CLE program.

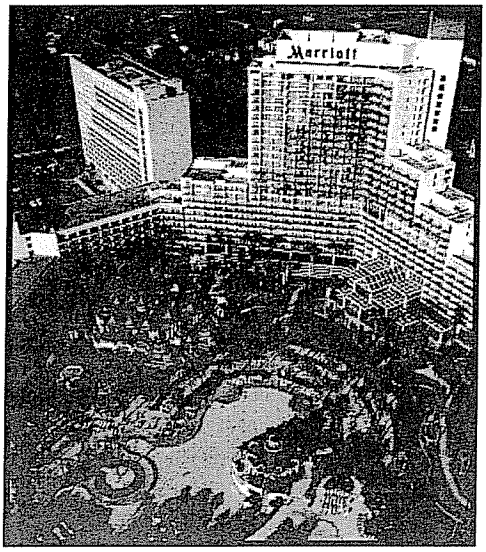
Linda Rigot mentioned a bill that would replace the Florida Administrative Weekly with an online publication, only.

Bill Williams mentioned an upcoming administrative law CLE being organized by Andy Bertron, and urged Section members to support the program.

III. The meeting was adjourned at 10:15 a.m.

Respectfully submitted,
Robert C. Downie, II
Secretary

Make Plans to Attend!



2003 Annual Meeting of The Florida Bar

- **Multiple CLE Seminars for ONE FEE!**
- **Meet with our Supreme Court Justices**
- **Attend the General Assembly**
- **Visit the Lawyers' Marketplace**
- **Check e-mail at the "Cyber Connection"**

June 25 - 28
Orlando World Center Marriott

LexisNexis™

Look for registration information in the 2003 Annual Meeting brochure in the May Bar *Journal*, or visit www.flabar.org.

Administrative Law Section Activities

June 26
6:30 - 7:30 p.m.
Section Reception

~~~

June 27
10:30 a.m. - 12:30 p.m.
Executive Council/Section Annual Meeting
~~~

The 2003 Amendments to the Florida APA

by Lawrence E. Sellers, Jr.

During the 2003 Regular Session, the Florida Legislature enacted a measure that amends Florida's Administrative Procedure Act (APA). CS/CS/SB 1584[1] generally is designed to minimize unnecessary delays in the administrative hearing process and to address several recent court decisions. The bill is somewhat similar to bills that were considered in prior years,[2] but this bill does *not* affect *who* may request an administrative hearing.[3] This article summarizes some of the key provisions.

1. Clarifies Grounds for Challenging Rules. The bill clarifies the grounds for challenging rules by revising the definition of "invalid exercise of delegated legislative authority" in s. 120.52(8) in two related respects.

A rule is an invalid exercise of delegated legislative authority if it is, among other things, "arbitrary or capricious."[4] The bill defines the terms "arbitrary" and "capricious" as follows: A rule is "arbitrary" if it is not supported by logic or the necessary facts; a rule is "capricious" if it is adopted without thought or reason or is irrational.[5]

Significantly, the new definition makes clear that a rule is "arbitrary" – and therefore invalid – if it is not supported by "the necessary facts."[6] This change is designed to retain the requirement that the factual predicate, if any, for a rule must be established,[7] while eliminating the existing, but apparently confusing, language that provides that a rule is invalid if it is not supported by "competent substantial evidence."[8] In particular, the elimination of this "competent substantial evidence" language will avoid the confusion recognized by the court in *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc.,* 808 So.2d 243, 256 (Fla. 1st DCA 2002), regarding whether "competent substantial evidence" is a standard of proof or a standard of review.[9]

The bill also makes identical changes to s. 120.57(1)(e), which describes what an agency must "prove up" when it applies an unadopted rule.[10]

2. Confirms Nature of Rule Challenge Proceedings. The bill amends s. 120.56(1) to make clear that proceedings before the administrative law judge (ALJ) are *de novo,*[11] and the bill thereby addresses the *Florida Board of Medicine* decision to the extent that it suggests otherwise.[12] The bill also confirms that the standard of proof in all rule challenge proceedings is a preponderance of the evidence.[13]

Taken together, it seems clear that these changes do not in any way lessen the grounds for determining a rule to be invalid; indeed, they may well make it easier for a petitioner to successfully challenge a rule and more difficult for an agency to defend the challenged rule.

3. Revises Required Contents of Petition. The bill revises the required contents of a petition for hearing so that the other parties are better informed at an early date of the petitioner's objections. Specifically, the bill amends s. 120.54(5) to require the petition to include an explanation of how the alleged facts relate to the cited rules or statutes.[14]

4. Confirms Burden of Proof in Challenges to Existing Rules. The bill revises s. 120.56 to provide that the *petitioner* has the burden of proof in cases involving challenges to *existing* rules.[15] This is consistent with the ruling in *SJRWMD v. Consolidated-Tomoka Land Co.,* 717 So. 2d 72, 76 (Fla. 1st DCA 1998).[16] The *agency* retains the burden of proof in challenges to *proposed* rules.

5. Clarifies Challenges to Agency Statements. The bill amends s. 120.56(4) to clarify procedures for administrative challenges to an agency statement that is defined as a rule.[17] The bill affirmatively establishes a clear presumption that the agency is acting expeditiously and in good faith if the agency publishes a proposed rule prior to the final hearing. The bill also requires the ALJ to hold in abeyance the challenge to an agency statement while the agency seeks to adopt a proposed rule addressing the challenged agency statement. Finally, the bill makes clear that, if the proposed rule addressing a challenged agency statement is determined to be invalid, then the agency must immediately discontinue reliance on the challenged agency statement. Some of these changes address issues raised by the court's decision in *Osceola Fish Farmers Association, Inc. v. SFWMD,* 830 So. 2d 932 (Fla. 4th DCA 2002).[18]

6. Requires Initial Scheduling Order. The bill amends s. 120.569 to require the ALJ, upon request, to enter an initial scheduling order to facilitate the just, speedy, and inexpensive determination of the proceeding.[19] It has been DOAH's practice to routinely enter initial orders in all cases, but the amended statute expressly requires the ALJ to enter such an order upon the request of any party, and it expressly requires the order to establish a discovery period, including a deadline by which all discovery shall be completed, and the date by which the parties shall identify expert witnesses and their opinions. The initial scheduling order also may require the parties to meet and file a joint report (or pre-hearing stipulation) by a date certain.

7. Authorizes Motion to Relinquish Jurisdiction. The bill makes minor changes to s. 120.57(1)(i), which authorizes the ALJ to relinquish jurisdiction to the agency when it appears there is no genuine issue as to any material fact.[20] This is somewhat akin to a motion for summary judgment in that it is designed to expedite administrative proceedings by avoiding unnecessary formal (fact-finding) hearings.

8. Rulings on Exceptions. The bill amends s. 120.57 to authorize the agency to decline to rule on exceptions that do not clearly identify the disputed portion of the recommended order, that do not identify the legal basis for the exception, or that do not

include specific citations to the record.[21] Heretofore, agencies were expected to rule on each exception, regardless of whether they were well-written or supported by record citation.[22]

9. Restores "Default" Language. The bill essentially restores to s. 120.60 the pre-1996 language, providing that a license application is considered approved without further action by the agency if the agency fails to act on the application within the prescribed time periods, thus avoiding unnecessary judicial proceedings to compel the agency to issue the license.[23] However, the new language expressly authorizes the "default" permit to include such reasonable conditions as are authorized by law.[24] It also requires any applicant seeking to claim licensure by default to notify the agency clerk in writing, and it prohibits the applicant from taking any action based upon the default license until after receipt of such notice by the agency clerk. Finally, a default license is not considered approved if a recommended order has been entered and it recommends that the agency deny the license.[25]

10. Authorizes Direct Appeals of Emergency Rules. The bill clarifies a provision authorizing direct appeals by conforming s. 120.68 to another statutory provision, s. 120.54(4), which expressly provides that an agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.[26]

11. Authorizes Attorneys' Fees and Damages Under s. 57.105.

One of the key changes seeks to minimize unnecessary delays in the administrative hearing process by discouraging unsupported claims and dilatory actions. The bill does so by amending s. 57.105 to make clear that it *also* applies to *administrative* proceedings.[27] As amended, s. 57.105 *requires* the ALJ to award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney or qualified representative in the same manner and upon the same basis as provided in Subsections (1)-(4). Such award by the ALJ is a final order subject to judicial review. If the losing party is an agency, then the award to the prevailing party shall be against and shall be paid by the agency (i.e., not the agency attorney).[28]

The referenced Subsections (1)-(4) require the court to award a reasonable attorney's fee on any claim or defense at any time during a proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) was not supported by the material facts necessary to establish the claim or defense; or (b) would not be supported by the application of then-existing law to those material facts.[29] Likewise, these subsections authorize an award of damages, which may include attorney's fees, for any action that was taken primarily for the purpose of unreasonable delay.[30]

The Legislature was aware that the APA already contains several provisions providing for attorneys' fees.[31] Two of these provisions are designed to discourage behavior that is for an "improper purpose."[32] Both sections contain a similar, if not identical, definition of "improper purpose."[33] Although both sections appear to be frequently invoked, it appears that ALJs (and reviewing courts) have been reluctant to assess fees under these "improper purpose" statutes.[34]

By making the provisions of s. 57.105 expressly applicable to administrative proceedings, the Legislature clearly has expanded the grounds for sanctions from simply "improper purpose" to both unsupported claims and dilatory tactics. As such, it seems obvious that the Legislature intended to authorize – indeed *require* – ALJs to make more liberal use of fees and sanctions to discourage both unsupported claims and dilatory actions.

This new attorney's fee provision also makes clear that a voluntary dismissal by a non-prevailing party does not divest the ALJ of jurisdiction to make the described award.[35] This language was added to address two administrative decisions in which the ALJ had ruled that he did not have statutory authority to enter a recommended order addressing entitlement to attorney's fees and costs when the underlying matter has been voluntarily dismissed.[36]

12. Increases Fees Available Under Equal Access to Justice Act. The bill increases from $15,000 to $50,000 the cap on attorneys' fees that may be awarded to a prevailing *small* business in an adjudicatory or administrative proceeding initiated by a state agency under s. 57.111, the Equal Access to Justice Act.[37] This change should not affect many cases, as an agency is *not* liable under that Act for such fees or costs if the agency's actions were substantially justified or special circumstances exist that would make the award unjust. The bill also amends the attorney's fees provision in the APA, s. 120.595, to add cross references to s. 57.105 and s. 57.111.[38]

13. Provides for Expedited Rulemaking for Adoption of ERP rules. The bill amends s. 120.54 to establish an expedited rulemaking process that may be used by the Department of Environmental Protection and the water management districts to update cross references to the other agency's environmental resource permitting (ERP) rules already incorporated by reference.[39] This provision is modeled after two existing provisions that provide an expedited process for the adoption of federal standards, s. 120.54(6) and s. 403.8055.

14. Agency Authority to Reject or Modify Conclusions of Law. Earlier versions of the bill would have revised s. 120.57 to again allow agencies to reject or modify even those conclusions of law that are not within the agency's substantive jurisdiction (such as evidentiary rulings),[40] and thereby repeal the change made in 1996. This was intended to avoid the need to respond to the court's request in *Barfield v. DOH* that the Legislature identify a specific appellate remedy to an agency that considers itself aggrieved by an ALJ's conclusions of law that are beyond the agency's substantive jurisdiction.[41] These earlier versions of the bill would have discouraged the agency's rejection or modification of such conclusions of law by requiring a reviewing court to

continued...

2003 AMENDMENTS

from page 13

award attorney's fees to the prevailing appellant if the court finds that the agency improperly rejected or modified a conclusion of law or an interpretation of an administrative rule over which the agency does not have substantive jurisdiction.[42] However, this issue proved very controversial, so these provisions were deleted from the bill.

Conclusion.

CS/CS/SB 1584 is largely intended to minimize delays in the administrative process and to address several recent court decisions. It will be interesting to see whether these recent amendments to the APA themselves will spawn new court decisions that in turn require further legislative attention.[43]

[1] SB 1584 was sponsored in the Senate by Senator David Aronberg (Dem. Greenacres). The House companion, HB 23, was sponsored by Representative Joe Spratt (Rep. Sebring).

[2] *E.g.* HB 257 and SB 280 (2002); HB 1135 and SB 910 (2001); HB 2023 and SB 2557 (2000).

[3] Legislation enacted in 2002 clarifies citizen standing under s. 403.412(5), F.S. *See* Lawrence E. Sellers and Cathy M. Sellers, *"Intervene" Means "Intervene": The Florida Legislature Revises Citizen Standing Under § 403.412(5),* 76 FLA. B. J. 63 (November 2002) (discussing Chapter 2002-261, Laws of Florida).

[4] See s. 120.52(8)(e), F.S.

[5] §1, CS/CS/SB 1584, 2d engrossed and enrolled, amending s. 120.52(8)(e), F.S. The definitions are taken in part from prior court decisions. *E.g. Agrico Chemical Co. v. DER*, 365 So.2d 759, 763 (Fla. 1st DCA 1978). However, there is one significant difference: prior cases have defined an "arbitrary" decision as one "not supported by facts or logic, or despotic." *Id.* at 763. However, the bill defines "arbitrary" as not supported by logic or the *necessary* facts.

[6] An example of a case in which the agency demonstrated that the challenged rule was not arbitrary because it was supported by the necessary facts is *Austin v. DHRS,* 495 So.2d 777 (Fla. 1st DCA 1986). That case concerned a proposed rule requiring applicants for public assistance to cooperate with the DHRS Child Support Enforcement Unit in identifying, locating, and establishing the paternity of parents of children for whom public assistance is received. Among other things, the challenged rule required the parent to cooperate by assisting in establishing the paternity of a child born out-of-wedlock. The challenged rule defined non-cooperation to include situations where a mother identifies one or more men as putative fathers, but HLA or other scientific tests indicate that none of the persons identified could in fact have been the father of the child. The hearing officer found that expert testimony and other evidence presented at the hearing established that HLA and other blood tests referenced in the rule are reliable means of excluding wrongfully accused putative fathers. The hearing officer therefore upheld the challenged rule against claims that it was arbitrary, and the court affirmed. Interestingly, the agency's prior efforts to apply the "unadopted" version of this same rule were unsuccessful because the agency had failed to present "competent, substantial evidence" of the accuracy of the HLA blood test. *Amos v. DHRS,* 444 So.2d 43, 46, n. 4 (Fla. 1st DCA 1983).

[7] Edwin A. Bayo and John R. Rimes, *Who Goes First and What is "Competent Substantial Evidence" in a Proposed Rule Challenge?,* 73 FLA. B. J. 62, 64 (Jan. 1999) ("When an agency has based its proposed rules on factual assumptions which are 'susceptible to proof by ordinary means' then, when challenged on its factual assumptions, the agency has (and should have) the burden of persuading the administrative law judge that its factual assumptions and conclusions are more likely to be correct than those of the challenger.")

[8] §1, CS/CS/SB 1584, 2d engrossed and enrolled, deleting s. 120.52(8)(f), F.S. The "competent substantial evidence" language was added to the definition of "invalid exercise of delegated legislative authority" in 1996. *See* Lawrence E. Sellers, Jr., *The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform,* 48 FLA. L. REV. 93, 131-132 (1996).

[9] For a discussion of the *Florida Board of Medicine* decision, see Donna E. Blanton, *Competent and Substantial Evidence in Rule Challenges: A Standard of Proof or Standard of Review?,* Admin. Law Section Newsletter (September 2002). For some interesting observations regarding the court's decision, see Judge Kent Wetherell's Final Order in *Levy v. Department of Health, Board of Osteopathic Medicine,* DOAH Case No. 02-002308RX (Final Order entered Dec. 3, 2002), and particularly note 14 at pp. 57-58.

[10] §5, CS/CS/SB 1584, 2d engrossed and enrolled, amending s. 120.57(1)(e)2.d. & f., F.S. For a description of the limits on agency reliance on nonrule policies, see Wade L. Hopping, Lawrence E. Sellers and Kent Wetherell, *Rulemaking Reforms and Nonrule Policies: A "Catch-22" for State Agencies?,* 71 FLA. B. J. 20 (March 1997); Wade L. Hopping and Kent Wetherell, *The Legislature Tweaks McDonald (Again): The New Restrictions on the Use of "Unadopted Rules" and "Incipient Policies" by Agencies in Florida's Administrative Procedure Act,* 48 FLA. L. REV. 135 (1996).

[11] §3, CS/CS/SB 1584, 2d engrossed and enrolled, amending s. 120.56(1)(e), F.S.

[12] The court characterized a rule challenge as "technically a *de novo* proceeding." 808 So.2d at 257-258. By making it clear that rule challenge proceedings are in fact *de novo* proceedings, there should be no question now that evidence regarding whether the challenged rule is invalid is not limited to that contained in the rulemaking record.

[13] §3, CS/CS/SB 1584, 2d engrossed and enrolled, amending s. 120.56(1)(e), F.S. The 1999 amendments to the APA already established that the standard of proof in *proposed* rule challenges is a preponderance of the evidence. David M. Greenbaum and Lawrence E. Sellers, Jr., *1999 Amendments to the Florida Administrative Procedure Act: Phantom Menace or Much Ado About Nothing?,* 28 FLA. L. REV. 499, 519 (2000).

[14] §2, CS/CS/SB 1584, 2d engrossed and enrolled, amending s. 120.54(5)(b)4.f., F.S. In prior years, similar proposed legislation would have required the petition to state "with particularity" the required information, "including a reference to the *specific* section, subsection, paragraph, or subparagraph, as appropriate" the petitioner contends require reversal or modification of the agency's proposed action. *E.g.* HB 257 (2002). These changes proved controversial, and were not included in this year's version of the bill. Parenthetically, an appellate court ruled recently that a petition need not state the specific statutory section numbers or rule provision numbers that are allegedly being violated. *Accardi v. DEP,* 824 So.2d 992 (Fla. 4th DCA 2002).

[15] §3, CS/CS/SB 1584, 2d engrossed and enrolled, amending s. 120.56(3)(a), F.S.

[16] *See also Dravo Basic Materials Co., Inc. v. DOT,* 602 So.2d 632 (Fla. 2nd DCA 1992); *Agrico Chemical Co. v. DER,* 365 So.2d 759 (Fla. 1st DCA 1978).

[17] §3, CS/CS/SB 1584, 2d engrossed and enrolled, amending s. 120.56(4)(e), F.S.

[18] For a discussion of this decision, as well as recommendations for legislative changes, see Cathy M. Sellers and Lawrence E. Sellers, *OFFA v. SFWMD — Agencies Need Not Successfully Adopt a Challenged Statement to Avoid a Final Order and Attorney's Fees,* Administrative Law Section Newsletter, Vol. XXIV, No. 3 (March 2003).

[19] §4, CS/CS/SB 1584, 2d engrossed and enrolled, adding a new paragraph (o) to s. 120.569(2), F.S.

[20] §5, CS/CS/SB 1584, 2d engrossed and enrolled, amending s. 120.57(1)(i), F.S.

[21] §5, CS/CS/SB 1584, 2d engrossed and enrolled, amending s. 120.57(1)(k), F.S.

[22] *Iturralde v. Department of Professional Regulation,* 484 So.2d 1315, 1316 (Fla. 1st DCA 1986); *Lloyd v. Department of Professional Regulation,* 473 So.2d 720 (Fla. 4th DCA 1985). But at least one case recognized an "exception" for exceptions that merely reiterate positions that were repeatedly asserted before the ALJ, and that were clearly and specifically addressed in the recommended order. *Britt v. Department of Professional Regulation,* 492 So.2d 697, 699-700 (Fla. 1st DCA), disapproved on other grounds, *Department of Professional Regulation v. Bernal,* 531 So.2d 967 (Fla. 1988).

[23] §7, CS/CS/SB 1584, 2d engrossed and enrolled, amending s. 120.60(1), F.S. Prior to 1996, the APA provided that the license was "deemed approved" if the agency failed to comply with the applicable time limits. In 1996, the language was changed to simply provide that "the agency must approve" any application if it is not approved or denied within the prescribed time periods. There appears to be no explanation for this change, although one article characterizes the changes to this section as "technical." *See* Deborah K. Kearney and Kent Wetherell, *The*

Practitioner's "Road Maps" to the Revised APA, 71 FLA. B. J. 53, 68 (March 1997).

[24] The Attorney General previously opined that an agency may place standard conditions in a default license issued pursuant to s. 120.60, F.S. Op. Atty. Gen. 078-169 (Dec. 29, 1978).

[25] An application for license must be approved or denied within 45 days after a recommended order is submitted to the agencies and the parties. s. 120.60(1), F.S.

[26] §8, CS/CS/SB 1584, 2d engrossed and enrolled, amending s. 120.68(9), F.S.

[27] §9, CS/CS/SB 1584, 2d engrossed and enrolled, creating a new Subsection (5) of s. 57.105, F.S. A footnote in an appellate decision had stated that s. 57.105 did *not* apply to administrative proceedings. *Procacci Commercial Realty v. DHRS,* 690 So. 2d 603, 607 n. 8 (Fla. 1st DCA 1997).

[28] Agency lawyers objected strenuously to the bill as originally filed to the extent that it would make an agency attorney responsible for payment of attorney's fees in administrative proceedings. Accordingly, this provision was revised to provide that, if the losing party is an agency, then the award to the prevailing party shall be against and shall be paid wholly by the agency. However, agency attorneys remain potentially liable for attorney's fees under s. 57.105 in proceedings other than administrative proceedings.

[29] *See* §57.105(1), F.S. For a discussion of s. 57.105, F.S., *see* Gary S. Gaffney and Scott A. Mager, *Section 57.105's New Look: The Florida Legislature Encourages Courts to Sanction Unsupported Claims and Dilatory Actions,* 76 FLA. B. J. 8 (April 2002). *See also* John P. Fenner, *New §57.105 Lawyer Sanctions, Our Ethics, and the Florida Constitution: Recent Developments and a Respectful Dissent,* 77 FLA. B. J. 26 (May 2003).

[30] *See* §57.105(3), F.S.

[31] For a discussion of some of these provisions, *see* Martha J. Edenfield, *Attorneys' Fees and Costs,* 71 Fla. B. J. 73 (March 1997).

[32] One section, s. 120.569(2)(e), seeks to discourage dilatory or abusive tactics and to streamline the litigation process by providing for certain sanctions, including a *discretionary* award of attorneys' fees, when a pleading, motion, or other paper is signed and filed for an "improper purpose." The second provision, Section 120.595(1), is designed to shift the cost of participation in a formal administrative proceeding to the non-prevailing party, if the non-prevailing party participated in the proceeding for an "improper purpose." *Burke v. Harbor Estates Assoc.,* 591 So.2d 1034, 1036-37 (Fla. 1st DCA 1991).

[33] The term "improper purpose" is defined in s. 120.569(2)(e) by example: "such as to harass or to cause unnecessary delay or for frivolous purpose or needless increase in the cost of litigation." The term is defined in s. 120.595(1)(e) to mean participation in a proceeding pursuant to s. 120.57(1) primarily to harass or cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity. This latter definition was amended by the bill to include an increase in the cost of litigation. *See* §6, CS/CS/SB 1584, 2d engrossed and enrolled.

[34] For example, in *Friends of Nassau County, Inc. v. Nassau County,* 752 So.2d 42 (Fla. 1st DCA 2000), the court reversed the ALJ's order assessing fees against the lawyers representing the petitioner even though the petitioner, "Friends of Nassau County," was created on the day the petition was filed by individuals associated with business competitors of the applicant, and even though the action was voluntarily dismissed prior to hearing, and the ALJ found that the applicant's competitors gained a competitive advantage because of the delay caused by the permit challenge. The court, applying an objectively reasonable standard, found that the moving parties did not carry their burden of showing that those signing the petition lacked legal justification for doing so where legal counsel was entitled to rely, and did rely, on the opinion of experts. *Id.* at 52.

One of the few reported cases in which the ALJ imposed, and the appellate court affirmed the imposition of, attorneys' fees is *Burke v. Harbor Estates Associates,* 591 So.2d 1034 (Fla. 1st DCA 1991). Subsequently, it appears that many ALJs have been unwilling to assess attorneys' fees under the "improper purpose" statutes unless the complained of behavior is very similar to (or worse than) that described in the *Burke* case. *E.g., Behrens v. Boran and SWFWMD,* DOAH Case No. 02-0282 (Recommended Order, July 29, 2002); *Save Our Bays, Air and Canals, Inc. v. Tampa Bay Desal and DEP,* DOAH Case Nos. 01-1949 and 01-2720 (Recommended Order, Oct. 17, 2001).

[35] §9, CS/CS/SB 1584, 2d engrossed and enrolled, creating a new Subsection (5) of s. 57.105, F.S.

[36] *See Orange City v. G.E.L. Corp. and DEP,* DOAH Case No. 01-4132 (Recommended Order, October 22, 2002) [ER FALR 03:046] (DEP Final Order, December 3, 2002), appeal pending, *G.E.L. Corp. v. DEP,* Case No. 5D03-13 (Notice of Appeal filed January 2, 2003); *Joyner and Manning v. Leon County and DEP,* DOAH Case No. 00-4220 (Recommended Order, April 4, 2001).

[37] §10, CS/CS/SB 1584, 2d engrossed and enrolled, amending s. 57.111(4)(d)2., F.S.

[38] §6, CS/CS/SB 1584, 2d engrossed and enrolled, adding a new Subsection (6) to s. 120.595, F.S. *See also* s. 120.595(1)(a), F.S. (the provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings).

[39] §2, CS/CS/SB 1584, 2d engrossed and enrolled, amending s. 120.54(1)(i), F.S.

[40] *E.g.* §5, CS/HB 23, amending s. 120.57(1)(l), F.S.

[41] 805 So.2d 1008, 1013 (Fla. 1st DCA 2001). For a discussion of the *Barfield* decision, see Lisa S. Nelson, *Insulated From Review: Barfield v. Department of Health, Board of Dentistry,* Admin. Law Section Newsletter, Vol. XXIII, No. 3 (March 2002); Robert P. Smith, *Be Not Amazed! At The Lessons of Barfield v. Department of Health, Board of Dentistry,* Admin. Law Section Newsletter, Vol. XXIII, No. 4 (June 2002).

[42] §4, HB 23, amending s. 120.595(5), F.S. (providing that the court *may* award fees and costs of the appeal); §6, CS/HB 23, amending s. 120.595(5), F.S. (providing that the court *shall* award fees and costs for the administrative proceeding *and* the appellate proceeding).

[43] *E.g. SWFWMD v. Save the Manatee Club, Inc.,* 773 So.2d 594, 598 (Fla. 1st DCA 2000) (recognizing that the Legislature revised the APA in 1999 to address the court's prior decision in *SJRWMD v. Consolidated Tomoka Land Co.,* 717 So.2d 72 (Fla. 1st DCA 1998), which in turn had interpreted the 1996 amendments to the APA); *Barfield v. DOH,* 805 So.2d 1008, 1011 (Fla. 1st DCA 2001) (recognizing that the Legislature revised the APA in 1999 to address the court's prior decision in *DCF v. Morman,* 715 So.2d 1076, 1077 (Fla. 1st DCA 1998)); David M. Greenbaum and Lawrence E. Sellers, Jr., *1999 Amendments to the Florida Administrative Procedure Act: Phantom Menace or Much Ado About Nothing?,* 27 FLA. ST. U. L. REV. 499 (2000).

Lawrence E. Sellers, Jr. *is a partner with Holland & Knight, LLP, in the firm's Tallahassee office. He received his J.D., with honors, from the University of Florida College of Law.*

2003 Bar Leaders Conference

July 25-26

St. Petersburg, Florida

Renaissance Vinoy Resort & Golf Club

This annual workshop for voluntary bar association officers and staff gives participants an opportunity to network and discuss problems faced by the attorneys who volunteer as members of the association in their local communities.

The conference, which moves around the state each year, is being co-hosted by three Southwest Florida voluntary bar associations — St. Petersburg Bar, Clearwater Bar, and Hillsborough County Bar associations. The Jacksonville Bar Association was host to more than 100 bar leaders at Ponte Vedra Beach in July, 2002.

THE FLORIDA BAR

The Florida Bar
651 E. Jefferson St.
Tallahassee, FL 32399-2300

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43