Administrative Law Section Newsletter

Vol. XXV, No. 4 **Elizabeth W. McArthur, Editor** **June 2004**

From the Chair

by Donna E. Blanton

Our newsletter editor, Elizabeth McArthur, tells me this column is to be my "swan song." After a year as chair of the section, I step down in June when DOT lawyer Bobby Downie assumes the role of chair. He'll do a great job, as will the others who have been nominated as officers: Debby Kearney (vice-chair), Booter Imhof (secretary), and Andy Bertron (treasurer).

Serving on the Administrative Law Section Executive Council is quite different, I think, from actively participating in most other Bar sections. For starters, the vast majority of our section's 1100-plus members live and work in Tallahassee. About half of our section's members are lawyers who work for the state. The other half are lawyers in private practice who regularly interact with those state employees on behalf of persons and entities whose interests are "substantially affected" by state agencies.

Our 20-member executive council also is almost equally divided between state employees and private practitioners. That makes for some lively discussions at council meetings, particularly concerning proposed legislation amending chapter 120, Florida Statutes, which often has the potential of altering the delicate balance between the rights of those regulated and state agencies' duty to protect the public health, safety, and welfare.[1]

Although members of our section often are adversaries, I continue to be impressed and grateful for the level of civility and professionalism we find in administrative practice. Most of the state agency lawyers I regu-

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Lock Down: The Misinterpretation of Section 120.81(3), Florida Statutes

by Stephen T. Maher

According to the September/October 2002 issue of the Correctional Compass, a publication of the Florida Department of Corrections available on its website, Florida now has the third largest prison system in the nation based on inmate population. The only states with larger systems are Texas and California. 75,210 inmates were incarcerated in Florida state prisons as of 2002.

Prisoners, as a class, are unpopular with almost everyone. First, their illegal conduct caused their incarceration. Second, prisoners litigate. Their litigation is burdensome due to its volume and the fact that much of it is conducted without aid of counsel. Prisoner litigation annoys the government, and the government has reacted. In 1996, Congress enacted the Prison Litigation Reform Act which has shrunk the number of new federal filings by inmates by over forty percent, notwithstanding a large increase in the affected incarcerated population. Margo Schlanger, Inmate Litigation, 116 Harvard L. Rev. 1555 (2003).

Different courts take different approaches to the management of prisoner litigation. The United States

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District Court for the Southern District of Florida maintains a pro se division of the court staffed by a magistrate judge and many law clerks. They deal with all pro se prisoner cases, from Section 2255 habeas corpus actions to 42 U.S.C. Section 1983 actions. The Court can assign counsel, when appropriate, to cases brought under Section 2255 pursuant to the Criminal Justice Assistance Act. Section 1983 actions can be handled by volunteer lawyers who participate in a program set up by administrative order.

In Florida, we have taken a very different approach to managing prisoner litigation arising under the state Administrative Procedure Act. Prisoners were originally allowed full use of the state's APA, and used it with varying degrees of success. *See, e.g., Florida Department of Offender Rehabilitation v. Jerry*, 353 So. 2d 1230 (Fla. 1st DCA 1978); *Diaz v. Florida Department of Corrections*, 519 So. 2d 41 (Fla 1st DCA 1988); *Florida Institutional Legal Services, Inc. v. Florida Department of Corrections*, 579 So. 2d 267 (Fla. 1st DCA 1991). Changes were made to the act in response to prisoner success in using it.

The ability of prisoners to use the act is now governed by Section 120.81(3), Florida Statutes. That section provides:

> (3) PRISONERS AND PAROLEES.—
>
> (a) Notwithstanding s. 120.52(12), prisoners, as defined by s. 944.02, shall not be considered parties in any proceedings other than those under s. 120.54(3)(c) or (7), and may not seek judicial review under s. 120.68 of any other agency action. Prisoners are not eligible to seek an administrative determination of an agency statement under s. 120.56(4). Parolees shall not be considered parties for purposes of agency action or judicial review when the proceedings relate to the rescission or revocation of parole.
>
> (b) Notwithstanding s. 120.54(3)(c), prisoners, as defined by s. 944.02, may be limited by the Department of Corrections to an opportunity to present evidence and argument on issues under consideration by submission of written statements concerning intended action on any department rule.
>
> (c) Notwithstanding ss. 120.569 and 120.57, in a preliminary hearing for revocation of parole, no less than 7 days' notice of hearing shall be given.

The leading court decision interpreting this section is *Quigley v. Florida Department of Corrections*, 745 So. 2d 1029 (Fla. 1st DCA 1999). Prisoner Quigley sought judicial review under Section 120.68 of an order denying a petition to initiate rulemaking under Section 120.54(7) that he filed with DOC. His petition asked for the repeal of a DOC rule that did not allow prisoners to retain notarized documents. He asked that it be replaced with a rule allowing prisoners to retain such documents. DOC timely denied the petition on the grounds that its rule vindicated a legitimate penological interest in preventing prisoners from altering notarized documents and DOC provided a written statement of reasons.

The Court affirmed the DOC, stating:

> We do not pass on the legal sufficiency of DOC's stated reasons or on the merits of Mr. Quigley's claims that the rule impermissibly impedes prisoners' access to courts. *See generally Turner v. Safley*, 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987). For some seven years, *see* Ch 92-166 § 9, at 1678, Laws of Fla. (codified at § 120.52(12), Fla.Stat. (Supp. 1992)), prisoners have been forbidden to maintain challenges to administrative rules under section 120.56 and predecessor provisions. *See* § 120.81(3)(a), Fla. Stat. (1997). . . .
>
> Although permissible in a petition under section 120.54(7), Florida Statutes (1997), Mr. Quigley's claim that Florida Administrative Code Rule 33-3.005(9)(a)2. is invalid, on grounds it violates the state and federal constitutions, does not entitle him to review of the merits of his contention here. Initial appellate judicial review of the validity of the reasons DOC sets out in a written statement of reasons for denying a petition is not available to prisoners under the Administrative Procedure Act. Their only avenue for judicial review is to seek declaratory or other relief in circuit court, as was done in *Bass v. Department of Corrections*, 684 So.2d 834 (Fla. 1st DCA 1996).
>
> Affirmed.

This decision was followed by *Caldwell v. State of Florida*, 821 So. 2d 374 (Fla. 1st DCA 2002), where the court again affirmed DOC's denial of a petition to initiate rulemaking filed under Section 120.54(7), Florida Statutes. That two-paragraph opinion explained why the court was affirming:

> Because the department complied with section 120.54(7)(a), Florida Statutes (2000), by denying Caldwell's petition within 30 calendar days with written reasons, we affirm. We do not address the merits of Caldwell's claims on appeal. Because the Administrative Procedure Act does not apply to him, Caldwell is not entitled to appellate review of the department's denial of his petition.

Reading these cases, it appears that the Court is taking an internally inconsistent position. It is saying both that the appellant cannot have judicial review "because the Administrative Procedure Act does not apply to him" and that it *affirms* the orders under review because they complied with the procedural requirements of Section 120.54(7), which creates proceedings in which the prisoners were clearly allowed to participate below. That section provides:

> (a) Any person regulated by an agency or having substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule or to provide the minimum public information required by this chapter. The petition shall

> specify the proposed rule and action requested. Not later than 30 calendar days following the date of filing a petition, the agency shall initiate rulemaking proceedings under this chapter, otherwise comply with the requested action, or deny the petition with a written statement of its reasons for the denial.

While it is clear that a prisoner seeking judicial review of a denial of a petition filed under Section 120.54(7) is out of luck in the First District, it is less clear why that is so or why that should be so. The APA language that the Court relies on to find that prisoners must lose their judicial review proceedings there is that "prisoners, as defined by s. 944.02, shall not be considered parties in any proceedings other than those under s. 120.54(3)(c) or (7), and may not seek judicial review under s. 120.68 of any other agency action." The language in the statute prohibiting judicial review under Section 120.68 "of any other agency action" seems to specifically allow judicial review of the referenced sections. Otherwise, there is no reason to cite Section 120.68 in the provision. If Section 120.68 had not been mentioned, the general language of the section would have forbidden prisoners to be parties to Section 120.68 proceedings. The phrase "of any other agency action" in the statute is not given any meaning in the Court's analysis. Fundamental rules of statutory construction require that every word in a statute be given some meaning when it is construed. That rule of construction was not followed in these cases.

The Court's other point in *Quigley* is that, on judicial review, the Court can not reach the merits of the claim that a rule change is legally necessary because the existing rule is invalid because prisoners "have been forbidden to maintain challenges to administrative rules under section 120.56...." It seems to me that this analysis mixes substantive apples with procedural oranges. The fact that the Legislature has made a specific type of rule challenge procedure unavailable to state prisoners does not mean that the Legislature has forbidden prisoners to argue that agency rules are in fact invalid in proceedings in which they are allowed to participate.

The Court's analysis was slightly different in *Vaughn v. Florida Department of Corrections*, 754 So. 2d 752 (Fla. 1st DCA 2000). There, a prisoner contended that a corrections rule was unconstitutional and an invalid exercise of delegated legislative authority. Relying on *Quigley*, the Court stated that "section 120.81(3), Florida Statutes (1999), provides that an inmate has no standing to challenge a rule on these grounds under chapter 120." *Vaughn*, 754 So. 2d at 752. Is that what Section 120.81(3) really says? I read the prohibition in the statute to be a limitation on the types of administrative proceedings that prisoners can participate in as a party, not a prohibition on the substance of the arguments that prisoners can raise when a prisoner participates in a permissible proceeding.

The argument that the Court was right to decide these cases as it did because prisoners should not be able to do indirectly what they are not allowed to do directly ignores what the Legislature actually did. All that the Legislature did was limit the types of proceedings in which prisoners could participate, it did not limit the types of arguments that prisoners could raise in proceedings in which they could participate. Nowhere did the Legislature prohibit prisoners from arguing that agency rules are invalid. It took a different tack. It deprived prisoners of the ability to participate as parties in a powerful administrative remedy, the rule challenge. While that is the proceeding that is commonly used when litigants challenge the invalidity of agency rules, the invalidity of rules may be raised outside Section 120.56 proceedings. Section 120.56 is just often considered the best way to challenge rules, from a strategic perspective. *See* Stephen T. Maher, How the Glitch Stole Christmas: The 1997 Amendments to the Florida Administrative Procedure Act, 25 Fla. St. U. L. Rev. 235 (1998).

The limitation on prisoner use of Section 120.56 is a significant restriction. Because of that legislative prohibition, prisoners cannot hold up the adoption of proposed rules while they litigate rule validity, as other litigants can. They cannot invalidate rules before the Division of Administrative Hearings (DOAH) as other litigants can. But when the Legislature preserved prisoner participation in much less procedurally powerful administrative remedies that exist in connection with rule change, the petition to initiate rulemaking and the Section 120.54(3) rulemaking hearing, they preserved the right of prisoners to make the arguments that people usually make to get the law changed. And one of the most common reasons that people advance to get law changed is that there is something wrong with the existing law. The Legislature did not intend to deprive prisoners of the ability to make this common argument when it limited them to less powerful administrative proceedings to make their arguments about why and how agency rules should be changed. The Court's refusal to address the merits of the agency's reasons for refusing to change its rules, or to adopt new rules, on the basis that its existing rules are invalid, denies prisoners one of the few rights they still have under the state APA.

To put the importance of this problem in context, prisoners are pervasively regulated by rules of the Department of Corrections. It is probably fair to say that prisoners are among the most regulated individuals in Florida. It is generally true that regulated individuals are in the best position to provide input into the rulemaking process. *See* Stephen T. Maher, We're No Angels: Rulemaking and Judicial Review in Florida, 18 Fla. St. U. L. Rev. 767 (1991). The Court's refusal to provide meaningful judicial review of the reasons for an agency's refusal to accept what could be valuable input into its rulemaking process relegates prisoners frustrated by the agency's response to their input to file declaratory actions in the circuit courts. This is not an efficient way to run a rulemaking system that is so central to so many unrepresented peoples' daily lives.

The irony of this case law, which forces these types of disputes into declaratory judgment actions in circuit court, is not lost on those of us

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who were around in the 1970s and 1980s. Then, the APA was widely used to do just the opposite, to force litigants to bring their rule-related cases in the administrative process (and in the appellate courts in judicial review of administrative decisions reached in that process), rather than file them as declaratory and injunctive actions in circuit court. The case law from that era allowed very few cases to be brought in circuit court and usually limited court participation in these kinds of cases to litigation before the district courts of appeal. *See Key Haven Associated Enters. v. Board of Trs. of Internal Improvement Trust Fund*, 427 So.2d 153 (Fla.1982).

It is time for the courts to reread the language of the statute and to rethink the logic and wisdom of the current approach.

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APPELLATE CASE NOTES

by Mary F. Smallwood

Statutory Construction

State of Florida v. Bodden, 29 Fla. L. Weekly 153 (Fla. 2004)

Bodden challenged the urinalysis testing conducted by the Florida Department of Law Enforcement (FDLE) arguing that it must be adopted as a rule pursuant to Chapter 120, Fla. Stat. The trial court and the Second District concluded that Section 316.1932, Fla. Stat., required adoption of rules establishing procedures for urinalysis testing. The Second District certified the question to the Supreme Court, however, as its decision was in conflict with the Fifth District's decision in *State v. Pierre*, 854 So. 2d 231 (Fla. 5th DCA 2003).

Section 316.1932, the implied consent law, provides that any person operating a motor vehicle is deemed to have consented to "an *approved* chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcohol content of his or her blood or breath, *and to a urine test* for the purpose of detecting the presence of chemical substances …." (Emphasis added). Under prior decisions, the term "approved" in this section has been construed to require adoption of testing procedures by rule for blood and breath testing. The Court concluded that the answer to the certified question, then, depended on whether "approved" modifies "urine test" in Section 316.1932.

The Court concluded that the grammatical structure of the sentence did not support a construction of the statute that "approved" modifies urine test. Instead, the Court read the sentence to establish two independent tests: (1) approved chemical and physical tests, and (2) urine tests. The Court further noted that other provisions of the implied consent statute likewise distinguished between chemical and physical tests and urine tests. Finally, the Court rejected Bodden's argument that requiring rule adoption for blood and breath testing but not for urine testing was a violation of the equal protection clauses of the state and federal constitutions as persons driving under the influence of drugs or alcohol are not a protected class under those provisions.

Licensing

Lusskin v. Department of Health, 29 Fla. L. Weekly 342 (Fla. 4th DCA 2004)

Lusskin, a physician, appealed a final order of the Department of Health revoking his license. The Department adopted the findings of fact and conclusions of law in the recommended order but rejected the recommendation that Lusskin's license be reinstated if he entered into a third contract with the Physicians Recovery Network (PRN). Instead, the Department revoked his license.

Lusskin had been subject to administrative sanctions on several occasions due to his inappropriate contact with female patients. In 1992, he had been prohibited from treating female patients without the supervision of a female employee. In 1996, Lusskin's license was suspended for failure to comply with a contract between him and PRN. However, that decision was overturned on appeal on the grounds that Lusskin had not been notified that such failure would result in suspension. Then in 1999, Lusskin was the subject of further proceedings for again failing to comply with his PRN contract. In that case, the Department revoked Lusskin's license; but the Fourth District reversed and remanded the case, finding that the Department had failed to state its reasons for increasing the penalty with sufficient particularity.

On remand, the Department issued a final order of revocation. In that order, the Department cited Lusskin's failure to comply with his PRN contracts, the psychological evaluations that indicated personality disorders that resulted in his attempted manipulation of people and failure to take responsibility for his actions, and his circumvention of the PRN by failing to file reports or assign responsibility to his employees.

The court upheld the final order, finding that the Department met the requirements of Section 120.57 in stating with specificity the reasons for rejecting the proposed penalty.

Formal Proceedings

Blackwood v. Agency for Health Care Administration, 29 Fla. L. Weekly 805 (Fla. 4th DCA 2004)

Blackwood filed a request for a formal proceeding challenging the Agency for Health Care Administration's (AHCA) denial of her request for a license to operate an assisted living facility. The notice of denial asserted that Blackwood did not meet level 2 screening requirements as she had been listed by the Department of Children and Family Services as a perpetrator of abuse, neglect, or exploitation.

AHCA denied the first petition on the grounds that it was untimely and did not meet the requirements of Section 120.569(2)(c), Fla. Stat. In response to an order to show cause from AHCA, Blackwood filed an amended petition. After determining that the amended petition was insufficient, AHCA issued a final order denying the request for hearing.

The court affirmed. It found that neither Blackwood's initial petition nor amended petition addressed the allegations in the denial that she was a perpetrator of abuse, neglect, or exploitation. Accordingly, the court concluded that the petitions did not contain a statement of the ultimate facts that the petitioner contended warranted reversal of the agency's action.

Anon v. Department of Children and Family Services, 29 Fla. L. Weekly 529 (Fla. 3d DCA 2004)

Anon, an attorney, was dismissed from employment by the Department of Children and Family Services. Subsequently, she filed a request for a hearing alleging that the Depart-

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ment was making statements disparaging her professional ability and integrity. The Department granted that request and assigned an agency employee to conduct the hearing. Anon then filed a petition for a formal proceeding under Section 120.57, Fla. Stat. That request was denied, and Anon appealed.

The court affirmed. It cited Section 110.604, Fla. Stat., which provides that actions affecting the employment of Select Exempt Service employees of the State, including dismissal, are not subject to the provisions of Chapter 120, Fla. Stat. Anon argued that that provision no longer applied as the alleged disparaging statements had been made after she was no longer an employee of the Department. The court rejected that argument, finding no basis for distinguishing between an employee who is subjected to such actions by an agency after demotion, suspension, or reduction of pay and an employee who has been terminated.

Informal Proceedings

Campbell v. Department of Business and Professional Regulation, 29 Fla. L. Weekly 701 (Fla. 4th DCA 2004)

Campbell appealed from a final order of the Department of Business and Professional Regulation (DBPR) suspending for one year her real estate license and imposing a fine. She argued that, during the course of the informal hearing, disputed facts had arisen that required the matter to be referred to the Division of Administrative Hearings for a formal hearing. DBPR argued that Campbell had waived her right to a formal proceeding.

The court reversed and remanded. In construing Section 120.57(1)(a), Fla. Stat., the court stated that the statute was amended to delete language from that section which had allowed the parties to waive the right to a formal hearing. The court concluded that the Legislature thus intended to eliminate the ability of parties to waive a formal hearing where there are disputed issues of material fact.

What the court failed to recognize is that the language was not actually deleted from the statute but was moved to Section 120.569(1), Fla. Stat. That section now provides that "[u]nless waived by all parties, s. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact." A motion for rehearing or clarification was rejected by the court as untimely, leaving the decision in effect.

Rehearing

Reich v. Department of Health, 29 Fla. L. Weekly 739 (Fla. 1st DCA 2004)

Reich filed a motion to vacate a final order with the Department of Health after entry of a final order incorporating a settlement agreement between the respondent and the Department. He alleged that his attorney did not have the authority to agree to the settlement. The Department denied the motion for lack of jurisdiction. Reich stated in argument on the motion that he had never received a copy of the final order.

On appeal, the court reversed and remanded for an evidentiary hearing. It held that generally an agency has inherent power to reconsider a matter before it so long as the request is made prior to the time for appealing the order expires. While the court agreed that the motion would have been untimely if Reich had received notice of the final order being entered, it held that Reich was entitled to an evidentiary hearing to determine whether he received notice of such entry.

Emergency Final Orders

Preferred RV, Inc. v. Department of Highway Safety and Motor Vehicles, 29 Fla. L. Weekly 850 (Fla. 1st DCA 2004)

The Department of Highway Safety and Motor Vehicles (DMV) issued an administrative complaint alleging multiple violations of Chapter 319, Fla. Stat., and rules adopted under that Chapter, and DMV also issued an emergency order suspending the respondent's license as a recreational vehicle dealer. On appeal, the court quashed the emergency order, holding that it did not contain sufficient information on its face to explain why other less harsh remedies, such as probation, a fine, or a notice of noncompliance, would not have achieved the same objective.

Agency Action on Recommended Order

Beverly Healthcare Kissimmee v. Agency for Health Care Administration, 29 Fla. L. Weekly 316 (Fla. 5th DCA 2004)

Beverly Healthcare appealed a final order of the Agency for Health Care Administration which rejected certain findings of fact and a conclusion of law in the recommended order. AHCA had proposed to downgrade Beverly's state license from standard to conditional. The basis for the downgrade was AHCA's contention that Beverly had failed to correct a Class III deficiency before a follow-up visit by an inspector. In particular, AHCA alleged that Beverly had failed to comply with a resident's care plan which required that the resident wear pressure boots to prevent pressure sores on two separate occasions. Beverly contended that pressure boots were not needed on either occasion as, in one case, the resident was lying in bed with a pressure mattress and, in the second case, was sitting in a wheelchair with regular shoes and bandages on his feet. It noted that the existing sores had been healing since his admission to the facility. The administrative law judge issued a recommended order concluding that AHCA was required to demonstrate that there was potential for harm to the resident from the facility's failure to follow the care plan. Since AHCA failed to put on any evidence demonstrating such harm and Beverly had made a demonstration as to why there was no harm to the patient, the ALJ recommended that the deficiency be classified as Class IV. The ALJ further recommended that the facility retain its standard license.

AHCA rejected the conclusion of law, holding that failure to correct a Class III deficiency resulted in strict liability for the licensee and that there was no requirement that AHCA demonstrate potential for harm to the resident.

The court reversed. It agreed with Beverly that the statutory scheme of Section 400.23, Fla. Stat., required classification of deficiencies based on the potential for harm and the nature and scope of the deficiency. Therefore,

the court concluded that AHCA was required to demonstrate that the failure to comply with the patient care plan would result in harm to the patient. In addition, the court noted that the agency may not reject a finding of fact in a recommended order if it is based on competent substantial evidence. In this case, AHCA had failed to put any evidence into the record regarding the impact on the resident of Beverly's deficiency. Conversely, Beverly had specifically addressed the effect on the resident in its case.

Government-in-the-Sunshine and Public Records

Baker County Press, Inc. v. Baker County Medical Services, Inc., 29 Fla. L. Weekly 560 (Fla. 1st DCA 2004)

The Baker County Press sought access to records of Baker County Medical Services, Inc., a private corporation that leased and operated the publicly owned county hospital. Medical Services argued that the documents were exempt from disclosure pursuant to Section 395.3036, Fla. Stat., which provides that "[t]he records of a private corporation that leases a public hospital or other public health care facility are confidential and exempt from the provisions of s. 119.07(1) and 24(a), Art. I of the State Constitution …."

The Baker County Press asserted that the statutory exemption was unconstitutional under Art. I, § 24(a) of the Florida Constitution, citing the Florida Supreme Court's decision in *Halifax Hospital Medical Center v. News-Journal Corp.*, 724 So. 2d 567 (Fla. 1999). The *Halifax* Court had held unconstitutional a prior statutory exemption that applied to strategic plans or marketing plans of private corporations leasing a public hospital. The Court concluded that the Legislature, in adopting that exemption, had failed to meet the constitutional requirement that it state with specificity the public necessity justifying the exemption. The Legislature had simply found that without the exemption, public hospitals would be at a competitive disadvantage to private hospitals.

In response to the *Halifax* decision, the Legislature adopted Section 395.3036, Fla. Stat., with an accompanying legislative finding of necessity. The finding again cited the competitive disadvantage imposed on public hospitals, but it expanded on the potential adverse implications, including closing of hospitals, use of tax dollars to subsidize losses, and lack of expenditure on capital improvements to the public hospitals.

The court in this case found that the Legislature had adequately justified the necessity of the exemption from the Public Records Act and concluded that the statute was facially valid.

Exhaustion of Administrative Remedies

Department of Agriculture and Consumer Services v. Haire, 29 Fla. L. Weekly 248 (Fla. 4th DCA 2004)

In the continuing saga of the public's battle against the destruction of citrus trees to protect against the spread of citrus canker, the Fourth District once again reversed the trial court and held that the plaintiffs had failed to exhaust administrative remedies. The plaintiffs had received a temporary injunction from the trial court which prevented the destruction of citrus trees until the Department of Agriculture and Consumer Services (DACS) had complied with court-imposed testing requirements related to the determination that a tree was infected with citrus canker and that the tree(s) to be destroyed were within 1900 feet of the infected tree. The trial court concluded that DACS was not properly making those determinations.

In reversing the decision of the trial court, the district court noted that Section 581.184, Fla. Stat., provided that DACS must issue an Immediate Final Order (IFO) and give notice to the property owner of its intent to remove a tree. The property owner then is afforded the right within 10 days of receipt of the IFO to seek a stay in the appropriate district court of appeal. The court rejected the argument of the plaintiffs that an appeal of the IFO was an inadequate remedy because review is limited to the record below. It noted that the record included the test results establishing that a tree is infected with citrus canker and the methods of determining that the tree that is subject to the IFO is within 1900 feet of the infected tree.

Constitutionality of Statute

Haire v. Department of Agriculture and Consumer Services, 29 Fla. L. Weekly 67 (Fla. 2004)

The Florida Supreme Court affirmed the decision of the Fourth District upholding the constitutionality of Section 581.184, Fla. Stat., which established the means by which the Department of Agriculture and Consumer Services could destroy citrus trees within 1900 feet of a tree determined to be infected by citrus canker.

The petitioners had challenged the statutory provision on the grounds that it violated both the procedural and substantive due process provisions of the United States and Florida constitutions. The statute at issue provided that DACS could enter private property pursuant to a search warrant and destroy exposed trees, those within 1900 feet of an infected tree. The statute required the State to compensate owners for the destruction of

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

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such trees. It set an amount of $100 per tree as a reasonable amount but provided that figure did not limit the amount that could be awarded by a court order. The statute also required DACS to issue an Immediate Final Order (IFO) prior to destroying a tree and allowed the owner 10 days to appeal that IFO to an appropriate district court.

The Court affirmed the holding of the Fourth District Court of Appeal that the appropriate standard of review for determining whether a statute meets substantive due process requirements was whether the statute bears a reasonable relationship to the purposes sought to be obtained. The petitioners had argued that a strict scrutiny test should be applied. In reaching this conclusion, the Court relied on the fact that the statute required compensation of property owners for destruction of exposed trees. It rejected the petitioners' argument that the amount of compensation provided for was inadequate, noting that a court could determine that any particular exposed tree was worth more that the minimum $100 amount specified in the statute. Had the statute not provided for adequate compensation, the court agreed that strict scrutiny standard would have been more appropriate. Moreover, applying the reasonable relationship standard, the Court held that the Legislature was justified in relying on the available scientific evidence in adopting the 1900 foot criterion for exposure. It rejected the argument of the petitioners that the evidence should have been subjected to a standard of greater certainty such as that resulting from a trial proceeding.

With respect to the procedural due process requirements, the Court held that the due process provisions did not require a pre-removal hearing. In reaching this conclusion, it relied upon the evidence that citrus canker could be easily and widely spread by wind and rain in a very brief period of time. Under the circumstances, it concluded that issuance of an IFO provided the necessary procedural due process.

Ex Parte Communications

City of Hollywood v. Hakanson, 29 Fla. L. Weekly 341 (Fla. 4th DCA 2004)

Hakanson was dismissed as risk manager for the City of Hollywood and appealed to the City's civil service board. That appeal was denied. On appeal to the Fourth District, Hakanson contended that the chairman of the civil service board had received an ex parte communication during the pendency of the appeal resulting in a presumption of bias.

The alleged ex parte communication in violation of Section 286.0115, Fla. Stat., occurred during a meeting of the City Commission attended by both the chairman and Hakanson where a city employee stated on the record that Hakanson had failed to undertake an evaluation of cost increases in the City's self-insurance plan. The court concluded that a statement made in a public meeting was not an ex parte communication simply because the chairman of the civil service board was in the audience.

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FROM THE CHAIR
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larly encounter are courteous and helpful, given that they have a duty to zealously represent their client. I hope they would say the same about me.

Many of our executive council members this year have worked extremely hard on behalf of the section. I would particularly like to thank Chris Moore, who has chaired a committee working on a review of the Uniform Rules of Procedure. As I write this, Chris' committee has essentially completed its work and is preparing to submit proposed revisions to the full executive council for discussion. The goal is to ultimately submit proposed revisions for consideration by the Administration Commission, which is responsible for adopting the rules.

Li Nelson, the immediate past chair of the section, has continued to be involved in just about every activity of the executive council. This year she has worked closely with Chief Administrative Law Judge Bob Cohen (and new director of the Division of Administrative Hearings) in the development of a mock-hearing CLE program at DOAH that is designed to educate inexperienced lawyers about how to try a case at DOAH. Li has brought her usual creative energies to this project, and has had able assistance from Andy Bertron and Dave Watkins, as well as many other section members. The mock hearing is unlike any CLE program the section has sponsored in recent years. Thanks to Judge Cohen for coming up with the idea and working so hard with our executive council members to make it happen. Li and Andy also are working on the Pat Dore Conference, a CLE program that will be held in the fall. The Conference this year will commemorate the 30th anniversary of the adoption of Florida's modern Administrative Procedure Act.

Natalie Futch Smith, chair of the section's Public Utilities Law Committee, put together a CLE program in December 2003 about practice before the Public Service Commission that was well-received. Natalie moved from Tallahassee to South Florida this year, making her the only member of the section's executive council who doesn't live in the capital area. Fortunately, she has continued serving as Public Utilities Chair, as her new job involves public utilities issues and brings her to Tallahassee often.

Our section newsletter has had another great year, thanks to editor Elizabeth McArthur. We began a new feature this year in the newsletter that offers "snapshots" in each issue of individual state agencies. The idea is to provide some general information about each agency and the way it operates in an effort to help attorneys who may only encounter certain agencies occasionally. Mary Ellen Clark is coordinating this project, which has been well-received by the newsletter's readers. I would like to encourage section members to consider writing an article for the newsletter. We want to put out an interesting publication with diverse viewpoints about current issues in administrative law. If you want to write – or even if you just have an idea for an article for someone else to write – please contact Elizabeth at emcarthur@radeylaw.com.

Once again Administrative Law Judge Linda Rigot and Bill Williams have spent long hours monitoring bills filed in the Legislature that have the potential to affect the Administrative Procedure Act. As we do every year, we had hastily called conferences this year to discuss whether a particular proposal impacting the APA fell within the ambit of our section's adopted legislative positions. The section's legislative positions can be found on the Administrative Law Section's website. Thanks to Linda and Bill for keeping us informed about proposed legislation, even if our executive council members don't always agree about whether the proposal is a good idea.

I hope the section will continue its almost-even balance between state lawyers and private practitioners. Although we often have different perspectives on administrative law, our interaction and discussions benefit us all. Additionally, the executive council always is looking for involvement from new lawyers or lawyers who are new to administrative law. We have lots of committees, from Publications to CLE programs to Membership, and we welcome your participation.

Endnotes:

[1] For the record, there are nine state employees on the 2003-2004 executive council, two of whom are administrative law judges (Linda Rigot and Charles Stampelos); ten lawyers in private practice, and one lawyer who works as an in-house attorney for Florida Power & Light Co. (Natalie Futch Smith). Two of the state lawyers work for the Legislature (Booter Imhof and Debby Kearney). The other state lawyers are Cathy Lannon and Mary Ellen Clark (Attorney General's office); Bobby Downie (DOT); Chris Moore (Public Service Commission); and Clark Jennings (Department of Agriculture). The executive council members in private practice are Dave Watkins, Elizabeth McArthur, Andy Bertron, Allen Grossman, Bill Williams, Cathy Sellers, Seann Frazier, Rick Ellis, Li Nelson, and me.

Donna E. Blanton *is a shareholder with Radey Thomas Yon & Clark, P.A.*

Agency Snapshots

Agency for Health Care Administration

With a FY 2003- 2004 budget of approximately $13.2 billion and some 1654 employees, the Agency for Health Care Administration is responsible for administration of Florida's Medicaid program, the State Center for Health Care Statistics, regulation of some 25,000 health care facilities and 25 managed care organizations, and serving as the Governor's policy development unit on health care issues. The Agency is organized into four sections: the Office of the Secretary; the Division of Medicaid; the Division of Health Quality Assurance; and the Division of Administrative Services.

Head of the Agency:
Alan Levine
Secretary (as of June 1, 2004)
Agency for Health Care Administration
2727 Mahan Drive
Tallahassee, FL 32308
(850) 922-3809

Agency Clerk:
Lealand McCharen
AHCA — Building 3, Third Floor
(850) 922-5873

General Counsel:
Valda Clark Christian
AHCA — Building 3, Third Floor
(850) 922-5873

Hours of Operation:
8:00 a.m. to 5:00 p.m.

Physical Address:
Fort Knox Office Complex
2727 Mahan Drive
Tallahassee, FL 32308

Mailing Address:
2727 Mahan Drive, Mail Stop #3
Tallahassee, FL 32308

Valda Christian obtained her undergraduate degree from Williams College and her JD from the Yale Law School. Following a judicial clerkship with the Honorable John R. Hargrove, Sr., U.S.D.C. for the District of Maryland, Valda practiced with Wilmer, Cutler & Pickering in Washington, D.C. She then relocated to Florida serving as in-house counsel for Blue Cross & Blue Shield of FL (BCBSF). Valda joined AHCA from her position at BCBSF.

Kinds of Cases: Healthcare facility licensure and regulation, Medicaid reimbursement, Medicaid-related bankruptcies, certificates of need, PERC proceedings, contract disputes, bid protests, rule challenges, Federal Civil Rights actions, and constitutional challenges to the Agency's statutes and rules.

Number of Lawyers on Staff: approximately 40 total attorney positions, 29 in the Headquarters Office, 11 in Regional Offices around the state. 14 attorneys provide primarily Medicaid support, and 22 provide primarily facilities regulation support.

APA Interaction: Substantial

Practice Tips: In recent years this agency has had a relatively rapid succession of Secretaries, General Counsels, and Agency Clerks. The administrator with perhaps the longest tenure and greatest institutional knowledge is Elizabeth Dudek, Deputy Secretary for the Division of Health Quality Assurance. Among other things she is responsible for the investigation of consumer complaints against health care facilities; the determination of need for additional health care facilities and services (Certificate of Need); and the provision of related training to staff, consumers and providers. She is the Agency's emergency operations coordinator and a registered lobbyist providing testimony before the Legislature on behalf of the Agency.

If you will be submitting a public records request, you should be aware that AHCA has a position set up specifically to handle public records requests and coordinate responses. You should submit your AHCA public records requests to:

Jennifer Reavis
Public Records Coordinator, External Affairs
AHCA
2727 Mahan Drive, Ft. Knox #3, Mail Stop #2
Tallahassee, FL 32308-5403
850/414-6044
850/921-9041 Fax

Florida Department of Highway Safety & Motor Vehicles

The Florida Department of Highway Safety & Motor Vehicles (DHSMV) is a statutorily created agency headed by Governor Jeb Bush and the Florida Cabinet, consisting of the Commissioner of Agriculture, Charles Bronson; the State Treasurer, Tom Gallagher; and the Florida Attorney General, Charlie Crist.

Head of the Agency:
Fred O. Dickinson
Executive Director
2900 Apalachee Parkway
Neil Kirkman Building
Tallahassee, FL 32399-0500
(850) 487-3132

Agency Clerk:
Various (Contact the General Counsel's office for specific details for the Division of Driver Licenses, the Division of Motor Vehicles, and the Florida Highway Patrol.)

General Counsel:
Enoch J. (Jon) Whitney
(850) 488-1606

Hours of Operation:
8:00 a.m. to 5:00 p.m.

Physical/Mailing Address:
Neil Kirkman Bldg.
2900 Apalachee Parkway
Tallahassee, FL 32399-0500

Jon was born in Jacksonville and raised in Tallahassee and Jacksonville. He received both his undergraduate and JD degrees from Florida State University, and was a member of the second class to graduate from the FSU College of Law. Jon began his career in state government during law school by working as a research assistant in the Florida Attorney General's Office. After being admitted to The Florida Bar in November 1970, he became an Assistant Attorney General and then became law clerk to the late Judge Sam Spector at the First District Court of Appeal. Upon rejoining the Attorney General's Office where he drafted opinions and handled criminal appellate litigation, Jon asked an important mentor in his life, Florida Supreme Court Justice Richard Ervin, how long he should remain in state government before moving to the private sector. Justice Ervin, having dedicated his career to public service in state government replied, "What's wrong with working for state government?" Jon worked for the Florida Attorney General for three years before joining DHSMV in 1974 and was appointed General Counsel in 1979. He became General Counsel for the Parole Commission in 1982, before being reappointed General Counsel to DHSMV in 1986. Jon's public service has extended beyond the agency to include Florida Bar activities that have ranged from four terms on the Board of Governors, to six years, including Chair, on the Appellate Certification Committee. He feels very blessed to have had the opportunity, with his dedicated staff, to create a continuity in service to an agency rarely seen in state government.

Number of Lawyers on Staff: 9

Kinds of Cases: The DHSMV Office of General Counsel, with substantial participation by the Department of Legal Affairs, represents DHSMV in all administrative and judicial proceedings in federal and state courts, including review of driver license and motor vehicle and mobile home dealer and manufacturer license suspensions, revocations and final orders, Public Employees Relations Commission appeals, collective bargaining agent arbitrations, Administrative Procedure Act matters, forfeiture proceedings, complaints filed in circuit court, and appellate litigation. The office coordinates with the Division of Risk Management within the Department of Financial Services on negligence and civil rights claims, provides legal instruction for the Florida Highway Patrol Training Academy, and handles legal inquiries from citizens and private attorneys.

APA Interaction: Substantial

Tip: Contact the individual division attorneys for perspective on how to best represent a client's interest in a matter under the Department's jurisdiction. In Tallahassee, the Florida Highway Patrol is represented by Judson Chapman, Sena Finklea, and Brian Pugh; the Division of Motor Vehicles is represented by Mike Alderman; and the Division of Driver Licenses is represented by Kathy Jimenez, all of whom can be reached at (850) 488-1606.

My Six-Month Year Abroad in Washington, D.C.

by Robert C. Downie, II

I recently returned from a six-month assignment at the Federal Highway Administration in our nation's Capitol. From a legal perspective, there are some very interesting differences and similarities between the ways state agencies and federal agencies operate. This is especially true from the point of view of administrative law practitioners. Some day, for all our sakes, I hope someone writes about those things. Being caught up in more mundane but life-critical tasks like not freezing to death, though, I had little time for such scholarly exercises. I did, however, notice some other things.

My tenure in D.C. lasted from November 1 to April 30 (although it seemed like twice that long), which is roughly the time of year when Washington weather is like the three worst winter days in Tallahassee over the past hundred years, or worse, all the time. After I moved there, I checked the map and noticed that the area surrounding the District of Columbia includes Maryland and is very close to places with names like Delaware, New Jersey, Pennsylvania and West Virginia. Those are northern states, in the north, which is pretty near Canada. So my six months in D.C. felt like a year in Canada.

Besides the weather, people who live in D.C. have something else in common with people who live in Canada – neither group is represented in the United States Congress. The license plates in D.C. say "Taxation Without Representation." It was explained to me that the people who live in Washington D.C. are not represented by voting members in Congress, yet it is Congress that must approve the D.C. budget. Further, D.C. full-time residents cannot vote in other states. D.C. residents pay Federal taxes just like everyone else, though. What this means is that in the capitol city of the country that was formed on the principle of "no taxation without representation" the citizens are taxed but have no voice within the taxing government. I nodded politely and thought, "just like Florida Democrats."

A good thing I learned was that one does not need a car in Washington. There is a train system, called the "Metro," that runs underground all over the place. There was a Metro

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station across the street from my apartment building, and another inside the courtyard of the building where I worked. On weekends, my family and I rode the Metro to go sightseeing. It was really efficient. The only downside to the Metro is that it is color-coded, and I am colorblind. It's a good thing I can read. Colorblind illiterates must stay lost.

Speaking of reading, on weekday mornings, outside most Metro stations there are people handing out free Express newspapers. The Express is published by the Washington Post, and is a condensed version of that day's paper. Thus, a ten-minute morning train ride becomes an opportunity to read the entire paper, in a kind of Cliff-Notes manner. Once everyone arrives at work, they can intelligently discuss the news-making issues, like what football coach Joe Gibbs had for dinner the night before.

My time in D.C. coincided with the second coming of Joe Gibbs. Mr. Gibbs won three Super Bowls as head coach of the Washington Redskins in the 80s and early 90s, and was brought back at the end of 2003 to return the franchise to the glory days. The local papers seemingly lost all interest in world events and politics as they reported on every move the coach made, especially his trips around the country to sign free agents. In fact, the day Saddam was found hiding in a hole, the paper ran a split headline: "HUSSEIN IN CUSTODY/GIBBS IN SAN DIEGO."

Another great thing in D.C. is that there are a lot of free (sort of) places to go see interesting things. The Smithsonian Museums, the National Gallery, the Holocaust Museum, the Zoo, and the White House all have free admission. Watch out when you get inside, though. It costs extra to spend time in some rooms, like the IMAX theaters and the Lincoln Bedroom.

So there you have it. Washington D.C. is quite a place. There is a lot of history there, and more being made every day. I recommend a visit, but if you go, don't drink the water.

***Robert C. Downie, II**, graduated from the Florida State University College of Law and practices as an assistant general counsel with the Florida Department of Transportation. He is currently serving as Chair-Elect of the Administrative Law Section, and will assume the position of Chair on July 1.*

ARE YOU CONNECTED???

The Administrative Law Section's website is available at *www.flaadminlaw.org*. The site contains information that administrative law practitioners should find interesting and useful.

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