ADMINISTRATIVE LAW SECTION NEWSLETTER

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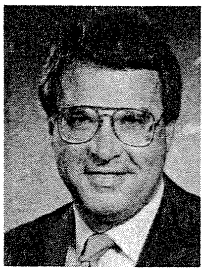
Veronica E. Donnelly, M. Catherine Lannon, Co-editors

From the Chair

by Gary Stephens



I was advised that this would be my last opportunity to speak to Section members From The Chair and that I probably would want to make it something special. So I set about conjuring up as many flashy insights into administrative law as I could muster. At least I could make a list, even though it wasn't a long list, but many of the topics have been addressed before: administrative due process before local government agencies, citizens' access to various types of administrative proceedings and remedies, and finally, how to wrap the warm and comforting arms of mediation around your typical administrative dispute without doing violence to anyone's legal rights. These are still tendered as worthy topics of reflection and, in fact, have been made the subject of separate task forces for that purpose. Hopefully, many of you will have already made contact with those task forces. 'Consequently, I felt no pressing need to throw the administrative law equivalent of a fourth quarter, Hail Mary pass in the hopes that somebody would be wandering around loose in the end zone or that a zealous defender would inadvertently tip the ball into the waiting hands of an eager Section member (wide receiver).

Rather, my normal tendency to ruminate happily about obscure matters of administrative law and procedure has been dampened of late by the extraordinary contrariness of things and the pain and sadness of too many fallen leaders. The untimely death of DCA Secretary Bill Sadowski, only weeks after the loss of Pat Dore, has stunned and sobered beyond the ordinary. In addition to being a bright lawyer and a remarkable individual, Bill was engaged full-time in a task which is near to our hearts and professions: trying to make a governmental program work within the wide array of forces, opinions, and interests which comprise the social and economic fabric of contemporary Florida. Our special sympathies are extended to his family and to his colleagues, including DCA General Counsel Steve Pfeiffer, Chair-Elect of our Section, whose task it will be to re-group and carry on that work. Other miscellaneous wounds and losses of sons and mothers, of fathers and grandmothers, of loved ones, teachers and colleagues combine to impress upon us the fragile and temporal character of our doings.

This momentary funk also reflects an awareness of the many things we do to ourselves or to one another to frustrate forward movement or to diminish well-intended efforts. Projects undertaken but abandoned in mid-

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stream, promises made but unfulfilled, and confusion left to reign where concerted effort could bring relief are all seeming to abound these days, at least under the rocks I've been obliged to look under. This mood will no doubt change, although these losses will not go away. The work of the Section, however, to promote the fair and efficient resolution of administrative disputes, will continue. Its leaders will change and its agenda will evolve. I hope each of you will support that work in a way which is both helpful and meaningful to you. The practice of administrative law in Florida is a changing and unsettled field, begging for new mousetraps to advance the goal of orderly dispute resolution. I would like to thank all of those members of the Section and others who have contributed to the Section's work this year and hope you will all join us for a productive year-end meeting at The Florida Bar Convention in Orlando.

The 1992 Legislative Session:

How the Legislature Sought to Gain Control of Agency Rulemaking

by Ralf G. Brookes
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Rulemaking, the stuff administrative lawyers dreams are made of . . . public workshops, proposed rule challenges, adopted rule challenges, drawn-out proceedings, economic impact statements, supporting documents and expert witnesses. Last year, the legislature amended Florida's Administrative Procedures Act by adopted Florida Statutes 120.535 which required agencies to adopt in rule form all incipient rule policy, effective March 1, 1992, and provided statutory attorney's fees if an agency impermissibly relied upon agency statements as a basis for action. This year, the legislature sought to increase legislative review of proposed agency rules. While some legislators believe the legislative compromise resulting in the 1992 amendments will cut agency rulemaking in half, some agency attorney's believe will have little or no impact at all. Committee substitute for Senate Bill 1354, introduced by Senator Grizzle was unamimously approved by both the Senate and the House, and became law without the Governor's signature on April 9, 1992.

The 1992 legislative amendments to Florida Administrative Procedures Act will require an Economic Impact Statement (EIS) only in certain cases, however, when required the scope of the EIS have been expanded. The Joint Administrative Procedures Committee (JAPC) now has standing to initiate administrative hearings to challenge proposed rules which are not modified to meet their objections. JAPC will soon begin to review rules under additional new criteria, the general language of which will be the subject of much debate. In addition, the 1992 amendments set forth formal procedures for rule development, repeal prisoner's access to certain administrative hearings, and allow indexing by computer database.

The Session

The stage was set for legislative revisions to the rulemaking process by Lt. Governor Buddy MacKay in a letter to Senator Ken Jenne dated August 14, 1992. The revisions proposed by the Governor's Office would have streamlined agency rulemaking. By repealing Florida Statutes 120.54(4) the Governor's proposal would have prevented challenges to proposed rules. The statutory requirement for an economic impact statements would have been repealed. Standing to challenge a rule based upon other supporting documents would have been limited.

Submittal of objections to a rule by the Joint Administrative Procedures Committee to an agency would be limited to a six months from the rule's effective date; even the definition of "rule" would have been amended to exclude agency statements which do not create legal rights or require compliance. The only proposal from the Governor's office which survived the session was the repeal of the statutory right of prisoners to challenge a rule in an administrative hearing pursuant to 120.54(4).

Led by freshman Representative Pruitt (who also introduced legislation requiring the Regional Planning Councils to face sunset review) and veteran Representative Sam Mitchell, a groundswell of 87 out of 120 members of the House signed a bill which would have tightened the reins on agency rulemaking. These legislators argued that rulemaking too often exceeded statutory authorization, resulting in rules which were 'unrecognizable" to the very legislature which adopted the enabling statute. *See*, "Agency implementation of delegated authority: Toward compliance with legislative intent." David W. Nam and Barry King, 65 Fla. B.J. 64 (Feb. 1991). In the opinion of these legislators, too many a similar objection to rulemaking can be detected in the executive branch as Dan Quayle's Council on Competitiveness seeks to reduce the amount and economic effects of agency rulemaking and President Bush proclaims temporary moratoriums on new rulemaking to promote economic development. Pointing out that over 72,000 rules have been adopted since 1975 and over 4300 agency rules were adopted in 1991, while only 335 statutes were passed during the same year, the Florida legislators argued for more legislative control of the agencies.

In response to what was perceived as Florida's run-away rulemaking, these legislators proposed radical changes to rein in the agencies through new rulemaking procedures. House Bill 711 would have required review and approval of all agency rules by the full legislature. Legislative approval threatened to take even the authority to draft proposed rules away from the executive branch of government. The proposed rulemaking process would have required agencies to submit conceptual rules to the JAPC. The JAPC then would put the concepts into rule form. All rules approved by the JAPC would then be submitted to the full legislature for debate and approval. As strange as this process may sound, a similar procedure has been adopted in West Virginia where over *1200* rules are debated and approved by the legislature each year, usually in omnibus bills addressing particular subject areas.

While the prospect of year long sessions devoted to the extremely "dry" subjects of agency rules, was ultimately more than the legislature itself could stomach, the resulting legislative compromise contains portions of this bill as well as three others. The compromise bill which was adopted included provisions addressing indexing and notice of rule development as introduced by Senator Kiser, revisions to the economic impact statements as introduced by Senator Thurman statutory exemptions from rulemaking for cost recovery clauses and public utilities policies as introduced by Senator Jenne, and the amendments requiring legislative review of all rules by the JAPC and standing legislative committees as co-sponsored by Representatives Mitchell and Pruitt.

Economic Impact Statements

An economic impact statement is no longer required for proposed rules unless the agency determines that the proposed action would result in:

(1) a substantial increase in costs or prices paid by consumers, individual industries, state or local government agencies,
(2) significant adverse effects on competition, employment, investment, productivity, or innovation, and
(3) alternative approaches to the regulatory objective exist and are not precluded by law.

An agency determination of whether an EIS is required pursuant to these criteria shall not be subject to challenge. However, an EIS must be prepared regardless of the initial agency determination if the agency is requested to prepare an EIS by:

(1) the Governor,
(2) a "body corporate or politic,"
(3) at request signed by at least 100 people
(4) an organization representing at least 100 people, or

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(5) any domestic nonprofit corporation or association.

Requests for an economic impact statement is prepared, the following new impacts must now be addressed:

(1) an estimate of the cost to any other state or local government entities of both implementing and enforcing the proposed rule;
(2) any anticipated effect on state or local revenues;
(3) the probable costs and benefits of adopting the proposed rule compared to the costs and benefits of not adopting the rule (the "no action" alternative);
(4) a determination of whether less costly or less intrusive methods exist to achieve the purpose of the proposed rule which are reasonable and not precluded by law;
(5) a description of any reasonable alternative methods to achieve the purpose of the proposed rule and the reasons for rejecting those alternatives in favor of the proposed rule; and
(6) a detailed statement of the data and methodology required to make these estimates and impact assessments.

While challenges to a rule based on an EIS still must be brought within 1 year of the rule's effective date, standing to challenge an EIS has been limited by the 1992 amendments. Standing will only extend to those persons who requested preparation of an EIS and have provided the agency with "sufficient information" regarding their specific concerns either through participation in a public workshop, public hearing, or by written comment.

Economic impact statements have been held to be a procedural aspect of rulemaking which is subject to a statutory harmless error rule providing for remand only if a material error results in impairing the fundamental fairness of the proceeding, even if costs included in the statement were speculative or incapable of estimation. *Brewster Phosphates v. DER*, 444 So.2d 483 (Fla. 1st DCA, 1989) *review denied* 450 So.2d 43 (Fla. 1st DCA, 1991). The amendments adopt a statutory standard of review for rule challenges based upon a challenge to an EIS. Grounds for invalidating a rule based upon an EIS are now statutorily limited to "an agency's failure to adhere to the procedure for preparation of an economic impact statement provided or an agency's failure to consider information submitted to the agency regarding specific concerns about he economic impact of a proposed rule only when such failure substantially impairs the fairness of the rulemaking proceeding."

"Lowest New Cost to Society?"

Section 120.54(12)(b) now states that all agencies must choose the regulatory approach among the alternatives to any objective with the "lowest net cost to society" or provide a statement of the reasons for rejecting that alternative. However, the statutory amendment also provides that this requirement shall not provide a basis for a rule challenge. Apparently this section was adopted expressing an intent to ensure that the agency consider alternatives or provide JAPC with sufficient information to review the rule. The analysis of alternatives required by this section may provide to basis for objections by the JAPC pursuant to their new criteria for review.

The Joint Administrative Procedures Committee

While the Joint Administrative Procedures Committee (JAPC) had existing authority to seek judicial review of administrative rules, it was never used. The JAPC now has statutory standing to seek an administrative hearing to review any rule which has not been withdrawn, modified, repealed, or amended to meet the JAPC's objections. In the past, agencies have rarely refused to modify a rule to meet the Committee's objections and judicial review, which has been politically unpalatable was also unnecessary.

Whether JAPC will flex its administrative muscle in a rulemaking challenge remains to be seen and may depend on the composition of the committee and its chair. While the composition of the Committee changes every two years, the chair and vice chair alternate yearly and are appointed by the President of the Senate or the Speaker of the House. Under House Bill 711 the composition of the JAPC would have included the

Chair or both Appropriations and Governmental Operations, from an agency perspective this would have resulted in a powerful presence. However, this provision was not carried forward in the legislation which passed. The Committee composition remains the choice of the Speaker of the House who may appoint three members of the House of Representatives including one member from the minority party; and the President of the Senate who may appoint three members of the Senate including one member of the minority party.

Additional criteria for JAPC rule review is also part of the JAPC's new found power. Previously, JAPC review was limited to procedural requirements of rule adoption and the adequacy of economic impact statements. The committee may now review proposed rules, to determine whether the rule:

(1) is consistent with expressed legislative intent,
(2) is necessary to accomplish the apparent or expressed objectives of the specific statutory provision,
(3) is a reasonable implementation of the law as it affects particularly affected by the rule,
(4) could be made less complex or more easily comprehensible to the general public,
(5) reflects the approach to the regulatory objective with the lowest net cost to society to the degree consistent with the enabling authority, and
(6) will require additional appropriations.

JAPC will also review emergency rules, to determine whether:

(1) an emergency justifying the rule exists,
(2) the agency has exceeded the authority of the enabling statute, and
(3) procedural requirements for emergency rulemaking were met.

JAPC may request any information from the agency which is reasonably necessary to review a proposed rule under these criteria.

JAPC must also consult with any standing committees of the legislature with jurisdiction over the subject areas relevant to the proposed rule to determine whether there is legislative authority for the rule. It is expected that the standing committees will provide a great deal of input, especially in such "hot" areas as growth management rules. As additional assurance of legislative review and control, perhaps through the threat of amendments to enabling legislation during the next session, the Committee must also notify the President and Speaker of the Committee's objections concurrent with notifying the agency.

Direct Judicial Review Pursuant to 120.68

Direct judicial review of proposed rules pursuant to 120.68 once offered an alternative forum for rule challenges. With the 1992 amendments, direct judicial review has been limited to those cases with constitutional issues having no disputed issues of fact.

A practical problem with direct appeals of rules has been the lack of an adequate record for review. Another problem with two alternative avenues fo review is the different standards of review which have been applied depending on which avenue is chosen. *Adam Smith Enterprises v. DER*, 553 So.2d 1260, 1274 (Fla. 1st DCA 1989), held that a Hearing Officer's determination arising out of a 120.54(4) or 120.56 hearing was quasi-judicial and subject to the appellate court review to determine "whether the Hearing Officer's findings were supported by competent substantial evidence," but held that direct appeal of a rule adopted pursuant to 120.54(3)(a) is quasi-legislative and "should be sustained as long as it is reasonably related to the purposes of the enabling legislation and is not arbitrary and capricious."

By limiting judicial review of rule challenges to final orders entered pursuant to 120.54(4) and 120.56, this amendment not only assures an adequate record for review, but will likely result in application of the competent substantial evidence standard of review at the appellate court.

Public Utilities Exempt from Regional Rulemaking

Public Service Commission "statements" which relate to cost recovery clauses, factors, or mechanisms pursuant to Florida Statutes chapter 366 (public utilities) are now expressly exempt from required rulemaking pursuant to section 120.535.

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Prisoners

Section 12 of F.S. 120.52 defining parties was amended to exclude prisoners from administrative rulemaking proceedings under 120.54(4), 120.54(9) and direct appeals pursuant to 120.68. However, prisoners may still participate in 120.54(3) or 120.54(5) rule proceedings and formal grievance procedures may be available. *See*, "Securing Constitutional Rights of Prisoners: A new mission for the APA?" Harry A. Witte, 63 Fla. B.J. 40 (April 1989).

Rule Development Procedures

Procedures for development of proposed rules, including public workshop which have become a matter of common practice at many agencies, were formalized in amendments to 120.54. Agencies may provide Notice of Rule Development in the Florida Administrative Weekly (FAW). If notice is given, a short plain statement of the rule, the specific legal authority for the rule and any preliminary text which may be available must be provided. In addition, the agency must also hold a public workshop if requested by any affected person. Notice of public workshops must be provided 14 days prior to the workshop in the FAW.

Computer Indexing

The use of computer indices allowing searches by a key word or phrase selected by the researcher are now permitted as an alternative to a written index. This amendment will promote accessible computer databases for all agency orders.

Conclusions?

It is difficult to determine whether these amendments, individually or as a result of their cumulative effect, will impede or help agency rulemaking in the future. How many economic impact statements will be requested? How thoroughly must an agency address the alternatives? Where does analyses of the lowest net cost to society end? Must analyses of the lowest net societal cost include a risk assessment or actuarial tables? What is the societal net cost of a wetland? Will the JAPC initiate rule challenges? Will the JAPC or the agency appeal? Only time, practice and the ingenuity of administrative lawyers will tell.

The Civil Rights Act of 1991: An Overview and Analysis

by Daniel H. Kunkel & John M. Hament
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I. Introduction

On November 7, 1991, Congress passed the Civil Rights Act of 1991. The Act was signed into law by President Bush on November 21, 1991. It makes available damages and jury trials for persons claiming intentional sex, religious and disability discrimination, and overturns portions of the holdings in seven U.S. Supreme Court decisions. Those opinions, most of which were issued during the Court's 1989 term, had made job bias lawsuits not only more difficult to win, but more difficult to bring. As a result of this new legislation, employers should anticipate an increase in the number of lawsuits alleging job discrimination and the cost of their defense. The only good news for business is that, unlike such landmark measures as the recently enacted Americans with Disabilities Act, the Civil Rights Act of 1991 does not require significant changes in present personnel practices, as long as those practices are non-discriminatory in form and application.

The stated purpose of this Statute is to provide "appropriate remedies" for intentional discrimination and unlawful harassment in the workplace. The law also seeks to make it easier for litigants to prevail in unintentional discrimination cases. In this regard, the Act overturns the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), which had made it harder for litigants to prove a disparate impact violation. The law specifically codifies the concepts of "business necessity" and "job relatedness" set out by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and in other decisions prior to *Wards Cove*. This article discusses the Act's provisions regarding increased opportunities for compensatory and punitive damages (*II. The Civil Rights Act of 1991's Provisions Regarding Damages and Jury Trials*). It also reviews the specific Supreme Court holdings overturned by the Act (*III. The Civil Rights Law Reverses Seven Supreme Court Rulings*). Finally, it addresses the important question of whether the statute will apply to pending job bias cases (*IV. The Question of the Civil Rights Act's Retroactivity*).

II. The Civil Rights Act's Provisions Regarding Damages and Jury Trials

For many years, victims of intentional racial and some forms of national origin discrimination have been able to recover compensatory and punitive damages in actions filed under §1981 of the Civil Rights Act of 1866. The new Act provides that for the first time, persons claiming intentional sex, religious, disability and previously excluded types of national origin discrimination can seek compensatory and punitive damages, as well as the traditional remedies of back pay and attorney's fees.

Compensatory damages include awards for such things as future monetary losses, mental anguish, and emotional pain and suffering. Punitive damages are available when the plaintiff demonstrates that the employer engaged in a discriminatory practice "with malice or reckless indifference" to the employee's protected rights. Separate and apart from these damages, plaintiffs may seek the traditional monetary relief available in cases brought under the Civil Rights Act of 1964. (e.g., back pay, interest on back pay, value of lost benefits, etc.).

The new law provides a cap on the total amount that can be awarded for compensatory and punitive damages. For companies with 15 to 100 employees–$50,000; between 101 and 200 employees - $100,000; between 201 and 500 employees–$200,000; and more than 500 employees–$300,000. There continues to be no cap on the compensatory and punitive damages that may be awarded under the Civil Rights Act of 1866.

The Act further provides that plaintiffs may demand a jury trial when they allege intentional discrimination and seek compensatory or punitive damages. Up to now, most employment discrimination cases, apart from age claims under the ADEA and race claims under the Civil Rights Act of 1866 (§1981), have not been subject to jury trial. This aspect of the new Act is important, as juries tend to be sympathetic towards plaintiffs in employment cases, and also frequently approach the damage issue with a lottery-like mentality.

Access to compensatory and punitive damages, coupled with the right to a trial by jury, is sure to trigger an increase in lawsuits filed by women alleging intentional sex-based employment discrimination, including sexual harassment. In addition, the implementation of the employment provisions of the Americans With Disabilities Act, effective July, 1992, will be a further spur to increased litigation over employment decisions. Moreover, the 1991 Civil Rights Act will force companies to settle more claims for greater amounts, and that, too, will encourage others to file discrimination charges.

Most employers now exercise care to implement and document employment decisions in compliance with the law, and in recent years courts have shown an interest in acknowledging business concerns. Of course, judges are also accustomed to making the fine distinctions that can be important in defending an employment case, such as the difference between employment decisions that are based on a prohibited consideration and decisions that are simply "unfair". Juries, on the other hand, are generally not sympathetic to business concerns, and are

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less inclined to be reigned in by the law when the facts of a case seem to demand "justice".

What should employers do in response to the Act? First, they should continue taking preventive measures such as auditing employment decisions for adverse impact upon protected groups, carefully documenting employment decisions, using sound disciplinary procedures, and making employees aware of standards of conduct. In addition, they should begin looking at sensitive employment decisions from a juror's perspective, and give more weight to equitable concerns than perhaps has been the case in the past.

III. The Civil Rights Act Reverses Seven Supreme Court Rulings

The Civil Rights Act of 1991 overturns portions of seven recent U.S. Supreme Court decisions. Throughout the negotiations over the Act, the focus was on the Court's ruling in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), involving unintentional or indirect discrimination. For 18 years following the unanimous landmark decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), Title VII had been construed to place on employers the burden of proving that employment practices with a "disparate impact", (i.e., a facially neutral practice that has an adverse disproportionate effect on a protected class, such as a height requirement on women) were required by business necessity. In *Wards Cove*, the Court diminished the requirements of the *Griggs* rule by shifting to employees the burden of proving both that a job practice had an adverse impact and that it was not justified as "business necessity". Congress has restored the *Griggs* rule by placing the latter burden back on the employer. Thus, the employer must demonstrate that the practices at issue are "job related to the position in question and consistent with business necessity". The new law continues to require plaintiffs to specify the particular employment practices having a disparate impact on a protected class. However, the Act provides that where the plaintiff demonstrates that the elements of a company's decision-making process cannot be separated for analysis (e.g., in the case of multiple subjective employment criteria), the decision-making process as a whole may be analyzed as one employment practice.

The Supreme Court's 1989 decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2353 (1989), held that the 1866 Civil Rights Act (Section 1981), guaranteeing all persons "the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens", does not proscribe racial harassment on the job and other forms of race discrimination occurring after the formation of a contract, i.e., post-hire. The new Act amends Section 1981 to reaffirm that the right "to make and enforce contracts" includes all phases of employment including termination and not just hiring.

The Act also reverses *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), in which the Court held that an employer could avoid liability for intentional discrimination in "mixed motive" cases if it could demonstrate that the same action would have been taken absent the discriminatory motive. The Act declares that any intentional discrimination is unlawful, even if a nondiscriminatory motive for a job action is also present. The principal purpose and effect of the provision is to allow a court to grant injunctions and award attorneys' fees in cases in which an employer is shown to have acted with an unlawful motive, even though the application of the non-discriminatory criteria would have achieved the same result. At the same time, the Act states that, in such cases, a court may not award damages or require reinstatement, hiring, or promotion.

In *Lorance v. AT&T Technologies*, 109 S.Ct. 2261 (1989), the Court held that the statute of limitations challenging discriminatory seniority plans begins to run when the plan is adopted, rather than when the employee is adversely affected by the operation of the seniority system. As a result, persons who were later harmed by discriminatory seniority plans could be forever barred from bringing suit. The new Act permits persons to challenge discriminatory seniority plans when they are adopted or when they are the cause of actual harm.

The Act limits the Supreme Court's ruling in *Martin v. Wilks*, 109 S. Ct. 2180 (1989),

in which the Supreme Court held that persons who did not contest a consent decree settling a job discrimination suit in the proceedings leading to its adoption, could still later challenge the decree in a separate lawsuit. Now, challenges to consent decrees by persons who had notice of the proposed judgment and a reasonable opportunity to present objections or by those whose interests were adequately represented by another party who challenged the decree on the same legal grounds and similar facts, will not be permitted, except where there has been an intervening chance in law or fact.

In *West Virginia University Hospitals v. Casey*, 111 S. Ct. 1138 (1991), the Supreme Court ruled that expert witness fees are separate from attorney's fees and that fees for non-testimonial services rendered by experts could not be recovered by successful plaintiffs. The Act amends the Attorney's Fees Awards Act (42 U.S.C. §1988) by providing that expert witness fees are included in the definition of recoverable attorney's fees awarded under Section 1981 of the 1866 Civil Rights Act and under Title VII.

The final recent Supreme Court decision overturned by the 1991 Civil Rights Act is *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227 (1991). There, the Court held that Title VII did not apply outside the territorial jurisdiction of the United States. The Act provides that the protections of both Title VII of the Civil Rights Act and the Americans with Disabilities Act (ADA) extends to American employees of U.S. companies working abroad. The only exemption is where compliance with Title VII or the ADA would cause a company to violate the law of the foreign country in which it is located.

IV. The Question of the Civil Rights Act's Retroactivity

Among the issues that is the subject of litigation under the Act is whether its provisions, most particularly those governing compensatory/punitive damages and jury trials, will be applied to claims arising before the law's enactment. The Act itself is unclear on that point. It states: "Except as otherwise specifically provided, this Act and the amendments made by the Act shall take effect upon enactment."

In the Statute's legislative history, its chief Congressional sponsors, Senators Danforth and Kennedy, disagreed on the question of the law's retroactive application to pending cases. Senator Danforth and other Republicans stated that the original co-sponsors, who are the authors of the effective date provision of the Act, did not intend for the law to have any retroactive effect or application. They cite Justice Scalia's opinion in *Kaiser Aluminum v. Chemical Corp. v. Bonjourno*, 110 S. Ct. 1570 (1990), and the unanimous opinion of the Supreme Court in *Bowen v. Georgetown University Hospital*, 488 U.S. 204 (1988), for the proposition that in the absence of an explicit provision to the contrary, new legislation should not be applied retroactively. On the other hand, Senator Kennedy and other Democrats draw support from a line of cases, in particular *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), that support retroactive application of new statutes in the absence of "manifest injustice." Senator Kennedy argues that particularly where a new rule is merely a restoration of a prior rule that had been changed by the courts, the newly restored rule is often applied retroactively, as was the case with the Civil Rights Restoration Act of 1988. While that may be true with respect to aspects of the Act (e.g., the restoration of the right to sue for all forms of race discrimination under §1981 of the Civil Rights Act of 1866), it is not the case with regard to compensatory and punitive damages which now are available to protected classes who previously were not entitled to such remedies, or the right to jury trials. Given the lack of agreement as to the retroactivity issues, it is likely that many plaintiffs who have pending cases alleging intentional discrimination will amend their complaints to request compensatory and punitive damages and a trial by jury, hoping that the courts will ultimately rule that the Act should have retroactive application.

Mr. Kunkel is the Chairman and Mr. Hament is a member of the Labor and Employment Law Department of Abel, Band, Russell, Collier, Pitchford & Gordon, Chartered in Sarasota, Florida. They represent management exclusively in all aspects of labor and employment law. (Mr. Hament is a member of the Maryland Bar and Florida Bar.)

More Election Year News

Linda M. Rigot, Chair, Publications Committee

1992 is an election year on all levels. While we are waiting for "the big one" in November, let's not forget that June offers us the opportunity to vote for the Chair-elect, Secretary, Treasurer, and five members of the Executive Council of the Administrative Law Section. Pertinent portions of the Bylaws of the Administrative Law Section provide as follows:

Article III
OFFICERS

Section 4. Election of Officers. The chairman-elect, secretary and treasurer shall be elected by a plurality of the membership of the section in attendance at its annual meeting. Nominations shall be made by the Executive Council and may be accepted from the floor.

Article IV
EXECUTIVE COUNCIL

Section 3. Election of Executive Council Members. The members of the Executive Council to be elected each year for two (2) year terms shall be elected by a plurality vote of the membership in attendance at the annual meeting of the section. Nominations shall be made by the Executive Council and may be accepted from the floor.

In accordance with the Bylaws, this year's election will be conducted during the annual meeting of the Administrative Law Section and The Florida Bar in Orlando. The annual meeting of the Administrative Law Section will begin at 8:30 am. on Friday, June 26, 1992. Please join us at the annual meeting and also at the Administrative Law Section/ Environmental Law Section joint reception the evening before from 6:30-7:30 p.m.

Bid Specifications and Bid Protests

by Thomas V. Infantino
Infantino and Berman, Winter Park

Government and private counsel often deal with procurement issues as they provide representation to their clients. One area that presents unique practice challenges and opportunities is the protest of bid or proposal specifications.

Questions with regard to specifications arise during the agency's design of the procurement; questions develop immediately after the Invitation to Bid ("ITB") or Request for Proposal ("RFP") is issued. Private persons have the option to assist state and local government agencies in the procurement design stage through voluntary assistance and through the formal protest procedures provided by Chapter 120.53(5), *Fla. Stat.*

Government managers, usually desiring the greatest amount of flexibility, often draft specifications to be broad and all-inclusive, and allow the market place to respond accordingly. Often, they will seek out suggestions from providers of commodities or services.

However, many times a particular type of equipment is favored or a style of commodity or item is preferred. There may be a particular type of automobile or a favored location in a lease solicitation. Specifications are created which tend to be source specific, or brand specific, or favor a supplier or bidder. A procurement may combine a request for services as well as equipment, which has, in effect, limited the number of proposers because of the combination.

This is where counsel can assist their public clients in minimizing the chance of a bid protest of the specifications, or later, minimize the chance of a protest in the award decision. Chapters 120, 255 and 287, *Fla. Stat.*, and related administrative rules provide the framework for finding the answers. Administrative and appellate decisions also provide direction.

As a general rule, the competitive bidding process requires that the procuring agency

deal fairly with all prospective bidders or proposers. *Wester v. Belote*, 103 Fla. 976, 138 So. 721 (Fla. 1931) No competitive advantage is to be given one person over another. *Hotel China & Glassware Co. v. Board of Public Instruction*, 130 So.2d 78 (Fla. 1st DCA 1961); *City of Miami Beach v. Klinger*, 179 So.2d 864 (Fla. 3rd DCA 1965) This also means that bid specifications should not be drafted to favor one bidder over another.

The purpose of a protest of specifications is to convince the agency that it ought to change its mind with regard to the specifications set forth in the procurement. Agencies are required by Section 120.53(5)(a) to adopt rules that establish the agencies' procedures for the resolution of protests arising from the contract bidding process. These rules set forth the substantive and procedural requirements for initiating the protest. They often establish time frames within which the protest of bid specifications must occur.

A notice of protest of bid specifications must be filed within 72 hours of issuance of the procurement. Section 120.53(5)(b), *Fla. Stat.* If your client is an interested bidder, he should make sure that he receives the procurement. This is done by requesting that a copy be sent. Questions arise as to whether this time period means within 72 hours of actual receipt of the procurement package or 72 hours of agency distribution. A failure to protest the specifications within the 72 hour window amounts to a waiver of this right. In a later protest of a bid award, challenges to the specifications are properly excluded. However, there may be an opportunity for the private litigant to raise the issues in a bid award protest proceeding. The formal protest petition must be filed within ten (10) days after filing of the Notice of Protest.

A protest bond may be required as part of the protest filed. Section 255.25(3)(c), *Fla. Stat.* provides for the filing of a protest bond in the event any person files an action protesting a decision or intended decision pertaining to a competitive bid for real estate to be leased by an agency. The purpose of requiring the protest bond is to ensure that protests are not frivolous. This is a new requirement for real estate solicitations, adopted in 1990 as part of Chapter 90-224, Laws of Florida. Similar requirements exist for other procurements.

The amount of the bond is equal to 1 percent of the estimated total rental of the basic lease period or $5,000.00, whichever is less. Some agencies have interpreted this requirement to mean that a bond is also required as a condition precedent to the filing of a protest of bid specifications issued by the agency.

Thus, if your private client wishes to protest a bid specification because of some improper inclusion of a requirement or unclear wording relating thereto, a protest bond may be required.

An alternative to the protest is to request clarification, in writing, from the agency. Agency response will often take the form of written addenda. This is less formal and less adversarial than a protest; and the desired result may be achieved without the necessity of filing the protest and related bond.

Arguments can be made that the protest bond is not required for bid specification protest proceedings. The issuance of an ITB or

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

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BID SPECIFICATIONS/PROTESTS

from preceding page

RFP is, by itself, not "a decision or intended decision pertaining to a competitive bid for space. . . ." The Final Staff Analysis issued by the House Governmental Operations Committee was silent regarding the application of the protest bond to protests of bid specifications. And, since the purpose of the protest is to get the agency to change its mind, before time and expense are incurred with the evaluation and award proceedings, it seems logical that the protest bond requirements were not meant to be applied to specification protests.

The agency perspective is obviously different. It wants to proceed forward with its procurement plans. Protests of specifications are not well received by the agency; and, this is appropriate, since such protest suggests the agency has not acted according to state law and rules with regard to the procurement. Frivolous protests result in lost time. This agency interest must, however, be balanced with the rights of the bidders and proposers to have their bids or proposals fairly evaluated on a reasonable basis, with specifications which are reasonably related to the object of the procurement.

Counsel should remain aware of the issues and opportunities, with regard to competitive procurement and related protest issues. Specification protests may assist private parties in ensuring the fairness of the procurement. Adoption and enforcement of procurement statutes and rules should also protect agencies as they acquire and use private resources, commodities and services to implement their various programs.

Tips on Practicing Before a Hearing Officer of the Division of Administrative Hearings, or "Judgment Calls I Have Known and Loved"

by Ella Jane P. Davis, Hearing Officer, Division of Administrative Hearings, Tallahassee

This article is written from the perspective of a sitting DOAH Hearing Officer (eight years) who came to the Division after 13 years of litigation experience. Mrs. Davis has recently completed all the educational and practical training (mentorship) retirements of Rule 1.760 Fla. R. Civ. P. and is awaiting certification by the Florida Supreme Court as a Circuit Court Mediator. She hopes that this article will, tongue-in-cheek, provide basic information not usually contained in standard seminars.

It has been correctly stated that a good lawyer is a good lawyer, but a great lawyer is a triple "goods" threat: good at negotiation toward settlement, good at presenting his case at trial, and good at appeal when the so-and-so on the bench cannot see how good the lawyer really is.

As with any trial lawyer, an administrative law practitioner must begin by planning backward. I would suggest starting with an idea of what points might be argued on appeal. By planning backward, one is forced to focus not only on the minimum evidence necessary to prove the essential elements of the case, but also on the quality of that evidence. That is *not* to say that you should be prepared to "try the judge" if you do not have either the law or the facts in your favor. If that is the case, aggressive settlement discussions should begin immediately, before discovery results in your opponent being assured of what he so far only sus-

pects. If, in fact, you have a case, focusing your judgment calls on a possible appeal will clarify for you that what goes *into* the record is all that the hearing officer, the agency, or the appellate court may legitimately consider at each sequential stage of the proceeding.

Never assume that the hearing officer knows the law on any particular point. Considering the heavy caseload of most DOAH hearing officers, it is the rare one who does not appreciate the submission of case law, especially with regard to relatively obscure points.

Because twenty-six hearing officers must share the five copies of the *Florida Administrative Code* located in the Division of Administrative Hearings headquarters and because hearing officers travel 3-4 days each week, providing the hearing officer with a copy of the rules you are invoking also will be almost universally appreciated. If you cannot provide copies at formal hearing, perhaps you can attach them to your post-hearing proposals. There are formal procedures for obtaining advance official recognition of many items. See, Rule 22I-6.020 *F.A.C.* However, such formality is not always necessary.

It may seem like a lot of trouble to go this "extra mile," but providing copies can have excellent results, particularly if you face the classic situation that, "The new lawyer knows the rules; the experienced lawyer knows the exceptions." Meeting anticipated legal arguments with extra copies of your research also illustrates the old saw that "more cases are won by perspiration than by inspiration."

While copies of case law and of the rules are a great help to everyone in the obscure and esoteric case, they are not necessary in every case, and it is a judgment call of *what* to provide and *when*. If you decide to copy a case or a rule anyway, you might just as well copy it three times: once for your file, once for opposing counsel, and once for the hearing officer. Letting opposing counsel use a third copy during hearing is not "sleeping with the enemy." It is a reasonable and gracious professional mode of practice. The ideal situation in which your opposition accommodatingly capitulates when confronted with your superior research seldom occurs, but at the very least, a courtesy copy provided to the opposition can streamline both yours and your opponent's arguments on selected points, thus speeding up the whole proceeding. While it may be acceptable to ask opposing counsel to return his copy, it is bad form to ask the hearing officer to return his. After all, you want him to consider it when he writes his order in your favor, don't you?

How much hearing time you devote to legal oratory and to certain types of witnesses is also a judgment call that is best formulated by familiarity with your case and knowledge of the applicable case law. For instance, in a Section 120.57 (1) *F.S.* case, belaboring obvious legal points or explaining to an experienced hearing officer how an agency has inconvenienced your permit/license-seeking client or how agency investigations were conducted before the formal intended agency action/administrative complaint issued, is not going to make a favorable impression. Under present case law, concerns over bureaucratic foul-ups and/or investigative high-handedness are almost always subordinate to the controlling issues of the case. In the words of a former Career Service Commissioner to an outraged litigant, "It's awful but lawful!" Where a subordinate issue is "awful but lawful," counsel is well advised to prove up the material facts that can persuade the trier of fact to enter an order in his client's favor and save the rhetoric for closing argument. This cannot be taken as a blanket instruction, however, since attacks based on your client's righteous indignation may have merit in Section 120.54 and 120.56 *F.S.* cases or when you are using the formal Section 120.57(1) *F.S.* hearing on the merits to set the other side up for a subsequen.. attorney's fee and costs motion/petition.

There are certain findings that should be made in every DOAH order. A very basic mistake often made by practitioners is failing to determine in advance whether these findings will be stipulated or contested. For instance, although DOAH jurisdiction is almost never contested, one should know if it will be necessary to prove it up, which proof is easily introduced. This is particularly important in situations such as certificate of need proceedings, rules cases, and bid protests wherein the appellate courts' decisions have sometimes used the terms "jurisdiction" and "standing" as if they are interchange-

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JUDGMENT CALLS

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able. Sometimes both sides' familiarity with an important date or other element of the case results in a gaping evidentiary hole that the hearing officer must somehow resolve within his order. Leaving the hearing officer adrift to resolve these issues is irresponsible. It is the advocate's job to stipulate or prove that which he wishes the hearing officer to find or conclude. It can be fatal to an otherwise perfectly orchestrated case if, left to his own devices, the hearing officer simply finds that there was no evidence on a crucial threshold issue.

Examples of important, frequently overlooked threshold issues are: What date was the school teacher suspended? Was that suspension with or without pay? Is the professional to be disciplined licensed in Florida? If so, under what license number and by which board? Is the determination of lost earnings in a discrimination case mere arithmetic or is there another, more complicated, legal issue? Has the agency issued or denied the permit within the appropriate timeframe? What is the relationship and what are the ages of the alleged perpetrator and the alleged victim in an abuse/neglect registry case? In order to have a reasonable idea of the outcome of the formal hearing, the practitioner must first have a firm grasp of these and similar issues.

The time to determine if potential issues will be contested is long before the formal hearing. If there is only one issue being tried, develop your theory (or theories) early, and be prepared to prove each theory.

Today, due to overcrowded dockets, the opportunity for a live prehearing conference is practically non-existent, but if you think it would be useful, file a motion requesting one. Many hearing officers enter orders that require pre-hearing statements/stipulations. Often, attorneys drowning in a sea of paperwork resent such orders, but they serve at least two functions that are not readily apparent: The list of witnesses provided by the litigants alerts the hearing officer in advance to any potential conflict of interest, thereby avoiding recusal or mistrial at the last minute. Preparing the stipulation/statement usually fosters the practitioner's "client control." participation in preparation of the prehearing stipulation forces your client to realistically prepare for the worst while hoping for the best. It may persuade him to settle. It certainly lets him see what a good job you are doing for him. If you do not automatically receive an order requiring such a stipulation/statement and you think it would be helpful, file a motion.

Fulfilling a hearing officer's request to set up a telephone status or pre-trial conference is mandatory. If you do not set up the call, the hearing officer can simply notice the telephone conference hearing. Judgment calls arise after everyone is connected and the opportunity can be used to your client's advantage. Conferencing on the phone with the hearing officer and opposing counsel can narrow issues, simplify trial preparation, or lead to settlement of the case in your client's favor without formal hearing. Nearly every hearing officer will use telephone conferences to raise jurisdictional issues *sua sponte*, for rescheduling cases to everyone's mutual convenience, and/or for resolving tricky evidentiary issues in advance of formal hearing. Whatever the hearing officer's original reason for asking you to set up a conference call, once the call is actually placed, *you* can often seize the opportunity to educate the hearing officer about your client's theory of the case. The conventional wisdom of the trial bar has always been that the most effective advocates take every opportunity afforded to persuade. If, on these occasions, you alternatively choose to listen to the other side and reveal nothing, that can also be a judgment call of pure strategy, but the important thing is to formulate *some* strategy and use it to your client's advantage. All telephone conference calls are an opportunity to be innovative in your practice.

For formal hearings, you need to know only a little about courtroom logistics. When I tried my first jury trial, I stayed up the night before filling two legal tablets with questions—questions for *voir dire* of the jury *venire* as well as questions I planned to ask each witness, but on the morning of trial, the real issues left my head and I was preoccupied with nitpicking concerns such as "Which chair and table are mine? Should I use the podium? May I approach the witness? How loud can my voice be at the sidebar? How do I know when to stand up?" Fortunately, most of those extraneous de-

tails never arise in a DOAH hearing. If similar concerns enter your mind, just *ask* the hearing officer where he prefers you sit, how many places you can take up at the table, where will the witness sit, *et cetera*. No hearing officer is going to consider you naive or offensive for asking. Most hearing officers will be glad you asked. Getting it right the first time saves the hearing officer having to ask you to rearrange yourself, and that pleases him.

When requested to enter your appearance, *do it*. "Entering an appearance at formal hearing" means stating aloud your name, your agency or firm name (if any), your address, and your telephone number. The hearing officer has all that in the file, but the court reporter usually does not, and now you are "on the record."

The time to invoke the sequestration rule is after all appearances have been entered and *before* opening arguments. If you forget, your last effective chance to invoke the rule will be before the first witness is called.

Court reporters are not machines. They are technically "officers of the court" and entitled to concommitant respect. If you are the party employing one, present your card and arrange billing in advance of the commencement of formal hearing. It is also helpful if you can provide the court reporter in advance with a copy of the notice of hearing which bears the style of the case and the names, addresses, and telephone numbers of all parties' counsel and the hearing officer. If you have done this, most hearing officers will accept an abbreviated oral "entering of appearances."

After the basics, every hearing officer has his own way of opening formal hearing. For instance, I usually ask the parties if they have any objection to the Joint Prehearing Stipulation being provided to the court reporter so that there will be no need to stop and spell the name of each witness as he or she is called to the stand. I also ask the court reporter to indicate on the transcript's table of contents page the page number where each exhibit is identified *and each* page number where each exhibit is admitted, if it *is* admitted. Any party may make similar suggestions. "Proper prior planning prevents poor performances" when it comes to transcripts. You can never start too early to make it easier and quicker to prepare your post-hearing proposals.

Do not block the hearing officer's *or* the court reporter's view of the witness. If a witness nods his or her head in answer to a question you have put to him or if his answer is inaudible to you and you think the court reporter missed the witness' answer, ask the witness to repeat his answer verbally and louder. This is one area in which the hearing officer will often intervene, but it is better to be safe than sorry. Cases have been won or lost on a court reporter's interpretation of "nods head affirmatively" or "nods head negatively," or worse, have had to be entirely retried because the transcript showed "inaudible."

Some will suggest that you should present evidence to support any conceivable theory that could win your case, but it is much more effective to focus on, at most, the two or three strongest theories that you have available. If you should develop alternative theories that do not pan out, be assured, the hearing officer will not develop them for you, and opposing counsel will take potshots at your expense.

The best rule to follow in trying to prove any case is the military acronym—KISS—Keep It Simple, Stupid. At the risk of sounding self-serving, I assert that DOAH hearing officers, who share the same threshhold qualifications as Article V circuit court judges, are not stupid, but the situation in a formal proceeding is much the same as in a jury or bench trial in circuit court: The trier of fact is a blank slate. It is up to each practitioner to paint the picture he wants the hearing officer to see. DOAH hearing officers may try as many as two full-blown cases in a single day. Therefore, the *simpler* your presentation, the more *effective* your presentation is likely to be.

A close second to simplicity of presentation for winning cases is the art of making a *lasting impression* with that simple presentation. You want the hearing officer to remember the elements of your case at least until he writes his order. To that end, your decision to provide a transcript or not to provide a transcript can be pivotal to your client's ultimate success.

Whether or not you ultimately elect to bear the expense of a transcript is always a judgment call. All things being equal, that judgment call should always include, but not be

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JUDGMENT CALLS

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limited to, balancing the expense to your client against the ultimate goal of persuading the hearing officer to rule in your client's favor. Some attorneys choose to announce as early as possible in the proceedings that they will provide a transcript. Such an announcement cannot help but affect the detail with which the hearing officer keeps notes and how much time the hearing officer allots to "eyeballing" each witness for weight and credibility purposes. Dependent upon how you, as an advocate, initially analyze potential credibility issues, you may want more or less of the hearing officer's visual attention focused on the witnesses. However, if you are the attorney who, at the commencement of the hearing, promised a transcript and then did not provide it, you may be indelibly imprinted on the hearing officer's gray cells in a way you would not like to be.

Most factors in the decision will arise only *after* the record closes, so most practitioners await the close of the record before announcing whether or not they will provide a transcript. This timing has the advantage of hindsight as to what has actually occurred at formal hearing. Perhaps your motivation in ordering a transcript is to aid the hearing officer because you anticipate that he will rule for your client. Perhaps you only want a transcript to delay the date of the order. For recommended orders, perhaps the deciding factor for you will be that you anticipate having to appeal the agency decision. You may want to weigh the chances that the agency will insinuate itself into the hearing officer's findings of fact or conclusions of law if the agency has a transcript to refer to *versus* what the agency may do if there is no transcript available. "Guesstimating" that situation, you must first "guesstimate" whether or not you will *want* the agency to second-guess the hearing officer based on an even earlier "guesstimate" of what the hearing officer may do in his recommended order. In reaching each of these "ladderback" guesses you will be performing the highest function of a lawyer: advising your client based on your professional education, training, and experience.

Finally, if all your education, training, and experience leave you still feeling that the strategy of transcript-ordering is based on pure speculation, it is at least comforting to remember that hearing officers have no authority to order you to provide a transcript, and DOAH policy is to never solicit transcripts. Therefore, no practitioner should ever feel the obligation to provide one. The moral: make your best judgment call, know it is a judgment call, and live by it.

There are many important benefits that accrue when you have carefully considered the elements and theories to be presented, eliminated the factual chaff, curbed the "awful but lawful" rhetoric, provided copies of the appropriate legal authorities, and tried your case with precision. Some of these benefits attach to ordering the transcript; some apply with or without the transcript.

For instance, in a very short case, the transcript may be dispensed with entirely. If ordered, a short transcript costs less. Preparing your proposed order is easier and quicker for the practitioner who has tried a case precisely than for one who has created a situation in which the hearing dragged on for weeks over irrelevant, immaterial, subordinate, unnecessary, or cumulative material or where days were devoted to proving elements, issues, and theories which could have been stipulated. Likewise, the hearing officer will be able to prepare his order quicker and with greater clarity if have tried the case with precision. Moreover, your drafting of exceptions to the order or any resultant appeal can be wielded like a surgeon's scalpel instead of like a blunt instrument.

A short refresher course for getting your documentary materials into evidence is as follows: PMPO—*p*resent the document to be marked; *m*ark the document with an exhibit number; *p*resent the predicate; *o*ffer the exhibit. The PMPO technique can be a lifeline when all memory flees in "trial by combat," but it is, of course, an oversimplification. There are many permutations of this order of presentation *before* you can actually get an exhibit "into" evidence, such as *voir dire* on the exhibit or of the predicatory witness. There are also many permutations *after* PMPO, such as proffers if an objection is sustained against your exhibit. One thing is certain, however, only *you* can move your materials into evidence. The hearing officer is not there to try the case for you, just as a

referee is forbidden to kick the ball, and the opposition certainly will not help with this crucial aspect of your case. However, if you generally follow the PMPO format and keep a checklist as you go, you should not run the risk of forgetting the last, essential step which is to get "in" the materials you need to prove your case.

Rule 22I-6.027 *F.A.C.* covers consideration of cumbersome exhibits. You will have a happier hearing officer if you do not make him resort to the rule. Under Chapter 90, *F.S.*, the modern "Evidence Code," there is no excuse for trying to admit frozen horse excrement, weapons confiscated in a school riot, or genuine contraband drugs, even if hearing officers of yore have insisted on "the real thing." Laboratory reports and photographs are usually all you will need today *if* you lay the appropriate predicate.

While some agencies in a defense posture would argue that it is best to deny everything claimed in the hope that the hearing officer will be reluctant to rule against the agency on every defense, an agency, like any other litigant, probably is more likely to prevail when, either as petitioner or respondent, its counsel concedes the client's weak points and enthusiastically promotes its strong ones. It is the courteous and fair advocate who is likely to get the close calls whether he represents the agency *or* the citizen.

First, though, you must be in the proper position to get the close calls. Your initial analysis of the case should have given you a tentative idea of which issues you should concede and which ones you should fight. Once you have determined which issues you should dispute, you must do everything possible to make a positive presentation of those issues, not just a passive or negative one. Considering the central issue, ask yourself why is your opponent's position not tenable and go from there. While you are at it, ask yourself what *practical* purpose does this case serve? Such a query is very helpful for phrasing your oral closing argument and any proposed penalty/no penalty proposals. Such questions are rarely framed by the hearing officer, but an answer may be solicited if any theory of the case has dealt with selective enforcement or if the hearing officer wants to know the practical effect of the case upon the public in general as well as upon the parties before him. If you feel that a public policy argument may improve your client's cause, do not be afraid to raise it, but be judicious in when and how you raise it.

Finally, it is very frustrating when a hearing officer rules against you, especially when you just *know* your objection or motion was well-taken and you should have prevailed. As trial counsel, we have all had the same experience, and it can become an open wound if you let it. *Don't!* The hearing officer has walked in your moccasins and certainly meant nothing personal by his ruling. If your objection/motion truly was "right" enough and the hearing officer's ruling truly was "wrong" enough, you may get several more bites at that apple: your proposed order, your exceptions filed with the agency prior to entry' of its final order if applicable, and/or your appeal to the District Court of Appeal.

It is likewise frustrating, only more so, if the hearing officer's order comes out against your client, but take comfort from the old saw that, "Good cases make good lawyers, and bad cases make bad lawyers." If, upon reflection, you still believe that the hearing officer has erred, you have an obligation to aggressively pursue all avenues for redress open to your client. Yet, in fairness, you should likewise consider that sometimes the hearing officer, constrained by the record *you* have made, has decided in the only appropriate way.

Counsel are often privy to information that the hearing officer never gets to consider due to the nature of the administrative forum and/or the rules of evidence. Perhaps you would have prevailed but for the unavailability of witnesses or the hearing officer's only having one shot at developing his feel for your witnesses' credibility. You get several "bites at the apple," but the hearing officer gets only one. A hearing officer never knows whether his ruling accurately reflects the truth, whatever *that* may be. It is difficult enough for a DOAH hearing officer to make a ruling that is properly based on the evidence in the record and which complies with the statutory law as interpreted by the appellate courts. To that end, counsel should put forth the best case possible so as to achieve a just result.

The views expressed are purely those of the writer. The Division of Administrative Hearings does not have a Division view on this particular topic.

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Case Notes

by John Radey
Aurell, Radey, Hinkle & Thomas, Tallahassee

A divided Florida Supreme Court in *Coy v. Florida Birth-related Neurological Injury Compensation Plan*, 17 FLW S104 (Fla., No. 76,565, February 13, 1992) held that an assessment of $250.00 per physician, regardless of specialty, to be a tax that passed the rational basis test and therefore did not violate either the due process or equal protection clauses of the Florida and federal constitutions. Three justices in dissent disagreed because the tax was upon all physicians and only some obstetricians benefitted while the vast majority of those taxed received no benefit whatsoever. The majority seemed to heavily weigh testimony presented in circuit court that hospitals in their entirety would be disastrously affected if obstetricians could not practice their specialty.

Justice Ervin in *Pershing Industries, Inc. v. Dept. of Banking and Finance*, 17 FLW D46 (Fla. 1st DCA, December 17, 1991, Case No. 90-3384) wrote an opinion emphasizing agency latitude to interpret a statute in a particular manner even though reasonable alternative interpretations existed. The court affirmed the Department's interpretation of Chapter 497, related to the licensing of cemeteries, and in essence told the Department to do whatever it wanted so long as it was not arbitrary and acted consistent with its statutes and rules.

Consistent with *Pershing Industries*, in *Florida Hospital Association, Inc. et al v. Health Care Cost Containment Board et al.*, 17 FLW D428 (Fla. 1st DCA, Cases No. 91-1311, -1317, February 7, 1992), the court affirmed DOAH's final order upholding an HCCB rule as valid. The challenged rule provided for penalties where a hospital exceeded its allowable gross charges per adjusted admission even though the statute specifically provided a penalty only where a hospital exceeded its allowable net charges per adjusted admissions. The unanimous court gave substantial leeway to the HCCB in executing the law entrusted to it to administer and easily concluded that the HCCB had rulemaking authority. However, the court certified a question to the Supreme Court as to whether the HCCB could use a procedure in its rule which amounts to penalizing hospitals with excessive gross revenues on an annual basis.

But in *Webb v. DPR, Board of Professional Engineers*, 17 FLW D804 (Fla. 5th DCA, No. 91-1703, March 27, 1992), the court, without much ado, reversed a final order of the Board of Professional Engineers which determined that appellant was guilty of misconduct in the practice of engineering. In essence, the court held that the undisputed facts showed a fee dispute and that, as a matter of law, those facts could not be interpreted by the board to constitute misconduct in the practice.

So, too, the same court on the same day via different judges in *Clark v. School Board of Lake County*, 17 FLW D804 (Fla. 5th DCA, No. 91-1229, March 27, 1992) reversed a school board that had entered a final order determining that the 5th grade teacher-appellant was guilty of incompetence, immoral conduct, and misconduct in office for actions during a summer "binge". The board action was predicated on DOAH findings, but rejection of DOAH conclusions relative to the teacher's actions. The court determined that the summer binge did not show "incompetency as a matter of law." The court further determined that the board's reliance upon an illegal sexual act performed by appellant was inappropriate given the total absence of notice of such reliance even at the DOAH hearing. The court made a similar conclusion as to misconduct in office and therefore substituted the court's conclusions of law for the conclusions of the school board with a commendation to the school board for its interest in protecting children, but with the ruling that "this 47-year old tenured teacher who exhibited a human weakness to a few persons for a few days during a troubled time in her life" could not be terminated.

Again, on the same day, the same court reversed a final order of the Department of Community Affairs that required a developer to submit an application for develop-

ment approval under Chapter 380. *Ridgewood Properties, Inc. v. Department of Community Affairs*, 17 FLW D809 (Fla. 5th DCA, March 27, 1992, No. 91-1401) The court rejected the Department's "conclusionary legal opinion" and relied upon "uncontroverted factual evidence" that appellant developer was vested under tests applied by the Department in the past.

Lay representatives beware! DER's final order denying attorney's fees was reversed in *Burke v. Harbor Estates Associates and DER*, 17 FLW D101 (Fla. 1st DCA, December 26, 1991, No. 90-01782), where petitioner was represented at final hearing by an apparently incompetent albeit qualified (by DOAH) lay representative and where the hearing officer made findings of fact that supported a conclusion that the applicant-respondent-appellant was entitled to an award of attorney's fees and costs under Section 120.59(6). DER rejected that award in its final order, but the court reversed noting that DER could not circumvent a finding by calling it a conclusion.

Attorneys beware! The court advised that ineffective counsel in an administrative hearing involving a disciplinary matter for a chiropractor does not cause the hearing to fail to comply with the essential requirements of law, but an inadequately represented party has a remedy in "a malpractice action." *Maddox v. DPR*, 17 FLW D104 (Fla. 1st DCA, December 23, 1991, No. 90-3842) Ultimately the court in *Maddox* reversed the DPR's final order and remanded because of inconsistent findings of fact made in the recommended order.

Failure to request a hearing within the standard 21-day APA point of entry period does not necessarily result in waiver of an administrative hearing. The 21-day period is subject to equitable considerations like a statute of limitation, and is not a jurisdictional matter. *Castillo v. Department of Administration*, 17 FLW D373 (Fla. 2d DCA, January 31, 1992, No. 91-00504). *See also, Giordano v. Department of Banking and Finance*, 17 FLW D786 (Fla. 1st DCA, March 17, 1992, No. 91-572). A timely formal written protest of a proposed award of contract for laboratory services triggered the automatic stay provisions of Section 120.53(5)(c) and a contract entered by HRS despite that stay was unlawful and therefore a Writ of Mandamus was granted in *Smithkline Beecham Clinical Laboratories, Inc. v. HRS*, 17 FLW D532 (Fla. 2d DCA, February 19, 1992, No. 91-03539).

In another bid case, the court in *Moore v. HRS et al.*, 17 FLW D878 (Fla. 1st DCA, April 2, 1992, No. 91-1757), interpreted *Groves-Watkins* to find error in the hearing officer's *de novo* evaluation of the bids submitted and HRS' final order making the award recommended by the hearing officer.

1992-93 Calendar

June 24-27, 1992
Annual Meeting of The Florida Bar
Marriott's World Center, Orlando

June 25, 1992
Administrative Law Section and Environmental & Land Use Law Section Joint Reception
6:30-7:30 p.m.

June 26, 1992
Executive Council Meeting Administrative Law Section
Marriott's World Center, Orlando
8:30-11:30 a.m.

July 10-11, 1992
Section Leadership Conference
The Florida Bar, Tallahassee

August 6-13, 1992
Annual Meeting American Bar Association
San Francisco, California

September 9-12, 1992
General Meeting Sections and Committees
Tampa Airport Marriott, Tampa

January 13-16, 1993
Midyear Meeting Sections and Committees
Hyatt Regency, Miami

June 23-26, 1993
Annual Meeting
Walt Disney World Dolphin

Minutes

Administrative Law Section Executive Council Meeting

Friday, March 20, 1992
The Florida Bar Headquarters
Tallahassee, Florida

I. Call to Order

The meeting was called to order by Chair-Elect G. Steven Pfeiffer at 9:00 a.m. in the absence of Chair Gary Stephens, who had to leave Tallahassee unexpectedly the day before the meeting because of a death in the family.

Members present: Thomas M. Beason, William R. Dorsey, Jr., Vivian F. Garfein, Stephen T. Maher, G. Steven Pfeiffer, Linda M. Rigot, R. Michael Ruff, Betty J. Steffens, William E. Williams.

Members absent with excuse: Ralf G. Brookes, M. Catherine Lannon, Mary F. Smallwood, Gary Stephens, Diane D. Tremor.

II. Introduction of the Bar Liaison

Gene Stillman, the new Bar Liaison, was introduced.

III. Consideration of the Minutes, January 10, 1992

The minutes of the January 10,1992 meeting of the Executive Council were approved.

IV. Report from the Chair

Gary was unable to attend and make a report.

V. Report from the Treasurer

The Treasurer reported a fund balance of approximately $42,000.00

VI. Committee Reports

A. Publications

Linda Rigot and the others who work on publications were commended for their good work. The improvement in the quality of the newsletter was noted with pride. The deadline for the next issue was announced. Linda indicated that this year there would be four newsletters and five publications in the Florida Bar Journal.

B. Certification

Catherine Lannon was unable to attend and make a report.

C. Legislation

Betty Steffens reported on legislative developments. She will be making a full report on legislative developments to Section members and others who choose to attend at the 1992 Administrative Law Update.

D. CLE

The Council approved a second CLE seminar, which was scheduled for the morning of May 15, 1992, in Tallahassee, at the Radisson Hotel. The program, titled "1992 Administrative Law Update", will provide those who attend with insight on developments in both law and technology. Stephen Maher will chair the program. Bill Dorsey, who chairs the CLE committee of the section, and Betty Steffens will also work on developing the program.

E. Long Range Planning Committee

Steve Pfeiffer gave a report on the work of the Long Range Planning Committee, which had met the previous afternoon at Bill William's office. He stressed that he believed the Section should have a procedural focus. He expressed interest in pursuing the possibility of revising the Model Rules, which have become somewhat obsolete and which have lost their preminent status. He suggested that it may be time to identify the peculiarities that have developed in agency practice since the last revision about 12 years ago and to

bring back uniformity to agency procedure. Steve also announced that a new Administrative Law Handbook is being planned.

F. *Annual Meeting*
Ralf Brookes was unable to attend and make a report. However, it was announced that a joint reception with the Environmental Law Section is planned for Thursday, June 25,1992 from 6:30–7:30 p.m. It was also announced that an Executive Council Meeting is planned for Friday, June 26,1992 at 8:30 a.m.-11:30 a.m.

VII. Old Business

A. *1st DCA Mediation Proposal*
No developments on this proposal were announced.

B. *Task Force Appointments*
Letters making Task Force Appointments have been made, and more maybe coming.

VIII. New Business

A. *Policy on Republication of Newsletter Articles*
Now that the quality of the Newsletter has improved, how should we deal with requests to republish newsletter articles? A motion was made and seconded that the Bar's policy on this should be determined, and if it is consistent with Bar policy, we should develop a form to be signed by each author which states the work is original and that the Section has the right to authorize republication, (unless the author chooses to withhold permission).

B. *Pat Dore Memorial*
The Council feels that something should be done to honor Pat Dore. Various ideas for honoring her were suggested and discussed at the meeting. A committee was appointed to study the question and report back. Vivian Garfein was appointed chair, and Steve Maher, Cathy Lannon and Diane Tremor were also appointed to the committee.

C. *Donation to Supreme Court Lawyer's Lounge*
The Council decided not to make a contribution of section funds towards the Supreme Court Lawyer's Lounge

D. *Bar Lobbying Debate*
Steve Maher suggested that the Section take a position in the bar lobbying debate now before the Supreme Court of Florida. He distributed a draft of the response that he suggested the Section should file in those proceedings. After discussion, a motion to file the proposed response resulted in a tie vote, and the chair refused to break the tie, so it failed.

IX. Time and Place of Next Meeting
The next meeting of the Executive Council of the Administrative Law Section will be held at the Marriott World Center in Lake Buena Vista Florida, on June 26, 1992 at 8:30 a.m.

Editors' Note: These minutes have not been approved by the Executive Council.

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