Administrative Law Section Newsletter

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From the Chair

Professionalism, Take Two

by M. Catherine Lannon

Let me begin by saying that I was amazed at the response to my previous column on Professionalism. I had many people call me or talk with me in person to thank me for the column and to say how important it is that we pay more attention to professionalism and that we strive to behave better as we practice administrative law.

Many fellow practitioners are concerned about the lack of civility — and even the lack of good faith in bargaining and communication. One case I saw involved an agreement to forego asking for attorney's fees if the agency dismissed the case on a stated date. The agency did dismiss the case, but the record did not clearly establish (allegedly) whether the dismissal occurred on the stated date or the next day. So the attorney filed a petition for attorney's fees. (So much for those who chide lawyers for using phrases such as "on or about!")

Is this what we've come to? I know, I know — it was not illegal, immoral, or fattening to file the Petition. But was it professional? Does it make you or me want to settle cases or work cooperatively in other ways with that attorney? In fact, does not such conduct sometimes make us want to dig in our heels and force the party and every other opposing party to meet every single detail of the laws and rules every time?

There is the saying that a cat that jumps up onto a hot stove will never jump on a hot stove again; indeed, the cat will probably never jump up onto a cold stove either. The difference between the cat and us is that we should be able to use reason and not apply the "lessons" we learn so broadly that they hinder our ability to function appropriately.

What is the hardest thing about stopping the unprofessional conduct? Being the one to stop FIRST. It is like war — we always want the other side to stop dropping the bombs first, THEN we will stop.

Fortunately, or unfortunately, we aren't in control of or responsible for the other side's conduct. We are only in control of and responsible for our own conduct. Instead of retaliating in kind when faced with unprofessional conduct — instead of stooping to the other person's level — we need to act professionally in the face of bad conduct and, over time, hope that we can raise that person up. Sometimes nothing will shape someone up so quickly as being treated fairly and temperately when scorn has been earned.

Will we always behave as we should? Probably not. But we have to start somewhere. Let's try to start with ourselves.

Legislature Passes APA Bill

Lawrence E. Sellers, Jr., Holland & Knight LLP

The Florida Legislature recently enacted additional changes to the Administrative Procedure Act, and thereby continued its efforts to limit agency rulemaking authority and to "level the playing field" in disputes between citizens and their government.

Background

In 1996, the Florida Legislature enacted significant changes to the Administrative Procedure Act (APA).[1] Among other things, these amendments were designed to impose new limitations on agency rulemaking authority and to "level the playing field" in disputes between citizens and their government. Subsequently, Florida's appellate courts issued a number of decisions interpreting the 1996 amendments to the APA in a fashion that some legislators say was not intended. In response, measures were filed in both the House and the

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Senate to amend the APA to clarify the Legislature's intent. The Legislature ultimately approved the House bill, CS/HB 107, by Representative Ken Pruitt.[2] This article summarizes some of the key provisions in that bill.

Limitations on Rulemaking Authority

Prior to 1996, appellate courts held that a rule is valid if it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious.[3] In 1996, the Legislature sought to overrule this judicially created test by amending the APA to expressly provide that "[n]o agency shall have a authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious."[4] The amended language also provides that "[s]tatutory language granting rulemaking authority or generally describing the power and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute."[5]

Last year, the First District Court of Appeal struggled to interpret this "particular powers and duties" language. In *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.*,[6] the court recognized that there were two possible interpretations of the phrase "particular powers and duties." The statute could mean that the powers and duties delegated by the enabling statute must be "particular" in the sense that they are identified (and therefore limited to those identified) or in the sense that they are described in detail.[7] In his final order, the administrative law judge had adopted the latter interpretation, construing the phrase to mean that the enabling statute must "detail" the powers and duties that would be the subject of the rule, and he invalidated the proposed rule.[8] The First District Court of Appeal chose the former, less restrictive interpretation, and it reversed. The court went on to say:

> The question is whether the rule falls within the range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the *class of powers and duties* identified in the statute to be implemented.

717 So. 2d at 80 (emphasis supplied).

In enacting CS/HB 107, the Legislature rejected this "class of powers and duties" interpretation. The bill requires that agency rules must be derived from "specific" legislative authority and expressly provides that an agency may *not* adopt a rule simply because it is within the agency's "class of powers and duties" found in the enabling statute.[9]

Some argued that this new language should apply only to those rules adopted after the effective date of the bill. Indeed, at one point the Senate bill was amended to provide that the changes to the rulemaking authority only "apply to all rules adopted after the effective date of this act."[10] In the end, the Legislature rejected this prospective approach and instead provided simply that "it is not the intent of the Legislature to reverse the result of any specific judicial decision."[11] On the floor, Representative Pruitt explained that this was intended merely to preserve the "law of the case" as to those who were parties to the *Consolidated-Tomoka* case.

The bill also allows agencies to identify those rules that do not meet this clarified rulemaking standard and to shield these rules from rule challenges until the Legislature has an opportunity to determine whether to grant the necessary specific rulemaking authority.[12]

Leveling the Playing Field

CS/HB 107 seeks to "level the playing field" in several respects.

Order of Presentation

In 1996, the Legislature sought to level the playing field in proposed rule challenges.[13] Among other things, the 1996 amendments expressly provide that a proposed rule is not presumed to be valid or invalid.[14] The amendments also eased the burden on the challenger by simply requiring the challenger to "state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority."[15] The agency then has the burden to prove that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.[16] However, in *Consolidated-Tomoka*, the administrative law judge interpreted this procedure to mean that, although the agency has the ultimate burden of establishing the validity of the proposed rule, the petitioner has the burden of going forward with the evidence to support the objections.[17] In *dictum*, the First District Court of Appeal indicated its approval of this interpretation.[18] CS/HB 107 adopts this interpretation and expressly provides that the petitioner bears the burden of going forward.[19]

Standard of Proof

As noted, the agency has the ultimate *burden* to prove that the proposed rule is not an invalid exercise

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of delegated legislative authority as to the objections raised.[20] However, a decision by the First District Court of Appeal suggested that the *standard* of proof was not clear.[21] CS/HB 107 addresses this by expressly providing that the standard of proof in these cases is a preponderance of the evidence[22] and not merely competent substantial evidence.

Agency Authority to Reject Recommended Conclusions of Law

CS/HB 107 addresses an agency's authority to reject an administrative judge's recommended conclusions of law. First, the bill makes clear that the agency in its final order may reject or modify only those conclusions of law "over which the agency has substantive jurisdiction."[23]

Second, CS/HB 107 narrows an agency's authority to reject an administrative law judge's recommended conclusions of law. Florida courts have held that an agency may reject "without limitation" an administrative law judge's recommended conclusions of law.[24] CS/HB 107 limits this authority by providing that, when rejecting or modifying such conclusions of law, the agency must state with particularity its reasons for rejecting or modifying the recommended conclusion of law and must make a finding that its substituted conclusion of law is as or more reasonable than the conclusion that was rejected or modified.[25]

Retroactive Rules

Generally speaking, an administrative rule has only prospective application.[26] However, the First District Court of Appeal recently created an exception and held that a rule that "merely clarifies another existing rule and does not establish new requirements" may be applied retroactively.[27] CS/HB 107 provides that an agency may *not* adopt retroactive rules, including those intended to clarify existing law, unless expressly authorized by statute.[28]

Judicial Review

The APA provides for judicial review of agency action, and it requires the reviewing court to remand a case to the agency or to set aside agency action when it finds that the agency "has erroneously interpreted a provision of law."[29] Nothing in the APA requires the court to defer to the agency's interpretation and nothing limits the reviewing court's authority to those cases in which the court determines that the agency's interpretation is "clearly" erroneous. Rather, the court is to review the agency's interpretation of law *de novo*.[30]

Nonetheless, some courts have held that a reviewing court must give "great deference" or "great weight" to an agency's construction of a statute or rule that the agency is charged with enforcing.[31] Other courts have held that an agency's interpretation will not be overturned unless the interpretation is "clearly erroneous."[32]

At one point, the bill was amended to make it clear that a reviewing court is *not* to defer to an agency's construction of a statute or rule, or to otherwise afford any special weight to the agency's interpretation of a statute or rule.[33] However, in an effort to address objections raised by the Governor's Office, this provision was removed prior to final passage.

Miscellaneous

CS/HB 107 includes two other provisions that merit mention.

Definition of "Agency". The bill amends the definition of the term "agency" to expressly include a regional water supply authority.[34] The definition also is amended to expressly exclude entities described in Chapter 298 (water control districts) and any "multicounty special district with a majority of its governing board comprised of elected persons."[35] In addition, CS/HB 107 reorganizes the definition of "agency" in an effort to make it easier to understand.

School Districts. Finally, district school boards are authorized to adopt rules to implement their general powers under Section 230.22, Florida Statutes, notwithstanding the new limitations on rulemaking authority.[36]

Conclusion

Many of the 1999 amendments to the APA are designed to address appellate decisions, including decisions interpreting the 1996 amendments. It will be interesting to see how the courts interpret these latest amendments.

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[1] For a discussion of some of these changes, *see* Lawrence E. Sellers, Jr., *The Third Time's the Charm: Florida Finally Enacts Rulemaking Reform,* 48 FLA. L. REV. 93 (1996); James P. Rhea & Patrick L. "Booter" Imhof, *An Overview of the 1996 Administrative Procedure Act,* 48 FLA. L. REV. 1 (1996).

[2] The Senate companion, CS/CS/SB 206, was sponsored by Senator John Laurent.

[3] *E.g., General Telephone Co. of Florida v. Florida Public Service Commission,* 446 So. 2d 1063 (Fla. 1984); *Department of Labor and Employment Security v. Bradley,* 636 So. 2d 802 (Fla. 1st DCA 1994); *Florida Waterworks Association v. State Public Service Commission,* 473 So. 2d 237 (Fla. 1st DCA 1985); *Department of Professional Regulation v. Durrani,* 455 So. 2d 515 (Fla. 1st 1984); *Agrico Chemical Co. v. Florida Department of Environmental Regulation,* 365 So. 2d 759 (Fla. 1st DCA 1978); *Florida Beverage Corp. v. Wynne,* 306 So. 2d 200 (Fla. 1st DCA 1975).

[4] FLA. STAT. §§ 120.52(8) and 120.536(1).

[5] *Id.,* FLA. STAT. §§ 120.52(8) and 120.536(1).

[6] 717 So. 2d 72 (Fla. 1st DCA 1998), *rev. denied* 727 So. 2d 904 (Fla. 1999). For a discussion of the court's ruling, *see* Note, *St. Johns River Water Management District v. Consolidated-Tomoka Land Co.: Defining Agency Rulemaking Authority Under the 1996 Revisions to the Florida Administrative Procedure Act,* 26 FLA. ST. U. L. REV. 517 (1999).

[7] 717 So. 2d at 79.

[8] *Consolidated-Tomoka Land Co. v. St. Johns River Water Management District,* DOAH Case No. 97-0870RP at 48 (final order entered June 27, 1997).

[9] Sections 2 & 3, CS/HB 107, *to be codified at* FLA. STAT. §§ 120.52(8) and 120.536(1).

[10] *See* Section 3, CS/CS/206, at p. 5.

[11] Section 1, CS/HB 107.

[12] Section 3, CS/HB 107, *to be codified at* FLA. STAT. §§ 120.536(2)(b) and (3).

[13] Sellers, *supra* note 1, at 123-130.

[14] FLA. STAT. § 120.56(2)(c).

[15] *Id.,* § 120.56(2)(a).

[16] *Id.*

[17] *Consolidated-Tomoka Land Co. v. St. Johns River Water Management District,* DOAH Case No. 97-0870RP (final order entered June 27, 1997).

[18] 717 So. 2d at 76-77. For a discussion of the order of presentation and the burden of proof in proceedings involving challenges to proposed rules, *see* Kent Wetherell, *What is the Burden of Proof in Cases Involving Challenges to Proposed Rules, and Who Has it?*, 19 Administrative Law Section Newsletter 9 (Sept.

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1998); Edwin A. Bayo & John R. Rimes, *Who Goes First and What is "Competent, Substantial Evidence" in a Proposed Rule Challenge?*, 73 FLA. B. J. 62 (Jan. 1999).

[19] Section 5, CS/HB 107, *to be codified at* FLA. STAT. § 120.56(2)(a).

[20] FLA. STAT. § 120.56(2)(a).

[21] *Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks*, 721 So. 2d 317 (Fla. 1st DCA 1998).

[22] Section 5, CS/HB 107, *to be codified at* FLA. STAT. § 120.56(2)(a).

[23] Section 6, CS/HB 107, *to be codified at* FLA. STAT. § 120.57(1)(l). The Legislature thus adopts the interpretation advanced by Judge Benton in his dissenting opinion in *Department of Children & Families v. Patricia Morman d/b/a Patti Cake Nursery*, 715 So. 2d 1076, 1078-79 (Fla. 1st DCA 1998), as opposed to the view expressed by Judge Ervin in his concurring opinion in that same case, 715 So. 2d at 1077-78.

[24] *E.g., Alles v. Department of Professional Regulation*, 423 So. 2d 624 (Fla. 5th DCA 1982).

[25] Section 6, CS/HB 107, *to be codified at* FLA. STAT. § 120.57(1)(l). As originally filed, the bill would have limited the agency's authority to rejecting or modifying only those "clearly erroneous" conclusions of law and interpretation of administrative rules. Section 4, HB 107 at p. 5. This language was revised in order to address objections raised by the Governor's Office.

[26] *Gulfstream Park Racing Association v. Department of Business Regulation*, 407 So. 2d 263, 265 (Fla. 3d DCA 1981).

[27] *The Environmental Trust v. Department of Environmental Protection*, 714 So. 2d 493, 500 (Fla. 1st DCA 1998). For a more detailed discussion of the court's ruling on this point, *see* Ralph A. DeMeo, *Environmental Trust v. Department of Environmental Protection: Who Do You Trust?*, 20 Administrative Law Section Newsletter 3 (March 1999).

[28] Section 4, CS/HB 107, *to be codified at* FLA. STAT. § 120.54(1)(f).

[29] FLA. STAT. § 120.68(7)(d).

[30] *See, e.g.,* F. Scott Boyd, *A Traveler's Guide for the Road to Reform*, 22 FLA. ST. U. L. REV. 247, 261 (1994).

[31] *E.g., Smith v. Crawford*, 645 So. 2d 513, 520 (Fla. 1st DCA 1994); *Harloff v. City of Sarasota*, 575 So. 2d 1324, 1327 (Fla. 2d DCA 1991), *rev. denied*, 583 So. 2d 1035 (Fla. 1991); *Department of Environmental Regulation v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985).

[32] *Chiles v. Department of State*, 711 So. 2d 151, 155 (Fla. 1st DCA 1998); *D.A.B. Constructors, Inc. v. Department of Transportation*, 656 So. 2d 940, 944 (Fla. 1st DCA 1995); *Orange Park Kennel Club, Inc. v. Department of Business and Professional Regulation*, 644 So. 2d 574, 576 (Fla. 1st DCA 1994).

[33] *E.g.,* Section 6, CS/SB 206 at p. 10.

[34] Section 2, CS/HB 107, *to be codified at* FLA. STAT. § 120.52(1)(b)2.

[35] *Id.*

[36] Section 7, CS/HB 107, *to be codified at* FLA. STAT. § 120.81(1)(a).

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