Administrative Law Section Newsletter

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Once More Unto The Breach:[1] The Legislature Turns Again to Improving Regulatory Oversight

by Eric H. Miller

According to Shakespeare, one purpose of Henry V's advisors for encouraging him to pursue sovereignty in France, leading to the assault on the walled city of Harfleur, was to divert the young King from eroding their privileges and property to the increase of his own power at home.[2] As the play unfolds, however, Henry acts to consolidate and reassert the power of the throne. The title's reference to Henry's call for renewed vigor in completing a hard but necessary task, and elements of the play itself, are apt analogies for the Legislature's continuing efforts to improve its oversight of rulemaking by administrative agencies.

In HB 7029[3] and CS/HB 7055,[4] passed during the 2012 session, the Legislature created tools enabling better routine review and revision both of statutory rulemaking authorizations and obsolescent rules. Expressly defining what is meant by an appointee "serving at the pleasure" of the Governor or other appointing authority, the Legislature clarified the relationship between constitutional executive officers and those administrative officers created by statute.

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From the Chair

by F. Scott Boyd

Looking back over old newsletters, I see that in my first column I should briefly thank the outgoing Executive Council members we are losing, preview our upcoming projects and events, and encourage everyone to become more involved with the Section. That makes a pretty good outline.

First, I want to thank immediate past chair, Allen R. Grossman. Allen calmly directed all of the Section's business, from budgeting to CLE programs to publications, all the while keeping tabs on more weighty Executive Orders, Supreme Court cases, and Legislative actions that affect us all. Struggles among the branches of government are nothing new to the world of administrative law (it exists because of them) but last year was especially noteworthy, and we could not have been in steadier hands. Thanks, Allen.

It would take the whole column to give credit to all of the members of the Executive Council who contributed so much time and effort to the Section's work, so I will simply acknowledge now the departing members of the Council. The list is a "who's who" in Florida administrative law: Debby Kearney; Wellington Meffert; Judge Pete Peterson; and Shaw Stiller. I regret, but understand, your decisions not to run for re-election for another

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term, and I want to express the Section's grateful appreciation for your years of work. Thanks, my friends.

All is not lost, though, because we have enlisted some great folks for terms ending in 2014: Gar Chisenhall; Fred Dudley; Steve Emmanuel; Clark Jennings; Bruce Lamb; Patty Nelson; and Brian Newman. Whether they are returning members or are new to the Council, please thank these folks for their service when you see them, and give them the benefit of your ideas.

The work of the Section goes on. So many things are going well that my main objective for the coming year will simply be to stay out of the way and not upset the apple cart. Take our publications, for example. They have never looked better. Amy Schrader, Judge Elizabeth McArthur, and Paul Amundsen are always looking for new material, though. So volunteer to write something or just suggest a topic or author for this Newsletter or the Florida Bar Journal. We're also continuing our work with the Florida Bar to keep the Florida Administrative Practice Manual current. Members will be busy writing and editing in the coming year. We are very proud to be the only Section that provides a Steering Committee for a Bar CLE publication. And finally, don't forget our own "e-News" that was launched this past year under the direction of Francine Ffolkes. Just drop her a quick note on anything that Section members might be interested in or need to know, and she'll spread the word.

Patty Nelson has plans to focus the efforts of our Law School Liaison Committee in the upcoming year. We're hoping to present a session on administrative law research for the FSU College of Law that I'm sure will be well received. If you can help, or just have some tips we can pass on, please give Patty a call.

The Section will also continue its efforts to assist the Administration Commission in updating the Uniform Rules of Procedure. The existing rules are a bit out of date due to case law developments and statutory changes. Judge Linda Rigot is representing the Section on this important project and it seems that the stars may finally be aligned, so stay tuned.

This will also be a big year on the CLE front. Under the leadership of Bruce Lamb, the Section last year introduced audio webcasts, and he has plans to expand the program this year. What topics would you like to learn about that can be covered in about an hour? Just let Bruce know. Better yet, if you are willing to help present on a topic, let us make you a star! Finally, this is also the year for our premiere CLE offering, the biennial Pat Dore Conference. Judge Li Nelson has agreed to chair this event again, so whether you are just getting started in administrative law or are a grizzled veteran, I can guarantee you that you will learn a lot from her top speakers and timely issues. Mark your calendars now for November 7th and 8th.

A final goal for the upcoming year involves the perennial problem of public access to agency orders. Jowanna Oates has volunteered to chair an ad hoc Committee on Orders Access with the goal of expanding the Section's website to include information on how to research the orders of each agency. If you have the inside scoop on one of the more obscure agencies because you work there, or just because you have broken the code, please let Jowanna know. Think how nice it would be to have all of that information summarized in one website, often with links! If you have other thoughts on improving the ability to research agency orders in the longer term, please pass those ideas along to Jowanna as well. I know you'll be hearing more about this project in future newsletters.

I've probably wasted enough ink now, so let me conclude with two points. First, under Jackie Werndli's gentle guidance I pledge to do my best to coordinate these and our many other projects in the coming year. Second, let me stress that your Section really wants you to get involved. Ask anyone who has volunteered to help with Section activities and they will tell you that every minute spent pays dividends in the form of friendships, growing expertise in administrative law, and yes, even fun. Just give us a call and we will put you to work!

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(Re)Introducing the Rules Ombudsman

Evaluating 2012 HB 541 & HB 7043

by Patricia Nelson

It all started with a telephone call from representatives of the Department of Economic Opportunity ("DEO").[1] They asked, "What are we supposed to do with rules sent to us by agencies?" Agencies were sending rule packages because the 2011 legislation that created the DEO replaced a reference to the Office of Tourism, Trade, and Economic Development ("OTTED") with a reference to the DEO.[2] The change was due to the transfer of OTTED from the Executive Office of the Governor to DEO and appeared to be innocuous. The change amended section 120.54(3)(b)2.b.(I), Florida Statutes (2011), to read:

> If the agency determines that the proposed action will affect small businesses as defined by the agency as provided in sub-subparagraph a., the agency shall send written notice of the rule to the **Small Business Regulatory Advisory Council and the Department of Economic Opportunity** at least 28 days before the intended action.

(emphasis added).

The change appeared to be a simple transfer of one of OTTED's statutory duties. Research, however, revealed two problems. First, the rule review duties of OTTED were not included in the transfer to DEO. Second, OTTED's rule review duties were always supposed to be done in conjunction with, and in addition to, the Executive Office of the Governor rules ombudsman, which was not referenced in section 120.54, Florida Statutes.

Finding the ultimate answer to DEO's question required a research journey back to 1996, and a chronological review of statutory changes to chapters 14, 120, and 288, Florida Statutes. As it turns out, 1996 was a very busy year in the Legislature. In 1994 through 1996, there was great emphasis on revising Florida's Administrative Procedure Act ("APA"),[3] which was ultimately accomplished in 1996 ("APA Legislation").[4] In 1996, the Legislature was also reorganizing Florida's economic development structure ("Commerce Legislation").[5] The reorganization resulted in the dissolution of the Florida Department of Commerce, with some agency functions repealed and other functions transferred to different agencies.[6] Both the APA Legislation and the Commerce Legislation amended section 120.54, Florida Statutes, and the interplay of those amendments caused ambiguity in the statutes and confusion for agencies implementing the APA.

Both the Commerce Legislation and the APA Legislation included provisions for the review of agency rules for their impact on small business. The APA Legislation included the following provision in section 120.54(3)(b)2.b.(I), Florida Statutes:

> If the agency determines that the proposed action will affect small businesses as defined by the agency as provided in sub-subparagraph a., the agency shall send written notice of the rule to **the small business ombudsman of the Department of Commerce** not less than 21 days prior to the intended action.[7]

(emphasis added).

The "small business ombudsman of the Department of Commerce" was a reference to section 288.701(3)(c), Florida Statutes (1995), which required the Division of Economic Development of the Department of Commerce to "[s]erve as ombudsman, as defined in s. 288.703, for small and minority businesses."[8] However, the Commerce Legislation repealed section 288.701, Florida Statutes,[9] and provided a different amendment to section 120.54(3)(b), Florida Statutes in conflict with the APA Legislation:

> If the agency determines that the proposed action will affect small business as defined by the agency as provided in paragraph (2)(a), the agency shall send written notice of such rule to **the Office of Tourism, Trade, and Economic Development** not less than 21 days prior to the intended action.

(emphasis added).

The 1996 Supplement to the 1995 Florida Statutes resolved the conflict in favor of the APA Legislation[10] and its wording was used for the text of section 120.54(3)(b)2.b.(I), Florida Statutes. The statute, however, included a note indicating that "[t]he amendment to paragraph (b) of subsection (3), as amended by [the Commerce Legislation], was not incorporated into the substantially reworded version [of section 120.54(3), Florida Statutes]."[11] The note served to point out the conflict that needed to be formally resolved by legislative act.

Two other changes made by the Commerce Legislation added to the ambiguity and confusion. The Commerce Legislation created OTTED, and gave it the following responsibilities:

> The office shall have powers and duties to:
>
> 1. Review proposed agency actions for impacts on small businesses and offer alternatives to mitigate such impacts, as provided in s. 120.54.
>
> 2. In consultation with the Governor's rules ombudsman, make recommendations to agencies on any existing and proposed rules for alleviating unnecessary or disproportionate adverse effects to businesses.[12]

Additionally, the Commerce Legislation created the rules ombudsman within the Executive Office of the Governor with the following responsibilities:

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OMBUDSMAN
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> The duties of the rules ombudsman are to:
>
> (1) Carry out the responsibility provided in section 120.54(2) [sic],[13] Florida Statutes, with respect to small businesses.
>
> (2) Review state agency rules that adversely or disproportionately impact businesses, particularly those relating to small and minority businesses.
>
> (3) Make recommendations on any existing or proposed rules to alleviate unnecessary or disproportionate adverse effects to businesses.[14]

As a result of the way the Commerce Legislation and APA Legislation were written, the implementation of the duties of OTTED and the rules ombudsman in the Executive Office of the Governor were partially reliant on the way section 120.54(3) ultimately would be written.

With such a major revision to the APA, it is no surprise that there were some glitches that needed to be fixed.[15] The OTTED/Department of Commerce glitch was one of those addressed by legislation in 1997. The Legislature settled on the following language for section 120.54(3)(b)2.b.(I), Florida Statutes (1997):

> If the agency determines that the proposed action will affect small businesses as defined by the agency as provided in sub-subparagraph a., the agency shall send written notice of the rule to **the small business ombudsman of the Office of Tourism, Trade, and Economic Development** not less than 28 days prior to the intended action.[16]

(emphasis added).

However, the legislation creating OTTED had not provided for an OTTED small business rules ombudsman. § 14.2015, Fla. Stat. (1996). Instead, the Commerce Legislation created the rules ombudsman position within the Executive Office of the Governor. § 288.7015, Fla. Stat. (1996). As a result, agencies following the 1997 APA sent all applicable rule packages to OTTED, but it is unclear whether OTTED ever had a rules ombudsman.

The reference to an OTTED small business ombudsman remained in section 120.54 until the Small Business Regulatory Advisory Council ("SBRAC") was created in 2008.[17] The 2008 legislation changed the language of section 120.54(3)(b)2.b.(I) to read:

> If the agency determines that the proposed action will affect small businesses as defined by the agency as provided in sub-subparagraph a., the agency shall send written notice of the rule to **the Small Business Regulatory Advisory Council and the Office of Tourism, Trade, and Economic Development** not less than 28 days prior to the intended action.[18]

(emphasis added).

With regard to the rules ombudsman in the Executive Office of the Governor, this change had little practical effect. Agencies continued to send the applicable rule packages to OTTED and started sending additional rule packages to SBRAC. Then OTTED was replaced by DEO in the statute, as described at the beginning of this article, during the most recent reorganization of Florida's economic development structure.[19] It is true that the 2011 legislation moved OTTED to DEO, but the rule review duties of OTTED were not included in the transfer. A review of section 20.60 and chapter 288, Florida Statutes (2011), reveals no power or duty given to DEO to review agency action or rules for the impact on small business. The absence of any such power or duty gave rise to DEO's confusion about its role in rulemaking.

Fortunately, this oversight was discovered during the 2012 legislative session, providing an opportunity to resolve the confusion. Representative Brandes had filed HB 541, creating the Florida Administrative Register, among other changes. Representative Brandes, recognizing the rules ombudsman discrepancy, helped by offering an amendment to his own bill.[20] The amendment contained the following language for section 120.54(3)(b)2.b.(I):

> If the agency determines that the proposed action will affect small businesses as defined by the agency as provided in sub-subparagraph a., the agency shall send written notice of the rule to **the Small Business Regulatory Advisory Council and the rules ombudsman in the Executive Office of the Governor** not less than 28 days prior to the intended action.[21]

(emphasis added).

The bill passed, and was signed by the Governor.

As HB 541 was making its way through the legislative process, another bill, HB 7043, was proposed to repeal statutes related to obsolete or outdated programs and requirements.[22] Because no funding appropriation for SBRAC was included in the state budget for the 2011-2012 fiscal year and none was present in the Legislature's or the Governor's proposed state budget for the 2012-2013 fiscal year, the SBRAC statutory references were repealed by HB 7043. The bill removed the SBRAC reference from section 120.54(3)(b)2.b.(I), Florida Statutes, and in place of the reference to DEO, to which OTTED's rule review functions were not transferred, the bill inserted a reference to the rules ombudsman in the Executive Office of the Governor.[23] This bill also passed and was signed by the Governor. Section 120.54 (3)(b)2.b.(I), Florida Statutes (2012), now reads:

> If the agency determines that the proposed action will affect small businesses as defined by the agency as provided in sub-subparagraph a., the agency shall send written notice of the rule to **the rules ombudsman in the Executive Office of the Governor** not less than 28 days prior to the intended action.

(emphasis added).

This represents the final change made to the statutory language -- for now.

In summary, the short answer to DEO's question is, "Nothing." Based strictly on the entirety of the legislative history, DEO was not the proper entity to be included in section 120.54(3)(b)2.b.(I), Florida Statutes (2011). Now, with the removal of OTTED and SBRAC, it remains to be seen how the newly discovered rules ombudsman will be implemented.

Endnotes:

[1] *See* ch. 11-142, Laws of Fla.

[2] *See id.* at § 49.

[3] For a comprehensive chronology and discussion of the proposed changes, legislative

history, and 1996 revisions, please see: David Gluckman, *1994 APA Legislation: the History, the Reasons, the Results*, 22 Fla. St. U. L. Rev. 345 (1994); Stephen T. Maher, *Getting Into the Act*, 22 Fla. St. U. L. Rev. 277 (1994); Donna E. Blanton & Robert M. Rhodes, *Florida's Revised Administrative Procedure Act*, 70 Fla. B.J. 30 (July/August 1996); Linda M. Rigot & Ralph DeMeo, *Florida's 1996 Administrative Procedure Act*, 71 Fla. B.J. 12 (March 1997); James P. Rhea & Patrick L. "Booter" Imhof, *Florida APA Symposium, An Overview of the 1996 Administrative Procedure Act*, 48 Fla. L. Rev. 1 (1996); Lawrence E. Sellers, Jr., *Florida APA Symposium, The Third Time's a Charm*, 48 Fla. L. Rev. 93 (1996); and Jim Rossi, *The 1996 Revised Administrative Procedure Act: A Survey of Major Provisions Affecting Florida Agencies*, 24 Fla. St. U. L. Rev. 283 (1997).

[4] *See* ch. 96-159, Laws of Fla.

[5] *See* Senate Staff Analysis and Economic Impact Statement for CS/CS/SB 958, dated March 18, 1996.

[6] *See* ch. 96-320, Laws of Fla. (CS/CS/SB 958)

[7] *See* § 10, ch. 96-159, Laws of Fla. (CS/SB 2288 & 2290).

[8] The Division of Economic Development of the Department of Commerce, not the ombudsman, was also required to "[m]onitor public hearings pursuant to chapter 120 in order to provide comments and recommendations upon the effect on small business of proposed rules." § 288.701(3)(h), Fla. Stat. (1995).

[9] *See* § 154, ch. 96-320, Laws of Fla.

[10] Typically, the legislation that is "last passed" will trump conflicting legislation because it represents the last word of the Legislature. In this case, the APA Legislation was passed on April 25, 1996, and the Commerce Legislation was passed on May 4, 1996. Notes from the Division of Statutory Revision, however, indicate that "[a]lthough [the Commerce Legislation] is last passed ([the APA Legislation] was already law at the time [the Commerce Legislation] passed), the [substantial] rewording should take precedence over a name substitution [three times in the Commerce Legislation]." *See* Fla. Off. of Leg. Servs., Div. of Stat. Rev., notes on CS/CS/SB 958 (1996) (on file with the div. and the author) (explaining how to resolve the conflict between the APA Legislation and the Commerce Legislation regarding section 120.54, Fla. Stat.).

[11] § 120.54, Fla. Stat., n.2 (Supp. 1996).

[12] § 2, ch. 96-320, Laws of Fla.

[13] The reference to subsection (2) instead of subsection (3) of section 120.54, Florida Statutes, is an error that remains in the statute today.

[14] § 5, ch. 96-320, Laws of Fla., codified at section 288.7015, Florida Statutes (Supp. 1996).

[15] For a discussion of the glitches and other issues surrounding the 1997 APA legislation, *see* Stephen T. Maher, *How the Glitch Stole Christmas: The 1997 Amendments to the Florida Administrative Procedure Act*, 25 Fla. St. L. Rev. 235 (1998).

[16] § 3, ch. 97-176, Laws of Fla.

[17] *See* ch. 08-149, Laws of Fla.

[18] *Id.* at § 7.

[19] § 49, ch. 11-142.

[20] *See* Amendment 256421 to HB 541 (2012).

[21] *Id.*

[22] *See* CS/HB 7043 (2012).

[23] *See* § 2, ch. 12-27, Laws of Fla.

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APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Smith v. Sylvester, 82 So. 3d 1159 (Fla. 1st DCA 2012) (Opinion filed March 12, 2012)

The Smiths filed a petition with the Department of Environmental Protection challenging its proposed action. The Department dismissed the petition without prejudice. The order of dismissal provided that an amended petition must be filed within 15 days of the date of the certificate of service, which was April 26, 2011. On May 13th, the Smiths filed a request for an extension of time to file the amended petition. The Department deemed the request to be untimely and dismissed with prejudice.

On appeal, the Smiths argued that the motion should have been considered as timely as the initial order of dismissal was served by mail thus adding an additional five days to the time to respond. The court reversed and remanded, citing Fla. Admin. Code R. 28.106.103. That rule provides that "in computing any period of time allowed by this chapter … [f] ive days shall be added when to the time limits when service has been made by regular U.S. mail …." The court rejected the Department's argument that the additional five days was not available because its order stated a specific timeframe for filing the amended petition, relying on similar provisions in the Rules of Civil Procedure and Rules of Appellate Procedure. The court distinguished the judicial rules from Rule 28.106.103 in that the administrative rule contained no limiting language. The court also rejected the Department's argument that the additional five days was not available because the matter fell within the parameters of Rule 28.106.111 governing timeframes for entry into proceedings.

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Washington County v. Northwest Florida Water Management District, 85 So. 3d 1127 (Fla. 1st DCA 2012) (Opinion filed March 16, 2012)

Washington County and the James L. Knight Charitable Term Trust (the "Trust") filed a challenge to the Water Management District's Regional Water Supply Plan (the "Plan"). The Plan, which was adopted in 2008, contained water supply development projects including an inland groundwater source. Under section 373.709, Fla. Stat., adoption of a plan is not subject to the rulemaking requirements of Chapter 120, Fla. Stat. However, provisions of the plan may be challenged by any person whose substantial interests are affected. When a water supply plan has been adopted, the water management district must presume that an application for a consumptive use permit is in the public interest under the permitting criteria.

In 2010, the District gave notice of its intent to issue a consumptive use permit to Bay County to use inland groundwater from a wellfield near the Washington County/Bay County line. Washington County challenged the issuance of that permit. In addition, the county and the Trust challenged the provisions of the plan related to inland groundwater sources. The District dismissed the challenge to the Plan provisions on the grounds that it did not have jurisdiction to address the validity of the Plan provisions and that the petitioners did not have standing.

On appeal the court affirmed the District's decision that the petitioners did not have standing, finding that that the Plan did not specifically approve the Bay County project. Instead, Bay County was required to apply for a site-specific consumptive use permit that could be challenged separately. However, the court rejected the District's determination that a water supply plan could not be challenged under any circumstances. It concluded that the Plan was an agency action that the Legislature had specifically made subject to challenge by entities whose substantial interests were affected.

Licensing

Fernandez v. Department of Health, 82 So. 3d 1202 (Fla. 4th DCA 2012) (Opinion filed March 21, 2012)

The Department of Health filed a three-count complaint against Fernandez, a registered nurse, related to his administration of a drug to a friend who was hospitalized. Fernandez was not employed by the hospital and was not authorized to administer the drug to his friend. The complaint alleged that he failed to meet minimal standards of nursing practice and that he engaged in unprofessional conduct. Fernandez requested an informal hearing seeking to mitigate any potential penalties. After the hearing, the Board of Nursing adopted a final order revoking Fernandez' license.

Fernandez appealed the order as to counts I and II arguing that the Department had failed to follow legislative requirements that there be penalty guidelines in place. The appellate court held that there were sufficient guidelines in place as to count I. However, those guidelines called only for a fine, suspension and probation. Since the Department had not articulated its basis for deviating from the guidelines as required by statute, the court remanded the order to the agency to either modify the penalty or provide the necessary documentation for increasing the penalty above the guidelines. As to count II, the court agreed with Fernandez that no guidelines had been adopted by rule. Therefore, it reversed the penalty for that alleged violation.

Applicability of Administrative Procedure Act

Couchman v. University of Central Florida, 84 So. 3d 445 (Fla. 5th DCA 2012) (Opinion filed April 5, 2012)

Couchman, a student at the University of Central Florida, filed an appeal pursuant to section 120.68, Fla. Stat., of an action of the University's Board of Trustees taking disciplinary action against him. The University sought to have the appeal dismissed on the grounds that its decisions on disciplinary actions were not subject to the Administrative Procedure Act.

On appeal, the court agreed and transferred the case to the circuit court for certiorari review. The court held that the University was acting under constitutional authority when it took disciplinary actions and, therefore, was not acting as an agency of the state. The court noted that section 120.52(1), Fla. Stat., defined agency to include universities where they were "acting pursuant to powers other than those derived from the constitution." In November 2002, the Florida Constitution was amended to establish a governance system for state universities, including creation of local boards of trustees. The Legislature in section 1001.706, Fla. Stat., recognized the authority of the Board of Governors, or the boards of trustees as its designee, to establish codes of conduct for students.

Decker v. University of West Florida, 85 So. 3d 571 (Fla. 1st DCA 2012) (Opinion filed April 24, 2012)

The First District Court of Appeal reached the same conclusion as the Fifth District in the *Couchman* case, concluding that the University was not an agency of the state.

Public Records

Johnson v. Jarvis, 74 So. 3d 168 (Fla. 1st DCA 2011) (Opinion filed November 16, 2011)

Johnson was arrested following an incident at a Wal-Mart store in Lake City, Florida. His attorney met with the assistant state attorney to review documents, including video surveillance tapes and witness statements. However, when he arrived at the state attorney's office to look at the documents he was informed that the charges had been dropped. Johnson's attorney made a verbal request to review the documents under the Public Records Act and was told that it was the State Attorney's policy that all public records were to be sent to Live Oak where the State Attorney's office was located so that he could personally review them for exemptions under the Act.

Johnson filed suit in circuit court seeking access to the documents, and the State Attorney's office filed a motion to dismiss. The court granted the motion to dismiss, holding that access had not been denied and that the

time and location of providing access was not unreasonable.

On appeal, the appellate court reversed. It remanded the case to the circuit court for an evidentiary hearing on whether the State Attorney's policy of requiring all public records to be produced in Live Oak caused unreasonable delay.

Hewlings v. Orange County Animal Services, 87 So. 3d 839 (Fla. 5th DCA 2012) (Opinion issued May 18, 2012)

Hewlings faxed a letter to the Orange County Animal Services agency requesting copies of all documents related to a dangerous dog investigation of her dog. Her request was acknowledged by voicemail. She submitted a second request the next day. When no response was forthcoming over the next week, she contacted the County Attorney's office. That office responded that someone would contact her within 14 days to arrange for her to review the files and determine what documents she wanted copied. She sent a written response stating that she wanted copies of all documents and did not need to review the files. When she received no further communication from the County, she filed a mandamus action seeking the records. The court ordered the County to produce the documents within 48 hours. Subsequently, Hewlings sought attorney's fees due to the unreasonable delay in producing the public records. The circuit court denied that request, concluding that the County had responded to the request by voicemail and fax.

On appeal, the ruling on attorney's fees was reversed. The appellate court held that the mere fact that the County had made a response to the initial request was not sufficient to avoid the imposition of attorney's fees. It construed the Public Records Act to require compliance with the request, not just a response that records would be produced in the future.

Matos v. Office of the State Attorney for the Seventeenth Judicial Circuit, 80 So. 3d 1149 (Fla. 4th DCA 2012) (Opinion filed March 14, 2012)

Matos filed a mandamus action seeking certain public records in June 2011. The circuit court issued an order in September of that year ordering the state to respond. No response, however, was provided; and the court did not set the matter for hearing. Matos then appealed, seeking an immediate hearing.

The appellate court held that section 119.11(1), Fla. Stat., requires that the circuit court give priority to public records cases over others and that the hearing must be set immediately, not just within a reasonable time. It further held that an 8-month delay did not meet that requirement.

Attorney's Fees

Agency for Health Care Administration v. MVP Health, Inc., 74 So. 3d 1141 (Fla. 1st DCA 2011) (Opinion filed December 2, 2011)

The Agency for Health Care Administration (AHCA) withdrew an application by MVP Health, Inc. for a license to operate a home health care facility on the grounds that the application contained insufficient information to verify the controlling interest in the entity and that it had lost accreditation. MVP challenged that decision and the administrative law judge concluded that AHCA had incorrectly withdrawn the application. AHCA adopted the recommended order.

MVP then sought attorney's fees pursuant to section 57.111(4)(a), Fla. Stat., arguing that there was no substantial justification for AHCA's action. The administrative law judge awarded attorney's fees to MVP.

On appeal, the court reversed. It held that at the time AHCA acted it had substantial justification to question the ownership of the applicant as the application, itself, stated that there was ongoing litigation involving the ownership. In addition, AHCA had been informed by the Joint Commission on Accreditation of Healthcare Organizations that it was taking action to revoke MVP's accreditation although it was still in place at the time the application was submitted. Accordingly, the court found that AHCA was substantially justified in its withdrawal of the application.

Appeals

Taylor v. Department of Children and Families, 81 So. 3d 566 (Fla. 4th DCA 2012) (Opinion filed February 22, 2012)

Taylor sought Sun Cap benefit eligibility and food stamp benefit recovery. She had requested and been granted a hearing. When she sought a continuance, the hearing officer denied the request. Taylor failed to appear at the final hearing. The Department subsequently treated her claims as abandoned. However, no final order was ever issued by the Department. Several months later, Taylor sought a hearing on the same claims. At that hearing, the Department moved to dismiss the matter on the grounds that she had abandoned the claims. The hearing officer concluded that he could not grant a rehearing and that Taylor's only remedy would have been a judicial appeal.

On appeal, the court reversed. It held that the agency's failure to reduce its decision to writing as required by section 120.569, Fla. Stat., prevented Taylor from seeking judicial review.

Sumner v. Bd. of Trustee, City of Pensacola Firefighters' Relief and Pension Fund, 78 So. 3d 123 (Fla. 1st DCA 2012) (Opinion issued January 30, 2012)

Sumner appealed an order of the Board of Trustees of the City of Pensacola's Firefighters' Relief and Pension Fund. The court dismissed the appeal as premature as the administrative order had not been rendered by the agency by filing with the agency clerk. The appellant argued that the agency could not properly render the order as it had not designated an agency clerk. However, the court held that where no clerk was specifically designated by an agency, the person whose duties and functions most closely resemble a clerk is the "clerk" for purposes of filing the administrative order.

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UNTO THE BREACH
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The Legislature took responsibility for removing archaic rules from the Florida Administrative Code (FAC) and began a continuing process to remove unnecessary rulemaking authorizations from the statutes. References to the Small Business Advisory Regulatory Council were repealed, directing actions instead to the rules ombudsman in the Executive Office of the Governor.[5]

Meanwhile, the Legislature continued its oversight of agency rulemaking. Two requests for rule ratification were considered during the 2012 session and one was passed.[6] Compliance (or, in some cases, the lack thereof) with the rule economic review and reporting requirements passed in 2011[7] was closely monitored and coordinated with the concurrent rule review process conducted by the Governor's Office of Fiscal Accountability and Regulatory Reform ("OFARR"). The public survey noted last session,[8] and initiated last fall, was monitored and reported to the membership. The Legislature continued to improve the substance of its oversight while holding agencies accountable for their exercises of delegated authority.

This article builds on prior heraldic augers[9] to detail the changes made to the Administrative Procedure Act ("APA")[10] by HB 7029 and CS/HB 7055. The Legislature's second rule ratification under the requirements of HB 2010-279, Laws of Florida,[11] and revisions to statutory rulemaking authorizations and the FAC are also examined.

I. The Sentinels

A. Department of State

Some of the most significant changes made to the APA in 2012 affect the responsibility of the Department of State ("DOS") for maintaining the FAC. Changes to the publication requirements in section 120.55, Florida Statutes, are treated elsewhere.[12] In HB 7029, the Legislature expressly stated the impact of statutory repeal on rules implementing a specific statute and authorized a summary process for DOS to implement when there is a question as to whether a rule remains in force and effect.

HB 7029 arose in the Florida House Rulemaking & Regulation Subcommittee as an indirect result of the economic review of existing rules established by section 120.745, Florida Statutes. An examination of the FAC showed a number of extant rules for which the rulemaking authority had been repealed, the adopting agency no longer existed, or the specific law implemented by the rule was repealed. At the time the bill was introduced in December 2011, the printed or online versions of the FAC, or both, included rules adopted by the former Advisory Council on Intergovernmental Relations ("ACIR"),[13] the former Department of Labor and Employment Security ("DLES"),[14] and the former Department of Commerce ("DOC").[15]

A rule is binding and operative from its effective date until modified or superseded by subsequent legislation or properly revised by subsequent rulemaking.[16] While the courts interpret the repeal of the specific law as nullifying the implementing rule, since the rule no longer has a substantive basis,[17] the APA was silent on this issue, and a number of such rules remained published in the FAC long after their nullification. Since revising or repealing an obsolete rule requires an existing agency with proper rulemaking authority,[18] the lack of an agency able to repeal the "orphan rules" identified in the preceding paragraph led to uncertainty about their status in the FAC.[19] To resolve these issues for the future, HB 7029 amended section 120.536 and created new section 120.555, Florida Statutes.

1. New §120.536(2) & (3): Codifying the Standard

HB 7029 creates section 120.536(2)(a), Florida Statutes,[20] codifying the principle that repealing a statute nullifies its implementing rules unless otherwise expressly provided by law. In conjunction with the rulemaking requirements of the APA,[21] this provision clarifies that a rule is nullified only by the complete repeal of the substantive statute it implements, not the repeal of rulemaking authority or termination of the adopting agency. Paragraph (2)(a) states the simplest form of the principle: a rule that implements only certain provisions of a statute is nullified by the complete repeal of those provisions. Paragraphs (2)(b) and (2)(c) anticipate the more likely occurrence of repealing only a portion of several statutes implemented by a particular rule.

Under paragraph (2)(b), the agency with authority over a rule for which part of the substantive statutory basis has been repealed is required to publish a notice of rule development[22] identifying the parts of the rule affected by the statutory repeal. This notice must be published within 180 days after the effective date of the law repealing the statute, similar to the requirement to initiate rulemaking mandated by passage of a new law.[23] Failure to timely publish the notice of rule development suspends operation of the entire rule until the notice is published.

Paragraph (2)(c) covers all other situations where the repeal of a statute is found to impact the continuing efficacy of a rule, including when the Division of Administrative Hearings ("DOAH") notifies DOS that a rule was found invalid in a Chapter 120 proceeding because of a statutory repeal.[24] Where DOS receives notice from any source, including DOAH or the Joint Administrative Procedures Committee, that part or all of a rule may be nullified due to repeal of a statute, DOS must follow the new procedure created in section 120.555 to determine if the affected part (or all) of a rule should be summarily removed from the FAC.

Regardless of the paragraph under which it receives notice of the rule nullification, DOS is required to update the FAC and note the repeal of the rule by operation of law as of the effective date of the law repealing the underlying substantive statute.[25]

2. New §120.555: Summary Removal

New section 120.555[26] creates a process for DOS to resolve any doubt about whether a rule remains in full force and effect. Rules previously remained in the published or online versions of the FAC (or both) well after repeal of the agency's rulemaking authority, the elimination of the agency itself, or the repeal of one or more of the underlying substantive statutes.[27]

Once a rule has been lawfully adopted, the subsequent repeal of the adopting agency's rulemaking authority, or even the agency's dissolution, does not avoid the requirement for rule revision or repeal through the normal rulemaking process.[28] A rule is legally binding until properly revised or until repeal of the underlying substantive statute.[29] Even though repeal of the substantive law effectively nullifies provisions of the rule implementing the statute, DOS has had no authority to *remove* the nullified rule from the FAC as part of the continuous revision system required by statute.[30]

Once DOS identifies a rule of doubtful efficacy, either through its present review process or otherwise as provided by law, the new section requires DOS to submit a written request to the agency with authority to amend or repeal the rule (or the Governor if no such agency can be identified) for a statement as to whether the rule is still in full force and effect. Notice of this request must be published in the Florida Administrative Register ("FAR")[31] and a copy promptly delivered to the Attorney General. The agency or the Governor, as applicable, has 90 days from the date DOS publishes the notice to respond to the request and state whether the rule is still in full force and effect; notice of this response must also be published in the FAR. Failure to respond is an acknowledgement that the rule is subject to summary repeal.

If the response states the rule is no longer in full force and effect, or if the agency or Governor fails to respond and is deemed to acknowledge the rule is no longer in full force and effect, the notice of response published in the FAR shall also state that the rule will be removed from the FAC. Anyone objecting to this summary repeal will have 21 days from the date of publication to file a challenge in the form of a petition under section 120.56(2), Florida Statutes.[32] This clause prevents unilateral action by DOS or the executive branch by providing the objecting party with the full hearing and appeal rights granted in the APA.[33]

The law expressly requires that a petition objecting to the summary repeal name the agency with authority to repeal the rule as the respondent, not DOS. This makes sense because the agency with proper authority over the rule would have the substantive knowledge to address whether or not the rule should be retained. If no agency has rulemaking authority to repeal the rule, the objecting party must name DOS as the respondent to the petition, in which case the bill requires the Attorney General to represent DOS in all resulting proceedings.

When the 21-day period from publishing the notice of the response from the agency or the Governor has run, or upon the finality of a decision overruling the objection(s) to summary repeal, DOS must remove the rule from the FAC and update the historical notes to show the manner of repeal. New section 120.555 provides an effective public process to remove nullified, obsolete "orphan" rules while preserving the notice and hearing rights afforded by the APA.

B. Office of Statutory Revision

In HB 7029, the Legislature took responsibility for removing a number of unnecessary, questionable, or obsolete rules either identified by current agencies or left behind by statutory changes that eliminated the adopting agency, the authority to amend or repeal the rule, or the underlying substantive statute. A key component of the bill was creating a process and authority for future removal of such rules. In CS/HB 7055, the principle of continuing review and revision was applied to statutory delegations of rulemaking authority.

The Office of Legislative Services is authorized and responsible for maintaining a program of statutory revision, part of which includes identifying statutes for correction or repeal through the process of submitting reviser's bills for consideration by the Legislature. Reviser's bills are drafted by the Office and enacted by the Legislature as part of Florida's ongoing process of statutory revision. The purposes for this program include "…removing inconsistencies, redundancies, and unnecessary repetitions (from the statutes) and otherwise improving their clarity…"[34] The relevant statute provides detailed criteria applicable to this process of review and proposing revisions.[35] The Office is already tasked with recommending the deletion of all laws that expire, become obsolete, had their effect, or served their purpose.[36] Duplicative, redundant, and unused rulemaking authority provisions similarly populate the Florida Statutes with unnecessary law, which can be omitted.

The bill creates new section 11.242(5)(j)[37] to provide for continual review and repeal of unnecessary rulemaking delegations. A key factor in paragraph (5)(j) is the express presumption that a delegation of rulemaking authority is unnecessary if it is in effect for more than five years and not used to promulgate any rules. For example, an agency may have an existing grant of authority to adopt rules necessary to implement the provisions of a particular substantive chapter. A bill is passed creating a new program but includes authority "to adopt rules to implement this section." The agency duly adopts rules for the new provision relying on the existing grant of authority without challenge. Future revisions to the rule continue to rely on the general provision for rulemaking authority.[38] The additional specific grant included in the more recent program thus proves to be unnecessary and would be slated for removal in a reviser's bill after five years.

II. Winnowing the Law

The Legislature did not merely establish additional process and duties for others to implement but tackled the task of trimming both the FAC and the statutes of obsolete, redundant, or unnecessary sections.[39] HB 7029 nullified 270 existing rules and CS/HB 7055 removed grants of rulemaking authority from, or repealed entirely, 47 separate statutory sections.

Participating in the review of existing rules through OFARR, as ordered by the Governor, the five water management districts identified a total of 165 rules which could be repealed without impairing the administration of their respective programs.[40] The justifications for nullifying these different rules are broadly categorized: some were duplicative of statute or other rules; some were unnecessary to implement the statute or outdated; some referenced another rule, statute, or a repealed statute; and for some the underlying statute had been repealed.[41] The bill provides an effective date of nullification 60 days after the

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bill was signed into law, allowing a period of notice and adjustment similar to what would be afforded if the water management districts repealed these rules through the normal APA process.[42]

The bill nullified another 105 rules for which the adopting agency was abolished, the grant of rulemaking authority repealed, or the specific law implemented had been repealed. Because the circumstances for nullification were different for each affected chapter, sometimes varying extensively between rules within the same chapter, the bill provided extensive history notes documenting the statutory history of revisions, transfers, and repeals that called into question the continuing efficacy of the particular rules. These "orphan" rules fell into two categories, and thus were assigned two different dates of effective nullification.

In the first category were those rules pertaining to no present program. These included: Chapters 8K-1, 8K-2, 8M-1, 8M-2, and 8M-3, FAC, for the former DOC; the entire Title 37, FAC, for the former ACIR; and Chapter 38I-40, FAC, for the former DLES. For each of these chapters, at disparate times the Legislature repealed the rulemaking authority (removing the authority for an agency to revise or repeal the rules), abolished the adopting agency (eliminating any agency having authority to enforce, revise, or repeal the rule), or transferred administrative responsibility for the underlying substantive law before finally repealing the statute. To end any further question about the disposition of these rules, the Legislature expressly nullified them.[43] The bill also nullified certain rules of the former Department of Health and Rehabilitative Services ("HRS") as clearly exceeding the scope of the specific law implemented.[44] For these rules, the bill provided the same 60-day period prior to the effective date of nullification as was provided for the repeal of the water management district rules.

"Orphan" rules in the second category appeared pertinent to present programs, but the laws transferring the substantive statutes or abolishing the prior agencies did not clearly spell out whether these rules continued in force and effect. Rules of the former HRS Health Program Office[45] and DLES Division of Vocational Rehabilitation[46] were also nullified, but the effective date was expressly delayed until July 1, 2013. This allows sufficient time for the Department of Health, concerning these former HRS rules, and the Department of Education, concerning these former DLES rules, to determine if the rules are necessary for programs now administered by these departments and, if so, to initiate rulemaking before the effective date as required by the bill.[47]

The historical notes in the bill trace the changes in the rulemaking authority, agency status, and law implemented for each of the nullified "orphan" rules, showing how the Legislature applied the doctrine now codified in new section 120.536(2). Retaining a copy of Chapter 2012-31, Laws of Florida, may be useful for future reference because the bill states that the sections nullifying rules (consequently including the historical notes) are not to be codified in the statutes.[48]

The House Rulemaking & Regulation Subcommittee also researched the statutes and found a number of rulemaking authorizations were in effect for several years but never used to adopt rules. CS/HB 7055 takes a conservative approach by repealing rulemaking authorizations in 47 different statute sections, most of which were on the books for more than five years.[49] The House Final Bill Analysis for CS/HB 7055[50] summarizes the bases for each of these repeals.

III. <u>The Chain of Command</u>

As previously reported,[51] in *Whiley v. Scott*, 79 So. 3d 702 (Fla. 2011), a majority of the Court invited the Legislature to consider amending the APA and delegations of rulemaking authority in light of their decision. In *Whiley*, the Court considered a petition for writ of quo warranto challenging the Governor's power to order agencies under the authority of appointed agency heads who served at his pleasure to suspend rulemaking and not proceed with present or proposed rules without first receiving approval from his office. The majority decided that rulemaking was delegated to agencies and final responsibility for exercising that authority was expressly assigned to the agency heads, not the Governor (unless expressly made the direct head of an agency), therefore the Governor had no authority to direct his appointees about rulemaking. The dissenting opinions pointed out that the APA imposes no restriction on the authority of the Governor to supervise and direct policy choices made by subordinate executive branch officials with respect to rulemaking; that the majority's decision would insulate discretionary executive policy decisions about rulemaking from the constitutional structure of accountability; that nothing in the APA prohibited an agency from receiving approval from the Governor or his designee for the policy direction of a proposed rule before initiating rulemaking; and that the Governor acted fully within his constitutional authority.[52]

In CS/HB 7055, the Legislature responded to the Court's invitation by amending Chapters 20 and 120, Florida Statutes, to expressly recognize the authority of elected executive branch officers, particularly the Governor, to direct and supervise those appointed officials who serve at the pleasure of the appointing entity. By providing detailed findings explaining the basis for the amendments, and by expressly affirming the Governor's Executive Orders 11-72 and 11-211 as consistent with state law and public policy,[53] the Legislature clearly recognized the capacity for rational and pragmatic supervision of delegated rulemaking within the executive branch.

Section 1 includes twenty-six detailed findings.[54] The Legislature acknowledged the Governor's constitutional role as the chief executive officer of the state, within the historical context of executive power as understood by the framers of the U.S. Constitution, and as that power has been articulated through each iteration of the Florida Constitution since 1838. The findings explain the foundation for the bill's clarifying statutory amendments together with the Legislature's relevant interpretation of the constitutional assignment of executive

power[55] and its implications with respect to statutory powers. The findings confirm both the procedural nature of the APA and that the APA does not intrude into the constitutional authority of elected executive officers. Other findings disagree with the majority's rationale in *Whiley*, approve the reasoning and conclusions in both dissenting opinions, emphasize the importance of holding appointed officials accountable to elected executive officers, and approve the interim results of the Governor's review process utilizing OFARR. Section 1 closes by finding that the decision in *Whiley* is accorded the deference due to an advisory opinion of the Court because no relief was granted, only a declaration of law.[56]

Section 3 of the bill expressly states the legislative intent for the revisions in sections 4 – 8 is to clarify that the placing of an agency under an office or board appointed by and serving at the Governor's pleasure does not implicitly limit or restrict any other authority of the Governor. Section 20.02(3), Florida Statutes, is created, and section 20.03(4), Florida Statutes, is amended by expressly stating the administration of an executive department placed under an officer or board appointed by and serving at the pleasure of the Governor remains at all times under the Governor's supervision and direction. The bill adds section 20.03(13), Florida Statutes, expressly defining the phrase "to serve at the pleasure" and reiterating that such an appointee remains subject to the direction and supervision of the appointing authority. Section 20.05(1), Florida Statutes, is revised to expressly state that agency heads are subject to the constitutional allotment of power in the executive branch.[57]

The bill makes two amendments to the APA. First, the specific declaration of policy in newly-created section 120.515, confirms the procedural nature of the APA and that the APA does not impair the authority of appointing officers to direct and supervise their at-will employees. The last clause of this section significantly addresses an issue argued in the *Whiley* case by expressly pointing out that an agency head's adherence to the direction and supervision of the appointing officer is not a delegation or transfer of statutory authority. For example, complying with the Governor's policy directions is not a transfer of the rulemaking responsibilities exercisable by the agency head.[58] The second revision amends the definition of "agency head" in section 120.52(3), Florida Statutes, reiterating that the appointee remains subject to the direction and supervision of the appointing authority, but also confirming that the actions of an agency head as authorized by statute are official acts. This latter clause prevents any argument that an otherwise-valid action could be voidable if done without the permission of the appointing authority. Both provisions make clear that "direction and supervision" as used in the bill constitute lawful influence over an agency head's exercise of statutory authority. Moreover, as these clarifying provisions are general in scope, under ordinary rules of construction they remain subject to more specific statutory regulation of an appointing authority's supervision of a particular agency head.

The Court granted the petition in *Whiley* and heard the case instead of referring it to a lower court because it viewed the issue presented as being of serious and immediate importance to the government of the state and to the people. The Legislature approached the ramifications of the Court's opinion with due regard for comity between the branches of government, resulting in the detailed findings and crafted amendments included in CS/HB 7055.

IV. Ratification and Continuing Oversight

Pursuant to the requirements of section 120.541(3), Florida Statutes, prior to the regular session the Legislature received submissions of rules for ratification required by their estimated economic impact. The Speaker of the House informally referred these requests to the House Rulemaking & Regulation Subcommittee. After due consideration, HB 7121 was prepared, proposing the ratification of Rule 5F-11.002, FAC, adopted by the Department of Agriculture and Consumer Services. The bill utilized the language developed in 2011 and used in HB 7253 (2011), emphasizing the only purpose of the bill was to fulfill the statutory condition for the rule to become effective, there was no express or implied preemption of the rulemaking process, and the result was a rule subject to all the requirements of the APA for challenge or amendment.

The Legislature continued to monitor the compliance of agencies with the reporting, publication, and review requirements of section 120.745, Florida Statutes. In October 2011, the Legislature initiated the online survey referred to in section 120.7455, Florida Statutes, and regularly monitors the responses and suggestions posted by the public.[59]

V. End of Act III

Since the passage of Ch. 2010-279, Laws of Florida, in November 2010, the Legislature has actively pursued not only the comprehensive economic review of agency rules, but processes designed for continuing effective supervision of rulemaking. The laws adopted during the 2012 session show the Legislature's willingness to oversee the delegations of rulemaking authority.

Thus, we reach the end of act three in the Legislature's resurgent exercise of its authority over the implementation of public policy through agency rulemaking and regulatory action. As the curtain rises on act four:

> The wall of stale and needless rules, now breached,
>
> And surplusage of statutes rendered void,
>
> Those happy few do pause, a moment reached
>
> For study, calm reflection well-deserved.
>
> Yet, late advancing skirmishers report
>
> Of rules upon the vale of Agincourt….[60]

Endnotes:

[1] "Once more unto the breach, dear friends, once more, Or close up the wall with our English dead." William Shakespeare, "The Life of Henry the Fifth," Act 3, sc.1 (Oxford University Press, NY, 1987) [herein *Henry V*].

[2] *Henry V*, Act I, scene 1.

[3] HB 7029 was signed into law as Chapter 2012-31, Laws of Florida.

[4] CS/HB 7055 was signed into law as Chapter 2012-116, Laws of Florida.

[5] These changes were enacted in CS/HB 7043 and HB 541, signed into law respectively as Chapters 2012-27 and 2012-63, Laws of Florida. For a thorough treatment of the revised role of

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the Rules Ombudsman, see "(Re)Introducing the Rules Ombudsman: Evaluating 2012 HB 541 & HB 7043," by Patricia Nelson, Deputy Director of OFARR, in this newsletter.

[6] HB 7121 was signed into law as Chapter 2012-101, Laws of Florida.

[7] §120.745, Fla. Stat. (2011).

[8] §120.7455, Fla. Stat. (2011).

[9] Pounding the Shakespearian analogies into the ground, the reference is to Lawrence E. Sellers, Jr., *The 2012 Amendments to the APA: The Legislature Responds to Whiley – and More*, Administrative Law Section Newsletter, Vol. XXXIII, No. 3 (April 2012).

[10] Ch. 120, Fla. Stat. Although you already knew that, the forms of academe must be maintained. "O ceremony, show me but thy worth." *Henry V*, Act 4, sc. 1.

[11] §120.541(3), Fla. Stat. (2011).

[12] For a thorough treatment of the changes to §120.55, F.S., see the forthcoming article by Daniel E. Nordby, Esq.

[13] Title 37, FAC.

[14] Chapter 38I-40, FAC

[15] Chapters 8K-1, 8K-2, 8M-1, 8M-2, 8M-3, FAC.

[16] *Florida Department of Revenue v. A. Duda & Sons, Inc.*, 608 So. 2d 881 (Fla. 5th DCA 1992), (quoting *Hulmes v. Division of Retirement*, 418 So. 2d 269, 270 (Fla. 1st DCA 1982)), rev. den. 426 So. 2d 26 (Fla. 1983). *See also Mednet Connect, Inc., et al. v. Agency for Health Care Administration*, Rec. Order, s. 117, DOAH Case No. 04-2978, at 2006 WL 2331282 (Fla. Div. Admin. Hrgs.) (citing *Canal Insurance Co. v. Continental Casualty Co.,* 489 So. 2d 136 (Fla. 2d DCA 1986) and *Hulmes*, supra at 270.

[17] *Office of Insurance Regulation v. Service Insurance Company*, 50 So. 3d 637 (Fla. 1st DCA 2011); *Hulmes,* supra at 270.

[18] §120.54(3)(a)1., Fla. Stat. (2011).

[19] House of Representatives, "Final Bill Analysis, Bill #: HB 7029 (SB 1470)," pp. 2 – 3 and notes 13-19 (March 30, 2012), [herein "HB 7029 Analysis"], available at http://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=48424 (accessed 5/11/2012).

[20] Ch. 2012-31, §1, Laws of Fla.

[21] §§120.536(1) and 120.54(3)(a)1., Fla. Stat. (2011).

[22] §120.54(2), Fla. Stat. (2011).

[23] §120.54(1)(b), Fla. Stat. (2011).

[24] §120.56(1)(d), Fla. Stat. (2011).

[25] Ch. 2012-31, §1, cl. 120.536(2)(a), Laws of Fla.

[26] Ch. 2012-31, §2, Laws of Fla.

[27] For an example of the effect of all three types of repealers, see the historical notes in Ch. 2012-31, §12, Laws of Fla.

[28] §120.54(3)(a)1., Fla. Stat. (2011).

[29] *Canal Insurance Co.*, supra at 138.

[30] §120.55(1)(a)1., Fla. Stat. (2011).

[31] The bill as signed into law required publication of various notices in the Florida Administrative Weekly. Chapter 2012-63, §2, Laws of Fla., subsequently amended §120.55(1)(b), Fla. Stat. to change the name of the publication to "Florida Administrative Register," among other revisions. As the process of statutory compilation and revision (see §11.242(2), Fla. Stat.) will conform Ch. 2012-31, Laws of Fla., with the amendments in Ch. 2012-63, §2, this article uses the later-enacted term.

[32] §120.56(2)(a), Fla. Stat. (2011).

[33] §§120.56, 120.569, 120.57, 120.68, Fla. Stat. (2011).

[34] §11.242(1), Fla. Stat. (2011).

[35] §11.242(5), Fla. Stat. (2011).

[36] §11.242(5)(i), Fla. Stat. (2011).

[37] Ch. 2012-116, §9, Laws of Fla.

[38] §120.536(1), Fla. Stat. (2011).

[39] "(T)he King himself will be a clipper." *Henry V*, Act 4, sc. 1.

[40] Ch. 2012-31, §§3, 4, 5, 6, 7, Laws of Fla.

[41] HB 7029 Analysis, 5.

[42] Ch. 2012-31, §15, Laws of Fla.

[43] Ch. 2012-31, §§8, 12, 13, Laws of Fla.

[44] Ch. 2012-31, §10, Laws of Fla., nullifying Rules 10D-116.004(4), 10D-116.006(4), and 10D-116.007, FAC.

[45] The rules and subsections of Chapter 10D-116, FAC, not nullified outright by the bill, and Rules 10D-124.003 and 10D-124.004, FAC.

[46] Chapter 38J-1, FAC.

[47] Ch. 2012-31, §§9, 11, 14, Laws of Fla.

[48] Ch. 2012-31, §15, Laws of Fla.

[49] Ch. 2012-116, §§10-57, Laws of Fla.

[50] House of Representatives, "Final Bill Analysis, Bill #: CS/HB 7055 (CS/SB 1312)," pp. 14 - 19 (April 16, 2012), [herein "HB 7055 Analysis"], available at http://myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=48941 (accessed 5/11/2012).

[51] Lawrence E. Sellers, Jr., *Governor's Rules Freeze: Supreme Court Says Legislative Power Trumps "Supreme Executive Power,"* Administrative Law Section Newsletter, Vol. XXXIII, No. 1, 1, 14-15 (September 2011).

[52] Chief Justice Canady and Justice Polston in dissent, 79 So. 3d at 717-726.

[53] Ch. 2012-116, §2, Laws of Fla.

[54] Ch. 2012-116, §1, Laws of Fla. This article presents only a brief summary of the detailed and extensive findings. Interested readers are best served by referring directly to the full text of the bill.

[55] For example, subsection (9) of the findings reads together §§1(a) and 6, Article IV, Florida Constitution. Properly construed, these sections preclude any implication that the Legislature created a class of unelected subordinates able to exercise executive power independent from supervision by the elected officials to whom the executive power is assigned by the Constitution.

[56] Ch. 2012-116, §1(26)(d), Laws of Fla.

[57] Ch. 2012-116, §§4, 5, 6, Laws of Fla.

[58] §120.54(1)(k), Fla. Stat. (2011).

[59] "Staff presentation on implementation of HB 993 (2011) (Ch. 2011-225) and on current results of online regulatory survey," meeting notice, meeting packet, and video archive at http://myfloridahouse.gov/Sections/Committees/committeesdetail.aspx?SessionId=70&CommitteeId=2618 (accessed 5/11/2012).

[60] With apologies to the Bard.

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