ADMINISTRATIVE LAW SECTION NEWSLETTER

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From the Chair

by Gary Stephens

This is my first time to address you *ex cathedra*, as it were, and I can't promise you that this title will survive. Both the tendency to speak from the seat of one's pants, and earlier involvements with Florida correctional system make the idea of speaking "from the chair" less than optimal.

In any case, this will be a first shot at some of the interests and activities for which I hope the Administrative Law Section will be able to serve as a catalyst. The first job has been just to keep the train running. In that regard, we have been fortunate to enlist the help and leadership of several especially talented people to chair important committees (is "chair" *really* a verb—I chair, you chair, we chair??). The Chair of the Administrative Law Conference Committee is William Williams, a former DOAH hearing officer and familiar (dimpled) face in administrative law circles. Bill has assembled a diverse crowd of people to help him orchestrate an Administrative Law Conference to be remembered. More information about the conference, scheduled for the second week in September, appears elsewhere in this newsletter.

Secondly, Linda Rigot has graciously agreed to head a new Publications Committee which will coordinate under one umbrella the Section's various publications opportunities. Linda has already lined up excellent people as well to ensure quality content in both the Section newsletter and the Florida Bar *Journal*.

Third, Bill Dorsey has agreed to assume leadership of the Section's CLE Committee which includes not only putting on CLE programs for the Section but also participating in the increasingly significant and high-profile CLE Committee of the Florida Bar. I have also asked Bill, and other members of the Section as well, to make suggestions for fundamentally rethinking our CLE activities and format.

Other appointments and committee assignments will be announced shortly, including a couple of ad hoc committees intended to plow some new ground. I was very pleased to see the significant response to our Committee Preference Questionnaire and hope that we will be able to utilize the energy and experience of a much wider circle of administrative lawyers.

Having had the good fortune of being in law school during the gestation period of Florida's Administrative Procedure Act, I am especially mindful of its historic evolution. Some agencies, for example, came to life and organized their earliest activities around Chapter 120 precepts. Still other agencies have decided only recently to have a look. What-

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ever the extent of agency integration, however, I sense that we are in a new period of inquiry and examination about the nature of disputes involving agency policies and actions, what prerequisites there are for the initiation of such proceedings, and how effectively closure can be achieved through current practices. I am hopeful that these concerns will be reflected in our Section's activities and that you will seize this opportunity to participate actively in the Section and in deliberations concerning administrative procedures and dispute resolution mechanisms.

We look forward to hearing from you.

Eighth Administrative Law Conference To Be Held in Tallahassee September 13-14, 1991

by William E. Williams
Huey, Guilday, Kuersteiner & Tucker, Tallahassee

Lt. Governor Buddy MacKay and Author David Osborne will headline the Eighth Administrative Law Conference to be held in Tallahassee at the Center for Professional Development and Public Services on Friday and Saturday, September 13 and 14, 1991. The Administrative Law Conference, which serves as the largest single educational and social event sponsored by the Administrative Law Section, will address a variety of topics this year. Primary among them will be a follow-up to last year's conference which dealt with rulemaking under the Administrative Procedure Act. This year the conference will include discussions of recent legislative changes to the APA dealing with agency policy, and will also include panel discussions concerning potential amendments to the APA focusing on streamlining the rulemaking process.

Lt. Governor Buddy MacKay will deliver the keynote address, emphasizing the current administration's views of the role of the APA in implementing executive branch programs, and potential changes in the rulemaking process to assist in reaching that goal. Following Lt. Governor MacKay, author David Osborne, whose books *Laboratories of Democracy and Reinventing Government* have been extremely influential in the Chiles administration, will address the conference. *Reinventing Government*, which will be published in February 1992, describes how public sector institutions across America are transforming the bureaucratic models they have inherited from the past, making government more flexible, creative and entrepreneurial.

Professors Johnny C. Burris of Nova University, Stephen T. Maher of the University of Miami, and Patricia A. Dore of Florida State University will participate in a panel discussion providing an academic perspective of rulemaking and agency policy under the Administrative Procedure Act. In addition, a panel moderated by Steve Pfeiffer, General Counsel of the Department of Community Affairs, along with Senator Kenneth Jenne, Senator Curt Kiser, Representative Mary Figg and either Lt. Governor MacKay or another representative of the executive branch, will discuss recent legislative changes to and proposed changes in the Administrative Procedure Act as they relate to agency policy and rulemaking.

Rounding out the Friday program will be a panel discussion of the alternative dispute resolution or mediation process and whether it can be tailored to serve as an effective tool in governmental decision making under the APA. Sharyn Smith, Director of Division of Administrative Hearings will serve as panel moderator, and will be joined by Representative Everett Kelly, Gary Stephens, Chair of the Administrative Law Section, Circuit Judge Matthew Stevenson, Richard Grosso, General Counsel of 1000 Friends of Florida, and Jack McRay, General Counsel of the Department of Professional Regulation. This panel discussion will be followed by a reception and cocktail hour.

Saturday morning will be kicked off with a continental breakfast followed by a panel discussion of the current status of competitive bid disputes under the APA since the Florida Supreme Court decision in *Grove-Watkins*. Donna Stinson of Tallahassee will moderate the panel, and will be joined by Susan Kirkland, General Counsel of the Department of General Services; George Banks, Director of the Division of Purchasing in the Department of General Services; Steven Ferst, Assistant General Counsel with the Department of Corrections; Thornton Williams, General Counsel in the Department of Transportation and William E. Williams of Tallahassee.

Professor Johnny C. Burris of Nova University will provide an overview of significant administrative law cases decided by the appellate courts in Florida in the past year, and the conference will conclude with a panel discussion of the ethnics of representing clients in formal and informal proceedings under the Administrative Procedure Act. Panelists include Dan Thompson, General Counsel of the Department of Environmental Regulation; David Guest, Managing Attorney of the Sierra Club Legal Defense Fund; Gerald Jaski, General Counsel, Florida State University; and Carlos Alvarez of Tallahassee.

Participants in the Administrative Law Conference will receive ten continuing legal education credit hours in Administrative and Governmental Law or General Practice; five hours in Environmental Law, Corporation and Business Law or Appellate Practice; and 7.5 hours' certification credit in civil trial. In addition participants will receive for the first time one hour credit toward their CLE requirement for Ethics. The $50.00 registration fee makes the conference probably the best CLE bargain offered by The Florida Bar.

The agency policy and rulemaking portions of the program should afford an excellent insight into the assessments of the legislative and executive branches and the academic community of the continuing vitality of the APA and changes considered advisable to insure continued governmental responsiveness and public access to the decision making process. Other panel discussions in the specific areas noted above will afford practitioners insights into those areas of concern and an opportunity to question panel members with experience in these more specialized areas of administrative practice. We look forward to seeing all of you at the conference in September.

REGISTRATION FORM

Register me for Eighth Administrative Law Conference, September 13-14, 1991, Tallahassee (053)

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____

PG:C7082

Return with your check in the amount of $50, payable to The Florida Bar, to:

The Florida Bar
CLE Registrations
650 Apalachee Parkway
Tallahassee, FL 32399-2300

All requests for refunds will be honored if postmarked by September 2, 1991. No refunds will be given after that time. For a copy of the conference agenda, call Peg Griffin, 904/561-5621.

Preparing the Proposed Recommended Order

by John D. C. Newton II
Aurell, Radey, Hinkle & Thomas, Tallahassee

Writing is writing. Preparing a proposed recommended order is no different from any other type of writing. In any writing the author needs to know three things and let them guide her writing. They are: (1) the rules, (2) the audience, and (3) the purpose. Once you know these things you can shape your writing accordingly. This article will examine these three factors in the context of preparing proposed recommended orders and then make some recommendations for preparing the orders.

The Rules

The rules are mercifully few and unrestrictive. All parties must have an opportunity to submit proposed findings of fact and proposed orders.[1] Findings of fact, and therefore proposed findings of fact, must be based on evidence of record, matters officially recognized, or fair inferences from the evidence.[2] Hearsay alone is not sufficient to support a proposed finding of fact. But unobjected to hearsay will support a finding of fact. It probably should not since Section 120.58(1), Florida Statutes (1989) states hearsay is not sufficient to support a finding of fact unless it would be admissible over objection in a civil proceeding. But the First District Court of Appeal said in *Tri-State Systems v. Department of Transportation*[3] that it will. The only prudent course is to politely object to all hearsay. Ideally the hearing officer and the parties will agree to a standing objection to all hearsay or the hearing officer will rule that no findings of fact will be based upon hearsay alone.

Parties may file proposed recommended orders within a time period designated by the Hearing Officer.[4] The designated time period is usually ten days after the hearing ends or, if the parties order a transcript, after the transcript is filed. If the parties agree to submit proposed recommended orders more than ten days after the hearing ends or the transcript of the hearing is filed, they waive the requirement of Florida Administrative Code Rule 28-5.402 that the hearing officer file a recommended order within thirty days after the hearing concludes or the division receives the transcript.[5] All proposed recommended orders must be filed on 8 1/2 inch by 11 inch paper.[6] An original and one copy must be filed with the division.[7] You must file the proposed recommended order at the division before 5:00 p.m. of the day that it is due.[8]

Parties cannot file proposed recommended orders longer than forty pages unless the hearing officer grants permission. Proposed findings of fact must be supported by citations to the record.[9]

The hearing officer must issue a recommended order consisting of findings of fact, conclusions of law, interpretations of agency rules, and other information required by law.[10] The hearing officer must rule individually and specifically on each proposed finding. The ruling should state why the finding is rejected.[11] Ideally, proposed findings should be ruled upon by reference to specific numbered paragraphs. But any order that identifies the rejected findings and the reasons for rejection in some recognizable fashion will suffice.[12]

Proposed findings may be rejected as subordinate, immaterial, or irrelevant.[13] But just what is subordinate, immaterial, or irrelevant remains a mystery.[14] The best way to deal with this rule is to not let it intimidate you. Hearing officers are unpredictable in how they apply this incantation. Fear of proposing something that may be labeled subordinate, immaterial, or irrelevant should not stop you from proposing a fact that you believe is a relevant part of your presentation.

Florida Administrative Code Rules 22I-6.002 and 28-5.103 govern how time will be computed in applying the rules of the Division of Administrative Hearings. Florida Administrative Code Rules 22I-6.016 and 28-5.204 authorize the filing of motions to obtain relief.

The relief that you are most likely to need at the proposed order stage is additional time to prepare your proposed order or permission to exceed forty pages. You should not be shy about seeking additional time. Sound writing

is time consuming and demands reflection. Avoid seeking to file proposed orders longer than forty pages. Very few cases require that much writing. If your proposed order exceeds forty pages, it probably contains superfluous and redundant material. Revise and edit it. Also put yourself in the shoes of a hearing officer trying to wade through forty pages of proposed order and consider what it would do to your attention span. Those two exercises will probably result in a shorter proposed order.

The Audiences of a Proposed Recommended Order

A proposed recommended order has three audiences. The hearing officer is the primary audience. This is the person that you want to simultaneously persuade of the righteousness of your position, require to make favorable findings, and prevent from making unfavorable findings.

The agency and the district courts of appeal are the secondary audiences of the proposed recommended order. These are the audiences that will look to see if you have fulfilled all technical requirements and preserved the alleged error.

Hearing officers are generally bright, responsible, diligent people. They will do their best to read the parties' pleadings and understand their cases. But they are also human beings. This has some inevitable effects upon the way they view proposed recommended orders. Hearing officers will not always be the most enthusiastic audience. Your hearing officer may have seen a hundred cases generally like yours. Despite her best intentions, this is likely to affect the way your case is received and tint her view with some preconceptions. To some degree, probably unconsciously, the hearing officer will make up her mind during the hearing.

Different hearing officers have different approaches to writing proposed orders. Two are most likely. The first is to avoid reaching a conclusion and to set the case aside until receiving the proposed orders. After receiving the proposed orders, the hearing officer reads them and then reviews the record before reaching her conclusions and beginning her recommended order. This is probably the model most people assume. It is probably not the only way things are done.

The second approach is just as valid. Some hearing officers have serious doubts about the usefulness of proposed recommended orders. They may draft their recommended order well before the parties file proposed orders. Some write them on the airplane on the way back from the hearing. A hearing officer who uses this approach will likely use the proposed recommended order because she has to rule on proposed findings, as an aid to locate support for a conclusion, to verify her recollection of the evidence, and to determine if she has overlooked or misapprehended anything.

Whatever her style may be, the hearing officer probably does not know as much about the subject or remember as much about the case as lawyers are prone to assume. The hearing officer is very busy with a large number of pending cases and has reams of paper to review. Most hearing officers travel extensively and have a limited amount of uninterrupted time in the office to write orders. This means that they will usually be writing in a hurry. Keep the circumstances in mind when writing the proposed recommended order. They make clear, simple, brief proposed orders essential.

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

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The Purposes of the Proposed Recommended Order

The proposed recommended order serves three purposes. The first is to persuade the hearing officer of your view of the evidence and the law.

The second is to assist the hearing officer in making findings of fact and conclusions of law. The easier you make it for the hearing officer to rule for your client, the more likely you obtain a favorable result.

The third is to identify and preserve all issues that must be ruled upon by the hearing officer, the agency, or any court reviewing the proceeding. The issues to preserve are factual and legal. You must propose the factual basis needed to support your legal positions. For instance, if you are arguing that the Department of Environmental Regulation has jurisdiction over a piece of land, you must be sure to propose the facts, such as the presence of wetlands vegetation, that would support the legal conclusion.

All three purposes are advanced by precise writing.

Writing the Proposed Recommended Order

Preparation of a proposed order begins before the hearing, continues through the hearing, and ends after the hearing. The first step is identifying legal issues, determining what you must prove or stop your opponent from proving, and deciding what evidence will support your position. The outlines and plans that you develop for final hearing are often the best place to start preparing your proposed recommended order. Ideally, you should review your notes from the hearing shortly after the hearing and create some sort of rough draft utilizing your trial outline.

For anything but a very short hearing, it is usually wise to summarize the transcript of testimony and exhibits. Develop a system for keying sections of your summary to the various issues to which they are relevant. One old fashioned method is to list each issue separately at the top of separate pages. As you review the testimony and exhibits, note information on the page for each issue to which it is relevant.

For instance, in a professional discipline case an expert's testimony that a doctor's procedure was negligent, but a common mistake, and had not harmed the patient would be listed on the pages for "punishment-degree of injury" and "negligence." This is just one approach. There are many. The computer literate have very sophisticated options. It is important to develop some system.

Summarizing a transcript page by page in numerical order is not particularly helpful. It also leads to organizational problems and wasted time in writing.

A page by page summary wastes time because it requires reading and re-reading both the summary and the transcript. It creates organizational problems because it encourages organizing the proposed order in the same way that evidence was presented at trial. That is usually the worst form of organization.

Rational organization is important. Different approaches are best for different types of cases. Chronological organization is one approach. It might be useful when the issue is whether a doctor had sex with a patient. But it might be useless in a certificate of need or growth management case. Organization by legal issue is another approach. It seems to work well in permitting or licensure types of cases. Any logical organization is fine. Organization that simply follows the sequence in which information was presented at the hearing is almost always bad.

Include enough background information, factual and legal, to orient the hearing officer to your case. Do not assume that the hearing officer knows all about your case or the applicable law. But do not make the background information burdensome or tedious. Make each proposed finding brief. That way the hearing officer looking for specific material can easily find it. The easier a proposed order is to use, the more likely the hearing officer is to use it.

In the ideal world you will prepare your proposed recommended order in time to let it sit before you review and revise it. If possible, have another lawyer review your proposed order. There has not yet been the writer who cannot benefit from an editor.

Findings of Fact are the first and most important part of a proposed recommended order. To a large extent the hearing officer has the final say on them. Review is very limited, and relief from factual findings is

rare. Consequently you should propose facts that support the conclusion you advocate and lead the hearing officer to that conclusion.

Brief proposed findings in numbered paragraphs are most effective. Broad statements are not helpful and are easier to reject. For instance a broad statement that wetlands vegetation was growing on a piece of land, followed by a string of page citations, is not likely to help someone trying to establish Department of Environmental Regulation jurisdiction over some property. It assumes too much, such as what vegetation would establish jurisdiction, and includes a conclusion of law. On review, persuading a court or agency to undertake the tedious task of reconstructing the inferences and conclusions that could be drawn from the myriad pages cited is unlikely. Smaller more specific findings help avoid the problem. It would be better to propose a series of findings as follows. Sawgrass grows in the northeastern quarter of the property. Sawgrass grows only within 5 feet of salt water bodies. Wetlands vegetation is vegetation that grows only within 5 feet of salt water.

Each sentence should be proposed in a separately numbered paragraph. These types of findings are more difficult for the hearing officer to reject with a broad dismissal. They are easier to consider because each one requires review of less record. They are more persuasive because they lead the hearing officer step by step through the logical process leading to your conclusion.

This is not to say you should propose everything. Findings of fact should be limited to relevant and truly factual determinations. They should be limited to the essential determinations necessary to a resolution of the dispute. There is no need to talk about what individual blades of sawgrass look like or the damage that they did to the unsuspecting European explorers. That testimony may have helped explain your position during the hearing. But it is not necessarily a proper subject for a finding of fact.

Findings of fact should not be summaries of testimony. This is a frequent complaint of hearing officers. Summaries of testimony are also easy for the hearing officer to reject as "mere recitations of testimony." Findings should be the facts that can be concluded from the testimony.

Summaries of testimony can also make it easier for an agency to reject a favorable order. *Houle v. Department of Environmental Regulation*, 10 F.A.L.R. 3671 is a good example of this. There the hearing officer "found" testimony of two witnesses and based his recommendation in part on these findings. The agency rejected the findings as not true findings. It then went on to change the result unencumbered by the findings. If the hearing officer had found that there were no crayfish burrows on the land instead of what the various witnesses said they observed, the agency would have had less of an opportunity to change the recommendation.

All relevant evidence is not necessarily something that should be in a finding of fact. Some evidence may be needed in the hearing to set the scene or tell the story. It may be useful in argument to persuade. Or it may help enhance or undermine a witness's credibility. But as a finding of fact the testimony may be irrelevant. One example of this is evidence impeaching a witness. It is important in the hearing and should be relied upon in your argument. It is not, however, a relevant finding of fact.

Argument belongs in the argument section of a proposed order, not in the findings of fact. Hearing officers universally prefer it that way. Including argument in your findings tends to undermine the credibility of your findings. It also makes them easier to reject.

Professional discipline cases present special problems. The lawyer for the professional should take the approach of a criminal lawyer. Hold the prosecutor to his burden of proof. Less is usually more. The biggest danger is proposing too many facts. The burden is on the prosecuting agency. The professional's lawyer should concentrate on proposing only facts that are favorable. The prosecutor should be aware of the burden to prove a violation by clear and convincing evidence.

Both sides of a professional discipline case should also remember to propose findings that are relevant to punishment. Most agencies have rules listing various mitigating and aggravating factors to consider. Propose findings relevant to the factors and you are more liable to receive a penalty you find acceptable. It is also more likely to be safe from revision by the agency.

Conclusions of law should state the relevant legal principles governing the proceeding. You should not assume that the hearing officer knows all of the applicable legal principles. The conclusions should apply the principles specifically to your case.

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Conclusions of law should articulate your view of any disputed issues of law. As a practical matter, hearing officers often determine how the agencies and courts interpret statutes. Lawyers should recognize this *de facto* role and present their legal argument to the hearing officer, not wait until they file briefs with the district court of appeal.

Also, as a practical matter, the hearing officer may give your legal analysis more careful attention than a court or an agency. Hearing officers are lawyers who do not have as many opportunities as district court of appeal judges and clerks to analyze interesting legal issues. Consequently, they may pay more attention to them. Agencies for the most part avoid indulging in detailed legal analysis. They tend to adopt the hearing officer's analysis or issue *ipse dixit* statements.

Conclusions of law must also include the ultimate determinations that amount to a statement of the legal effect of the facts proposed. They can contain argument about the evidence.

Argument is most effectively made in a separate section of the proposed recommended order called "Analysis" or even in a separate memorandum. This is the most overlooked part of proposed orders. It is the equivalent of closing argument in a jury trial. The argument is where you can explain the inferences that should be drawn from the evidence or why a witness is not credible. Parties, such as the Department of Professional Regulation, with an unusual burden of proof should include analysis and argument about why their evidence meets the burden. Pointing out inconsistencies in the opposition's evidence and the strength of your evidence, deficiencies in a witness's ability to observe, and errors in facts relied upon by an expert are examples of ways to argue for your view of evidence.

Each of these suggestions relates in some way to one or more of the purposes of the proposed order or the nature of your audiences. The test for whether any sentence, phrase, or even word leaves your office in the final version of the proposed order should be whether it advances one of the purposes or accommodates one of the audiences.

Conclusion

Obviously the proposed order is a critical part of any administrative case. It is your last chance to persuade the hearing officer, your first chance to persuade the agency and the appellate court, and your only chance to preserve most issues. It is well worth careful attention and a great deal of time. As you write and review the proposed recommended order, test each word to ensure that it serves a purpose. This is the way to better writing, regardless of the title the document bears.

This article is about the proposed recommended order. It is not, however, the only important pleading you file with a hearing officer. The pleadings you file earlier like the petition, motions, and pre-trial stipulations are equally important to persuading the hearing officer. Human beings will always reach some conclusions well before a case is over. Human beings also cannot avoid the tendency to be most persuaded by the argument that they hear first.

This is why opening arguments are so important in jury trials. Studies reveal that jurors often reach their conclusions before the plaintiff's or prosecutor's case is completed. Despite their training and discipline, hearing officers cannot escape the fact that, like jurors, they are human. You should recognize this human trait and tell your story well the first time you have an opportunity. If time permits and you have enough facts, the Petition for Formal Administrative Hearing is your first opportunity. Motions filed during pretrial matters are your second. If the hearing officer requires a pre-trial stipulation, it offers and excellent opportunity to tell your story just before the hearing starts. By then you will know your evidence and probably will not be giving away much to your opponent. However you do it, tell your story early and well if you have the opportunity. It will make your proposed recommended order all the more effective.

Footnotes

[1] §120.57, Fla. Stat. (1989); Fla. Admin. Code Rules 22I-6.031(1) & 28-5.401.

[2] §120.57(1)(b)8, Fla. Stat. (1989)

[3] *Tri-State Systems v. Department of Transportation*, 492 So.2d 1164 (Fla. 1st DCA, 1986). *But See Harris v. Game and Fresh Water Fish Commission*, 495 So.2d 806 (Fla. 1st DCA, 1986).

[4] Fla. Admin. Code Rule 22I-6.031(1).

[5] Fla. Admin. Code Rule 22I-6.031(2).

[6] Fla. Admin. Code Rule 22I-6.003(8).

[7] Fla. Admin. Code Rule 22I-6.003(1).

[8] Fla. Admin. Code Rule 22I-6.003(1) & (5).
[9] Fla. Admin. Code Rule 22I-6.031(3).
[10] §120.57(1)(b)9, Fla. Stat. (1989).
[11] *Island Harbor Beach Club, Ltd. v. Department of Natural Resources*, 476 So.2d 1350 (Fla. 1st DCA 1985), *app. after remand*, 495 So.2d 209 (Fla. 1st DCA 1986), *rev. den.* 503 So.2d 327 (Fla. 1987).
[12] *Health Care Management, Inc. v. Department of Health and Rehabilitative Services*, 479 So.2d 193 (Fla. 1st DCA 1985).
[13] *Iturralde v. Department of Professional Regulation*, 484 So.2d 1315 (Fla. 1st DCA 1986).
[14] *Compare, Health Care Management, Inc. v. Department of Health and Rehabilitative Services*, 479 So.2d 193 (Fla. 1st DCA 1985), Zehmer, J. dissenting with *Kinast v. Department of Professional Regulation*, 458 So.2d 1159 (Fla. 1st DCA 1984).

Legislative Report

by Bob L. Harris
Akerman, Senterfitt, Eidson & Moffitt, Tallahassee

The 1991 Florida Legislature considered a number of pieces of legislation which would have impacted administrative law practitioners, however, only a few bills made it through the process. The bills which *did* pass are as follows:

Agency Rulemaking (Ch. 91-30)—Reacting to increasingly expansive court decisions which have endorsed the practice of an agency to apply incipient non-rule policy on a case-by-case basis rather than undertake rulemaking, the Legislature saw fit to impose the burden on agencies to either adopt statements of agency policy as rules or take the chance of having such policy statements challenged and their applicability stayed. Presently, agencies have broad discretion in determining whether a statement of agency policy must be adopted as a rule of general applicability. By the creation of Section 120.535, which will take effect on March 1, 1992, a statement of agency policy can be challenged in a new form of proceeding as being not in conformance with rulemaking requirements. In accordance with the new law, the legislative intent is clearly that rulemaking will no longer he a discretionary act by the agency. There is now a clear presumption that rulemaking shall be undertaken unless the agency can establish that rulemaking is not feasible or practicable. The factors to be considered in determining feasibility and practicability are listed. Any person substantially affected by an agency statement may seek an administrative determination before DOAH. The decision of the hearing officer is final agency action. If a hearing officer determines that all or part of an agency statement violates Section 120.535, the agency shall immediately discontinue reliance upon the statement or any substantially similar statement as a basis of agency action. The agency can then seek relief by either proceeding to expeditiously and in good faith adopt rules which address the statement of agency policy, or the agency may seek a stay of the order of the hearing officer in the appellate court. Attorneys fees and costs may be available if an agency relies upon successfully challenged statements of policy as the basis for further agency action.

Agency Orders (Ch. 91-30)—In their oft-repeated version of "Friday the 13th," the Legislature allowed a piece of legislation which died in committee last year to "come back" when they enacted a number of changes to the method by which agencies are required to index and preserve agency orders. You may recall that Senator Curt Kiser had filed a very similar bill last year. The types of orders which must be indexed was expanded substantially and now include final agency orders resulting from 120.57(1) and (2), 120.57(3), 120.54(4) and 120.56 proceedings, and declaratory statements as well. The Department of State will establish by rule the procedures and criteria for each agency in the indexing and availability of orders. DOAH has also been authorized to direct a study and pilot program to implement a full text retrieval system to provide access to recommended orders, final orders and declaratory statements. Skeptics might note the coincidence that in this same piece of legislation was included both a number of restrictions on when statements of agency policy are to be promulgated as agency rules while at the same time agency orders containing statements of such policy are more likely to be readily accessible by the general public. Please also note that the original effective date of Ch. 91-30 was January 1, 1992 (before

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the next scheduled legislative session) but was extended to March 1, 1992 (which would be near the end of the next session) by subsequent legislation (Ch. 91-191, SB 2504). Stay tuned for further revisions.

Taxpayer Contest Proceedings (Ch. 91-112)—This amends Section 120.575 to authorize administrative proceedings for denial of refunds. Prior to the new law, such proceedings were limited to contesting the legality of assessments. This provision was effective on July 1, 1991.

Public Records—In what appears as a never-ending assault on the records of state agencies which are subject to public inspection, the Legislature enacted a number of additional exemptions, including: financial statements for bidders on road and public work projects (Ch. 91-96); addresses, home phone numbers and day care facilities of firefighters, state court judges and justices, and their families (Ch. 91-149); reports of abuse, neglect, or exploitation of aged persons or disabled adults, or children, that are subject to active criminal investigation; information about emotionally impaired adults, displaced homemakers, and clients of domestic violence centers (Ch. 91-71); and, formulas for pesticide products (Ch. 91-20).

There were a number of proposals which did not obtain final passage of the Legislature, but which may be revisited in the next session. Among those are:

Family Impact Statements (SB 1010, HB 797)—This would have required agencies to consider the impact of their policies and rules on the formation, maintenance, and general well-being of families. These so-called "family impact statements" would have required consideration of a number of factors including whether the action by the government strengthens or erodes the stability of the family or marital commitment, or does the policy or rule send a message to the public concerning the status of the family. This bill by Senator Dudley and Representative Webster passed out of the Senate Governmental Operations Committee but died in Appropriations.

Economic Impact Statements (CS/SB 1800)—This bill would have required substantial changes to the criteria considered in the development of rules by the various state agencies, most specifically the economic impact statements. Statements would have to consider the impact on other state or local governments, the number of new positions needed, the number of man-hours to be expended annually, and any anticipated effect on state revenue. Also, the Joint Administrative Procedures Committee, the Governor, a political subdivision, or at least 100 people signing a request, or an organization representing at least 100 persons, could request a review of the statement and issuance of a revised statement. This bill by Senator Thurman was passed as a committee substitute by Senate Governmental Operations Committee but died in the Senate Judiciary Committee.

As a point of information, the next legislative session will begin on January 12, 1992, and run for approximately 60 days. As many of you know, reapportionment has pushed the legislative schedule up quite a bit. Committee meetings will begin anew in September. No rest for the weary.

Executive Council Meeting Scheduled

The next meeting of the Administrative Law Section's Executive Council will take place Thursday, September 12, 1991, 2:30 p.m.–5:00 p.m., in Tallahassee. Interested section members are invited and encouraged to attend this, and all future meetings of the Executive Council. For further information, call Peg Griffin, 904/561-5621.

Case Notes

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

The court reversed a DPR final order in *McDonald v. Department of Professional Regulation, Board of Pilot Commissioners*, 1st DCA, No. 89-246, June 13, 1991. The court observed that DPR had the burden of proving the appellant harbor pilot negligent as a predicate to disciplinary action and DPR would not be allowed to formulate favorable evidentiary presumptions to help it carry that burden. The Pilot Board has no such implied power. Where an agency is acting pursuant to disciplinary statutes, those statutes will be narrowly construed to make sure that the agency does not escape its burden of proving specific acts to justify disciplinary penalties.

Similarly, in *Schiffman v. Department of Professional Regulation, Board of Pharmacy*, 1st DCA, No. 90-1838, June 13, 1991, DPR's pharmacy board, acting pursuant to its disciplinary statute, was found not to have authority to *permanently* revoke a pharmacist's license and the board's order was reversed.

In a third disciplinary case, Section 120.57(1)(b)10 was interpreted in *Inlet Mortgage Company, Ltd. v. Department of Banking*, 16 FLW D1827 (Fla. 1st DCA, July 11, 1991, Case No. 90-3027) as requiring exact compliance with its directives before an agency could increase the penalty recommended by DOAH. Because the Comptroller in this case effectively increased the penalty without a review of the complete record (no transcript was made until after the final order was entered) and failed to state with particularity its reasons for increasing the penalty, the court reversed for further proceedings before the Comptroller.

Again in a disciplinary setting, a court showed sympathy for the entity proposed to be disciplined in *Patmilt Corp. v. Division of Alcoholic Beverages*, 16 FLW D1782 (Fla. 1st DCA, Case No. 90-3294, June 28, 1991). In that case, the court reversed the final order of the Division revoking appellant's liquor license. The Division argued that the appellant had waived its point of entry to formal administrative proceedings, but the court rejected that argument where the Division prepared a stipulated settlement within the time for requesting a hearing that contained a clause that provided that an administrative proceeding would be allowed if the agreement were not approved. When the agreement was not approved, the Division argued waiver because the agreement had not been returned during the time provided in the point of entry for requesting a formal administrative hearing.

Yet again in a disciplinary context, Section 120.57(1)(b)5 was construed to require attorney's fees in favor of a hospital and against HRS where HRS' conduct in totality amounted to bringing an administrative complaint for an "improper purpose." *Good Samaritan Hospital v. DHRS*, 16 FLW D1732 (Fla. 4th DCA, Case No. 90-3219, July 3, 1991). Good Samaritan reported another hospital to HRS in connection with a transfer of a patient from Good Samaritan to the other hospital. HRS then investigated Good Samaritan and its investigators reported that no complaint should be pursued against Good Samaritan. Thereafter, the investigators were told to reevaluate the case based upon unpromulgated policies of HRS and begrudgingly came to the conclusion that Good Samaritan could be found to violate the policies of HRS. HRS then filed an administrative complaint, a DOAH recommended order and HRS final order dismissed the complaint. The court held that the HRS position was not frivolous, but improper purpose could be found from HRS' failure to provide discovery and its unpromulgated policies so that Section 120.57(1)(b)5 was interpreted "in a way which protects from and discourages abuse of [agency] power."

The 4th and 5th Florida District Courts of Appeal have recently underscored the requirement that administrative agencies act consistently when faced with similar facts. In *Martin Memorial Hospital Assn. v. DHRS*, 16 FLW D1803 (Fla. 4th DCA, Case No. 91-0829, July 5, 1991), granted nonfinal review of HRS' decision to exclude petitioner's certificate-of-need application because a resolution accompanying petitioner's letter of intent used the term "within the cost guidelines specifically indicated" rather than the phrase "at or below the costs contained in the application." The court **reversed** and in so doing referred to other instances where

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HRS had accepted resolutions with the "guidelines" language in them and refused to strictly enforce a new HRS rule with citation to petitioner's contention that during HRS workshops the rule was not explained to require word-for-word use, but rather reasonable compliance and with citation to Section 381.709(2) as requiring substantial rather than exact compliance.

In *Central Florida Regional Hospital, Inc. v. DHRS*, ____ So.2d ____ (Fla. 5th DCA, Case No. 90-364, June 6, 1991), the court was faced with an appeal of an HRS final order denying a certificate of need where competing applications had been filed. As to one of those batched applications, the HRS initial decision to grant the application was not challenged and that certificate of need was finally issued by HRS. Then appellant's application was heard in a Section 120.57 hearing and ultimately HRS entered a final order denying the certificate based on a theory inconsistent with the issuance of the certificate to the co-batched and unchallenged applicant. The court stated that "it is axiomatic that administrative due process requires agency consistency among like petitioners" and that because need was established at the outset of a batch, then "the same rules should apply to all batched applicants whether the applications are challenged or not." HRS' final order was therefore **reversed.**

HRS won one in *DHRS v. Diane Cleavinger and Blountstown Care Center, Inc.*, 16 FLW D1583 (Fla. 1st DCA, Case No. 91-693, June 14, 1991), where on petition for review of a nonfinal order, the court quashed the order of a DOAH hearing officer as departing from the essential requirements of law because she required HRS to answer interrogatories instead of allowing HRS to simply produce records as permitted under the applicable discovery rule.

1991-92
Administrative Law Section
Committee Chairs

Administrative Law Conference Committee
William E. Williams
Huey, Guilday, Kuersteiner & Tucker
P.O. Box 1794
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904/224-7091

Continuing Legal Education Committee
William R. Dorsey, Jr.
Division of Administrative Hearings
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904/488-9675

Florida Bar/Section Liaison Committee
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Coral Gables, FL 33124
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Legislation Committee
Betty J. Steffens
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Long Range Planning Committee
G. Steven Pfeiffer
Department of Community Affairs
2740 Centerview Drive
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904/488-0410

Membership Committee
To be announced

Publications Committee
Linda M. Rigot
Division of Administrative Hearings
1230 Apalachee Parkway
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Minutes

Administrative Law Section
Executive Council Meeting
Friday, June 28, 1991
Orlando, Florida

Preliminary Matters

Members Present: William L. Hyde, Charles Gary Stephens, G. Steven Pfeiffer, Stephen T. Maher, Thomas M. Beason, Walter S. Crumbley, Linda M. Rigot, William R. Dorsey, Vivian F. Garfein, and Drucilla E. Bell.

Betty J. Steffens, Diane D. Tremor, and M. Catherine Lannon had contacted the Chair and were excused.

Peg Griffin and William E. Williams were also present.

Minutes: The minutes of the April 19, 1991, meeting of the Executive Council were approved.

Chair's Report

The chair presented his report in comments that he made regarding specific agenda items.

Old Business and Committee Reports

Budget Committee: The Section's financial statement and budget report were presented by Mr. Maher. He noted that the Section continues to maintain a large fund balance and advocated developing a program to interact with other sections with regard to administrative law issues. Mr. Maher agreed to pursue the matter and make a report at the next Executive Council meeting.

Continuing Legal Education Committee: Mr. Dorsey reported that the Continuing Legal Education Committee of the Bar met the prior day. He outlined the Section's present schedule to conduct CLE programs related to practice at the Division of Administrative Hearings in the Fall, and agency practice in the spring. There was discussion about the prospects of either modifying the Spring program, which has experienced declining attendance, or merging it with the Fall program. Mr. Dorsey suggested that a program devoted to bid dispute issues may be timely. He stated that he would report back to the Council at its next meeting.

Legislation Committee: Mr. Hyde led a discussion regarding the *Frankel* decision that curtailed lobbying activities undertaken by the Bar.

Newsletter Committee: Mr. Hyde complimented Ms. Lannon for her dedication in producing the newsletter during the past year, and emphasized the quality of the issues.

Administrative Law Conference: Mr. Williams reported that he had formed a work group, and had been looking at topics. He expressed a consensus on keeping the Conference as a one and one-half day event. He indicated that one hour CLE credit would be available for ethics, on account of including a session related to litigating matters before collegial bodies. The main topics for the Conference would be agency policy-making in view of recent revisions to the Administrative Procedure Act, and proposed revisions to simplify the rule adoption process.

Mr. Williams is hoping to land Lt. Governor Buddy MacKay as the keynote speaker. He wants to include small group discussions with group leaders from the legislative, administrative and private sectors. He stated that mediation or informal processes would also be addressed.

There was a discussion about who should receive complimentary admission, and who the luncheon speaker should be.

New Business

Liaison with DOAH: Mr. Hyde expressed a desire to assign a member of the Council to serve as a designated liaison with the Division of Administrative Hearings.

Comments Regarding Student Education: The Student Education and Admissions to the Bar Committee had once again adopted a resolution regarding a system of required experience for law students that would need to be completed prior to admission to the Bar. The Council, which has seen this resolution before, was unanimously opposed to it. Mr. Maher was particularly eloquent in opposition, characterizing the proposal as exceedingly unfair to law students and amounting to indentured servitude. He agreed to draft a resolution for the Council stating its

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strong opposition to the proposal and its wish that the issue be laid to rest permanently. The Council unanimously agreed to adopt a resolution in opposition to the Committee resolution.

Staff Travel: Mr. Hyde reported that the Bar's effort to require the sections to pay for staff travel had been voted down by the Bar Budget Committee.

Council of Sections Proposed Bylaws: Mr. Hyde reported that the Council of Sections Bylaws would be distributed and that the Administrative Law Section Executive Council will have an opportunity to comment upon proposals before they are adopted.

CLE Programs at Mid-Year Meetings: Mr. Hyde announced that the Bar had decided to discontinue the highly unsuccessful CLE programs at the mid-year meeting.

Nomination of Officers: Mr. Hyde announced that Mr. Cook had resigned from the Council.

The following candidates were nominated for officers:

Chair: Gary Stephens
Chair-Elect: Steve Pfeiffer
Secretary: Stephen Maher
Treasurer: Vivian Garfein

The following candidates were nominated for Executive Council terms that expire in 1993: Thomas M. Beason, Linda M. Rigot, Betty J. Steffens, Diane D. Tremor, and William E. Williams.

The following candidates were nominated for vacant Executive Council terms that expire in 1992: Michael Ruff, Ralf Brookes, and Mary Smallwood.

The nominations were closed.

Next Meeting: Mr. Hyde announced that the next Council meeting will be conducted on September 12, 1991, in Tallahassee, in conjunction with the Administrative Law Conference.

Adjournment: Upon motion and second, the meeting was adjourned.

Respectfully submitted,

G. Steven Pfeiffer,
Secretary

Another Point of Entry

Has one of the recent Administrative Law Section columns in The Florida Bar *Journal* or one of the recent articles in the Section's *Newsletter* inspired you to want to disagree with or praise the views expressed, but you had no forum? Have you wanted to share an experience or a concern with other administrative law practitioners, but you had no forum? Has any of your doodling on a yellow pad during an administrative hearing produced the ingredients for a cartoon or poem about the lighter side of the practice of administrative law, but you had no forum? Has it occurred to you that the on-going debate you have with one of your colleagues over the finer points of the practice of administrative law would be a great topic for a point/counterpoint pair of articles, but you had no forum?

This year's *Newsletter* will be expanded to provide a forum for Section members who want to contribute articles or practice tips, letters to the editor, some comic relief, or suggestions for changes in the practice of administrative law. You now have a new point of entry, a forum that will allow other practitioners to benefit from your thoughts and experiences. So, pick up your pen (or turn on your lap-top) and then send your contribution to Co-editors Veronica Donnelly or Cathy Lannon. We want to hear from you.

Linda M. Rigot
Chair, Publications Committee

Minutes

Administrative Law Section Annual Meeting
Friday, June 28, 1991
Orlando, Florida

Preliminary Matters

Members Present: William L. Hyde, Charles Gary Stephens, G. Steven Pfeiffer, Stephen T. Maher, Thomas M. Beason, Walter S. Crumbley, Linda M. Rigot, William R. Dorsey, Vivian F. Garfein, Drucilla E. Bell, and William E. Williams.

Out-Going Chair's Report

Mr. Hyde expressed satisfaction with his year as Chair of the Section. He stated that he would remain active as Immediate Past Chair. He presented awards to Gary Stephens for his work as Chair-Elect, to Bill Dorsey for his work with the Bar *Journal*, to Steve Pfeiffer for his work as Secretary, to Steve Maher for his work as Treasurer, and to Cathy Lannon for her work with the Newsletter.

Guests

Pat Seitz and John Fisher, candidates for President-Elect of the Florida Bar, appeared at the Section meeting and presented their platforms.

Tom Ervin, the Section's once and present liaison with the Board of Governors, attended the meeting and offered his assistance to the Section.

Election of Officers

The slate of officers and members of the Council that had been nominated by the Executive Council was nominated, and elected unanimously by the Section. The new officers and Council members for the 1991-92 year are as follows:

Chair: Gary Stephens
Chair-Elect: Steve Pfeiffer
Secretary: Stephen Maher
Treasurer: Vivian Garfein

Terms on the Council expiring in 1993: Thomas M. Beason, Linda M. Rigot, Betty J. Steffens, Diane D. Tremor, and William E. Williams.

Terms on the Council expiring in 1992: Michael Ruff, Ralf Brookes, and Mary Smallwood.

New Chair's Report

Mr. Stephens began his presentation by presenting an award on behalf of the Section to Mr. Hyde. The award recognizes Mr. Hyde's outstanding contributions during the past year.

Mr. Stephens expressed his continuing concern about the Section's identity and relationship with Sections that have overlapping interests. He expressed his desire to reach out to the Government Lawyers Section, and his interest in establishing a joint task force to look at local and regional government dispute resolution issues.

Mr. Stephens appointed Mr. Dorsey to chair the Continuing Legal Education Committee; Ms. Rigot to chair the Publications Committee, which would include the Newsletter, along with Catherine Lannon and Veronica Donnelly; Steve Pfeiffer to chair the Long Range Planning Committee; Steve Pfeiffer, Stephen Maher and himself to serve on the Council of Sections.

Mr. Stephens wants productive meetings with good attendance. He asked that committee reports be submitted in advance of the meetings.

Mr. Stephens expressed his excitement for meeting the challenges of the next year.

Adjournment

Upon motion and second, the meeting was adjourned.

Respectfully submitted,
G. Steven Pfeiffer,
Secretary

THE FLORIDA BAR
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1991-92 Administrative Law Section Budget

The budget outlined below was approved by the Administrative Law Section Executive Council at its January 1991 meeting, and was subsequently approved by the Board of Governors of The Florida Bar.

REVENUE		
Dues	$16,000	
Dues Retained by Bar	8,000	
Net Dues	$ 8,000	$8,000
CLE Seminars	$ 3,861	
Administrative Law Conf.	10,000	
Videotape Sales	200	
Audiotape Sales	364	
Interest	2,580	
Total Other Revenue	$17,005	$17,005
TOTAL REVENUE		$25,005
EXPENSES		
FAX	$ 150	
Postage	800	
Printing	300	
Officer/Council Office	500	
Newsletter	1,000	
Membership	750	
Supplies	50	
Photocopying	150	
Officer Travel	2,300	
Meeting Travel	500	
*CLE Speakers	100	
Committees	500	
Council Meetings	400	
Bar Annual Meeting	1,200	
Awards	250	
Administrative Law Conf.	12,500	
Other	100	
TOTAL EXPENSES	$21,550	$21,550

BEGINNING FUND BALANCE	$32,257
PLUS REVENUE	+ 25,005
LESS EXPENSES -	-21,550
OPERATING RESERVE -	-2,155
ENDING BALANCE	$33,557

All travel and office expense payments are in accordance with Standing Board Policy 5.23.

**The section has elected to reimburse CLE speakers in excess of the CLE policy limit of $50 per day for meals. The excess expenses reimbursed by the section require approval of the chair and are without limit.*