Administrative Law Section Newsletter

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From the Chair

by Dave Watkins

Greetings to my fellow administrative law practitioners. By way of introduction, I practice primarily health care and insurance regulatory law in a small firm in Tallahassee. My partner, a former DOAH ALJ, practices primarily in the environmental law arena. Although I have had the privilege to get to know many of you over the years, there are many more of you that I hope to hear from during my tenure as Chair of the Section.

This will be a challenging year for the Section, primarily due to the continuing threat to the APA posed by some members of the state legislature that seem intent on limiting the due process rights of private parties to challenge agency action. During the 2001 session, several bills were introduced that would have severely penalized private parties who had the audacity to challenge the preliminary decisions of administrative agencies, or appeal agency final orders.

For example, SB 910 provided that in cases involving judicial review of an agency decision resulting in the issuance of a license or permit, the appellate court "shall order any nonprevailing third party appellant to pay costs, damages, and attorney's fees" to the license/permit applicant. The bill was silent on the meaning of the word "damages" or how they would be quantified and assessed against the loser of the appeal. And a proposed amendment to CS/HB 339 would have required a challenger to a certificate of need decision to deposit in escrow the amount of the project (up to $500K) and to "pay all costs of litigation, including treble attorney fees" of the party that was issued the CON.

Fortunately, cooler heads ultimately prevailed, and neither of these bills passed. But consider the chilling effect such legislation would have on your clients' willingness to challenge agency decisions. For those of you in private practice, talk to your clients about these kinds of legislative proposals. And have your clients talk to their local legislators about the importance of preserving the full and fair opportunity to contest agency decisions that the APA now affords.

The Administrative Law Section played a significant role in opposing the above bills, and others that would have eroded the APA's due process protections. Once again, Bill Williams and Linda Rigot are to be commended for their outstanding work in keeping track of all bills that would impact the APA, and in effectively communicating the Section's

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Administrative Rulemaking After the 1999 Amendments to the APA:

Do We Have a Workable Standard (or, Is It "Specific" Enough)?

by Richard M. Ellis

When Section 120.536, F.S., was enacted in 1996, it was apparent to the administrative law community that a new day had dawned concerning administrative rulemaking.[1] All knew that the prior rulemaking regime--whereby rules had merely to be reasonably related to rule-enabling legislation, and neither arbitrary nor capricious[2]--had been legislatively overruled. Further, many, and maybe most, thought that the subject matter upon which valid

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positions to our lawmakers. Not surprisingly, I have requested that Linda and Bill continue their fine lobbying work on behalf of the Section, and they have graciously agreed to do so. I am also pleased that Curt Kiser has agreed to assist Linda and Bill in those efforts.

In addition to fending off assaults on the APA, the Section has undertaken an ambitious agenda for the coming year. Section CLE programs for the coming year will include the fall program, tentatively scheduled for October 12th, as well as the Pat Dore Administrative Law Conference to be held in the spring. Dan Stengle has agreed to serve as Chair of the fall program, and Ralph DeMeo will be chairing the Pat Dore Conference. Further details on these fine programs will be forthcoming shortly.

This year the Section will again be sponsoring the Administrative Law Student Writing Contest, with a sizable cash prize for the winning paper. In addition to the dinero, the winning article will be published as a Section column in The Florida Bar *Journal*. Thanks to Seann Frazier for agreeing to oversee the contest. When he calls your firm seeking contributions to the sizable cash prize, please give generously.

Publications have long been an important focus of the Section, and the coming year will be no exception. I am pleased to welcome Charlie Stampelos back as Chair of the Publications Committee. This fine Newsletter in your hand is the result of the hard work of many, but in particular, of Liz McArthur, who has selflessly agreed to serve another year as Editor. Please contact Liz if you have article ideas for the Newsletter, or would like to contribute an article. They are always welcome. Against the advice of many, Debbie Kearney has agreed to serve as the Florida Bar *Journal* Editor this year. The Section is allotted up to five *Journal* articles per publication year, and in the past we have been successful in filling most, if not all, of those slots. Please contact Debbie if you have an interest in authoring an article.

Joe McGlothlin will be serving as the P.U.L.C. Chair this year. For you public utilities law practitioners, please let Joe know if there are any issues that you would like to see the Section address in the coming year. Also, we are overdue for a Bar *Journal* article on a public utilities law topic, so I encourage those who practice in this area to contribute a piece for publication.

Our Council of Sections Liaison for this year is Cathy Lannon. She will keep our Section apprised of the activities of other sections, from whom we have stolen many good ideas in the past. More importantly, Cathy will serve as our voice at the Council meetings to help ensure that the concerns of the Section are communicated to our Bar leadership.

The next executive council meeting of the Section will take place at Melhana Plantation, in Thomasville, Georgia, later this fall. This retreat will be an opportunity for the Section to discuss long-range planning ideas and goals in a relaxed, informal setting. My thanks to Li Nelson for agreeing to serve not only as Long Range Planning Chair, but also as coordinator of the retreat.

The Membership Committee will be co-chaired by Booter Imhof and Christiana Moore. Although the Section now has over 1,100 members, new members are always welcome. Booter and Chris will be doing their best to see that membership opportunities are offered to all who may be interested.

As I said at the outset, I look forward to speaking with many of you during the coming year, and I welcome your comments and suggestions as to how we can make this Section more responsive to the needs of administrative law practitioners. Please feel free to call, write, or e-mail me (watkins@floridacourts.com) with any ideas you may have.

THE FLORIDA BAR

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The Recent Amendments to Chapter 287, Florida Statutes: Will They Really Change Florida's Procurement Practices?

by Karen D. Walker

The State of Florida spends approximately $12 billion each year on goods and services. These goods and services range from computers to accounting services to paper goods. On June 19, 2001, a new law took effect that could simply codify what has long been the practice of some agencies, or could dramatically change the way that agencies procure goods and services.[1]

Section 287.057, Florida Statutes, requires executive branch agencies, absent express statutory exception, to award all contracts for the purchase of commodities or contractual services in excess of $25,000 by competitive sealed bidding.[2] When an agency determines in writing that the use of competitive sealed bidding is not practicable, the agency must procure commodities or contractual services through competitive sealed proposals.[3] A written solicitation for competitive sealed bids is known as an invitation to bid or ITB. A written solicitation for competitive sealed proposals is known as a request for proposal or RFP. Prior to June 19, 2001, there was no statutory authority for the issuance of any type of solicitation document other than an ITB or RFP by an executive branch agency procuring commodities or contractual services in excess of the $25,000 threshold.

On May 4, 2001, during the waning hours of the 2001 regular legislative session, the Florida Legislature adopted Senate Bill 1738, which deals primarily with one-stop permitting and the use of technology in procurements. Governor Bush signed Senate Bill 1738 into law on June 19, 2001, and it became effective on that date.

Senate Bill 1738 includes language amending Chapter 287, Florida Statutes, which was adopted as part of a last-minute amendment to the bill that has little or nothing to do with one-stop permitting or online procurement.[4] This language provides that, in addition to ITBs and RFPs, an agency may use an invitation to negotiate or a request for quote to procure contracts for commodities and contractual services. An invitation to negotiate is defined as "a written solicitation that calls for responses to select one or more persons or business entities with which to commence negotiations for the procurement of commodities or contractual services."[5] The new amendments to Section 287.057 authorize the use of an invitation to negotiate where an "an agency determines that the use of an invitation to bid or a request for a proposal would not result in the best value to the state, based on factors, including, but not limited to, price, quality, design, and workmanship . . . ."[6] A request for quote is defined as "a solicitation that calls for pricing information for purposes of competitively selecting and procuring commodities and contractual services from qualified or registered vendors."[7] The new amendments to Section 287.057 authorize an agency to procure commodities or contractual services "by a request for quote from vendors under contract with the department."[8]

Invitations to negotiate and requests for quotes are "new" procurement methods only in a statutory sense. Notwithstanding the complete lack of statutory authority for invitations to negotiate or requests for quotes, some Florida executive branch agencies have been using these procurement methods for years.[9] Indeed, the Florida Department of Management Services ("DMS") has had a rule in place for years that describes an invitation to negotiate as a method of procurement that can be used by executive branch agencies, [10] and has even adopted a "State of Florida Invitation to Negotiate Acknowledgement" form.[11]

Agencies appear to favor invitations to negotiate because they provide agencies with greater flexibility in evaluating responses and reaching contract terms. However, from the bidder's perspective, these aspects of an invitation to negotiate make the procurement process less predictable and awards arising out of such solicitations more difficult to protest. Requests for quotes have been used in the past by some agencies to gather information from prospective vendors prior to making a decision to issue an ITB or RFP.[12]

Although some Florida executive branch agencies have been using invitations to negotiate and requests for quotes despite any pronouncement by the Florida Legislature that these procurement methods are permissible, the use of invitations to negotiate and requests for quotes is likely to increase as a result of the new amendments to Chapter 287. In fact, as of July 17, 2001, DMS' web site included advertisements for seven different invitations to negotiate issued by five different agencies.[13]

The practical effect of the use of invitations to negotiate and requests for quotes is that agencies will have greater flexibility to evaluate proposals, agree on contract terms and negotiate prices throughout the course of a procurement without necessary adherence to more rigid specifications and evaluation criteria required as part of an invitation to bid, and to a lesser extent, a request for proposal. This will allow for more discretion on the part of the agency in contracting for commodities and contractual services.

The most dramatic change in Florida procurement law could come from the language describing when a request for quote may be used by an agency. This language refers to an agency issuing a request for quote from vendors under contract with the "department." The term "department" is defined in Chapter 287, as DMS.[14] Thus, read literally, the new amendments to Chapter 287 could allow an agency to limit the field of

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bidders in a procurement using a request for quotes to only those persons or entities currently under contract with DMS. An editorial published in the *St. Petersburg Times* shortly following the end of the 2001 regular legislative session suggested that the language in SB 1738 amending Chapter 287 could allow executive branch agencies to use a request for quote to limit the field of bidders participating in a procurement to those entities currently under contract with the soliciting agency.[15] Governor Bush, however, responded to the *St. Petersburg Times* editorial, stating that the "request for quote" language in Senate Bill 1738 anticipates the circumstance where multiple vendors are qualified by reason of being on a state term contract and an agency then requests a quote from the multiple vendors negotiating for the best price under the state term contract cap.[16] A state term contract is an indefinite quantity contract executed by DMS that is in effect for a specified period of time and is available for use by all agencies and local governments.[17] Although the intent of the "request for quote" language in SB 1738 may have been that expressed by Governor Bush in his letter to the *St. Petersburg Times*, there is nothing in SB 1738 that limits the use of a request for quote to state term contracts in general, and specifically to state term contracts that have already been awarded by DMS to multiple vendors. Thus, there appears to be nothing in Chapter 287, as amended, to prohibit DMS from using a request for quote as a procurement method that is restricted to bidding by only those vendors currently under contract with DMS. Whether this is how the language regarding "request for quote" will actually be applied remains to be seen.

Endnotes:

[1] Ch. 2001-278, LAWS OF FLA.
[2] § 287.057(1), FLA. STAT. (2000).
[3] § 287.057(2), FLA. STAT. (2000).
[4] The amendment to SB 1738 containing the language amending Chapter 287 was first introduced in, and adopted by, the Florida Senate on May 2, 2001, just two days before the 2001 regular legislative session ended. *Journal of the Senate*, May 2, 2001, at 867, 872, 905 and 939. When SB 1738, as amended, was taken up by the Florida House of Representatives on May 4, 2001, Representatives Loranne Ausley offered an amendment that would have eliminated the language in SB 1738 relating to invitations to negotiate and requests for quotes. *Journal of the House of Representatives*, May 4, 2001, at 1999-2000. Representative Ausley's amendment failed by a vote of 60-53 and SB 1738, as amended by the Senate, passed the House on third reading by a vote of 96-19. *Journal of the House of Representatives*, May 4, 2001, at 2000; *see also* Nancy Cook Lauer, *Measure Changes Bidding Process*, TALLAHASSEE DEMOCRAT, May 5, 2001.
[5] Ch. 2001-278, LAWS OF FLA. (to be codified at § 287.012(20), FLA. STAT.)
[6] Ch. 2001-278, LAWS OF FLA. (to be codified at § 287.057(3), FLA. STAT.).
[7] Ch. 2001-278, LAWS OF FLA. (to be codified at § 287.012(21), FLA. STAT.).
[8] Ch. 2001-278, LAWS OF FLA. (to be codified at § 287.057(3), FLA. STAT.).
[9] Prior to June 19, 2001, Section 287.057 did authorize an agency to negotiate, but only if the agency first issued an ITB or RFP and less than two responsive bids or proposals were received. § 287.057(4), FLA. STAT. (2000). The words "invitation to negotiate" and "request for quote," however, appeared nowhere in the Florida Statutes prior to June 19, 2001.
[10] FLA. ADMIN. CODE R. 60A-1.001(2) (defining an invitation to negotiate as a "[c]ompetitive solicitation used when an Invitation to Bid of Request for Proposal is not practicable. . . ."); *see also Medimpact Health Care Sys., Inc. v. Department of Mgmt. Servs.*, 2000 WL 1754858, *5 (Fla. Div. Admin. Hrgs. Nov. 21, 2000) ("Invitations to negotiate do not enjoy the status of specific statutory recognition. The term "invitation to negotiate" is currently defined by a DMS rule . . . .").
[11] FLA. ADMIN. CODE R. 60A-1.002(7)(b).
[12] *Systems Dev. Corp. v. Department of Labor and Employment Sec.*, 1982 WL 214826, *2 (Fla. Div. Admin. Hrgs. Aug. 19, 1982).
[13] Department of Highway Safety and Motor Vehicles Invitation to Negotiate, Crash Record Data Entry, Imaging & Retrieval, Advertisement Number 022-01; Department of Highway Safety and Motor Vehicles Invitation to Negotiate, Telephone Services for the Department, Advertisement Number 032-01; Department of Agriculture Invitation to Negotiate, Removal and Disposal of Citrus Trees-Citrus Canker Eradication Program, Advertisement Number ITN/PI-01/02-05; Department of Children and Families Invitation to Negotiate, Lead Agency for Community-Based Care for Foster Care and Related Services for Broward County, Advertisement Number 10DASC-8-FS; Department of Health, Invitation to Negotiate, Statewide Needs Assessment Study, Advertisement Number DOH00-062; Department of Transportation Invitation to Negotiate, Automobile Accessories, Advertisement Number ITN-DOT-00/01-9040-RR; Department of Transportation, Invitation to Negotiate, Helicopter Transportation Services, Advertisement Number ITN-DOT-01/02-7001-OP.
[14] § 287.012(8), Fla. Stat. (2000).
[15] *Power and Patronage*, ST. PETERSBURG TIMES, May 13, 2001.
[16] Jeb Bush, *Measure Furthers Competition in State Purchasing*, ST. PETERSBURG TIMES, May 29, 2001.
[17] FLA. ADMIN. CODE R. 60A-1.001(5)(c).

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APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

City of Sarasota v. Department of Transportation, 26 Fla. L. Weekly 1090 (Fla. 1st DCA 2001)

The City of Sarasota and the Bridge Too High Committee (Committee) challenged DOT's decision to replace a drawbridge with a 65-foot fixed span bridge. Following an administrative hearing, DOT adopted the ALJ's recommended order, finding that DOT had not abused its discretion in approving the replacement. In addition, however, DOT adopted conclusions of law that its decision was not subject to review under Chapter 120, Fla. Stat., because it was part of the agency strategic plan and that the petitioners lacked standing to bring the action.

On appeal, the court affirmed the decision to replace the drawbridge with the fixed span structure; however, it rejected DOT's conclusions of law denying a point of entry and holding that the petitioners lacked standing. Without explication, the court held that the decision to replace the drawbridge was not part of DOT's strategic plan and, thus, exempt from the APA. Instead, it held that the decision was part of the development of a "major transportation improvement" under Section 339.155(6)(b), Fla. Stat., and constituted agency action. With respect to the petitioners' standing to file a petition for hearing, the court summarily rejected DOT's position, citing numerous cases to the contrary.

S.T. as Next Friend and Parent of S.F. v. School Board of Seminole County, 26 Fla. L. Weekly 1217 (Fla. 5th DCA 2001)

S.T. requested a probable cause hearing pursuant to Section 230.23(4), Fla. Stat., to contest the school board's denial of her request that her son be placed in Exceptional Student Education "Hospital/Homebound" status. The admin-istrative law judge, at the request of the school board, issued subpoenas duces tecum for depositions scheduled by the school board. S.T. objected to these discovery efforts.

S.T. sought a writ of prohibition from the circuit court judge, arguing that the administrative law judge did not have authority to compel discovery in a probable cause hearing under Section 230.23(4). The circuit court denied the writ, citing Section 1209.569(2)(f) which allows administrative law judges to effect discovery on the written request of any party "by any means available to the courts."

On appeal, the court reversed. It noted that Section 230.23(4) specifically provided that probable cause hearings are exempt from the provisions of Sections 120.569 and 120.57. It held that administrative law judges do not have independent authority, absent specific statutory authorization, to allow discovery.

Standing

Maverick Media Group, Inc. v. Department of Transportation, 26 Fla. L. Weekly 1595 (Fla. 1st DCA 2001)

Maverick filed a request for a formal administrative proceeding to challenge the denial of its billboard permit. DOT had denied the permit on the grounds that the proposed sign would be within 1000 feet of an existing permitted billboard in violation of department regulations. There was no dispute that there was an existing sign within 1000 feet of the proposed sign; however, Maverick alleged that the existing sign was not properly permitted.

DOT dismissed the petition for lack of standing. It held that Maverick did not have standing as a third party to challenge the validity of the permit for the existing sign, citing *Agrico Chemical Co. v. Department of Environmental Regulation*, 406 So. 2d 478 (Fla. 2d DCA 1981).

The court reversed. It held that DOT had applied an incorrect standard in determining that Maverick did not have standing. The court concluded that Maverick had standing under Section 120.52(12)(a) as a "[s]pecifically named [person] whose substantial interests are being determined in the proceeding." Thus, DOT had erred in requiring Maverick to establish its standing under Section 120.52(12)(b). In reaching this result, the court noted that Maverick was not a third party challenging another party's permit. Accordingly, the court distinguished this case from *Agrico* in which competing business interests attempted to challenge a permit to be issued to Agrico.

The court specifically adopted the reasoning of the Florida Supreme Court in *Lamar Advertising Co. v. Department of Transportation*, 490 So. 2d 1315 (Fla. 1986), in holding that an existing sign permit that becomes invalid for any reason cannot serve as an impediment to the issuance of a permit for a new sign, regardless of when or if DOT takes specific action to revoke the invalid permit. Because the petition alleged numerous bases for finding the existing sign permit to be invalid, the court remanded the case to DOT for further proceedings.

Judge Wolf dissented. He raised concerns in his dissent that DOT could find itself having a sign permit declared invalid in an ancillary permitting case but be unable to meet the test for revocation of that sign permit in the enforcement proceeding, resulting in signs being located too close together. He would have distinguished the Lamar decision on the grounds that the applicant in Lamar had a contractual relationship with the property owner of the land where the competing sign was located, effectively resulting in a special injury to the applicant.

Government in the Sunshine and Public Records Act

Soud v. Kendale, Inc., 26 Fla. L. weekly 1089 (Fla. 1st DCA 2001)

Kendale sought and received a temporary injunction from the circuit court prohibiting the City Council for the City of Jacksonville from meeting "in the shade" to consider objections from the Department of Community Affairs to a proposed land use amendment requested by Kendale.

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APPELLATE CASE NOTES

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The temporary injunction was issued without notice to the City.

On appeal, the City argued successfully that the temporary injunction should not have been issued without notice, in violation of Fla. R. Civ. Proc. 1.610(a)(2). At oral argument, the parties stipulated that the City had taken action on the issue in dispute, resulting in the controversy being moot. Initially, the court dismissed the appeal on that ground. On motion for rehearing by the City, however, the court reversed its prior decision, noting that Kendale had sought attorney's fees pursuant to Section 286.011, Fla. Stat. The court agreed with the City that the request for attorney's fees was a "collateral legal consequence" affecting the parties' rights. The court distinguished this case from *Lund v. Department of Health*, 708 So. 2d 645 (Fla. 1st DCA 1998), where the court held that the possibility of an award of attorney's fees was not a collateral legal consequence. It concluded that the possibility of an award of fees was less speculative in this case and constituted more than a lost opportunity to potentially recover fees.

Memorial Hospital-West Volusia, Inc. v. News-Journal Corporation, 26 Fla. L. Weekly 268 (Fla. 2001)

The Fifth District Court of Appeal certified the following question to the Supreme Court:

> SHOULD SECTION 395.3036 [FLORIDA STATUTES (SUPP. 1998)] BE APPLIED RETROACTIVELY?

Section 395.3036 provides that records of a private corporation that leases a public hospital are exempt from the Public Records Act and that meetings of the governing board need not be held in the Sunshine. The statutory exemption was adopted while a prior case between the parties seeking access to the corporate records was pending before the Court. The Fifth District held that the records were subject to disclosure under the Public Records Act but certified the issue of the retroactivity of Section 395.3036 to the Court.

The Court concluded that the right of access to public records is a substantive right. Thus, the adoption of a statute affecting that right is presumed to apply prospectively unless there is clear legislative intent to the contrary. West Volusia argued that language in the statute stating that it applied to "existing leases and future leases" evidenced an intent on the part of the Legislature to make the act retroactive. The Court disagreed. It held that that language could reasonably be read to exempt from disclosure records created after the effective date of the legislation that related to pre-existing leases. Since the Court found no clear legislative intent to make the act retroactive, it affirmed the lower court's decision.

Immediate Final Orders

Markus v. Department of Agriculture and Consumer Services, 26 Fla. L. Weekly 1024 (Fla. 3d DCA 2001)

The Markuses appealed an Immediate Final Order ("IFO") of the Department notifying them that certain citrus trees on their residential property might be destroyed if within 1900 feet of a tree infected with citrus canker. The IFO had been posted on their property with the number for a "Citrus Canker Helpline." When the Markuses called the helpline, they spoke with an employee of the Department who was unable to tell them whether their trees would be destroyed. They sought, but were denied, a stay of the IFO by the court; and the trees were subsequently destroyed. On appeal of the IFO, the court upheld the action of the Department, noting prior precedent that allowed the removal of apparently healthy but exposed trees. However, the court expressed great concern with the process of appealing an IFO in this type of situation. It noted that there was no meaningful appeal available to the property owners since the "'record on appeal' is an oxymoron." The court stated that it found the situation "unacceptable as a matter of law, policy, and principle" but felt compelled to affirm the IFO.

Statutory Construction

United Specialties of America v. Department of Revenue, 26 Fla. L. Weekly 1386 (Fla. 5th DCA 2001)

United Specialties of America and Kasam, Inc. appealed orders of the Department denying requests for refunds of taxes paid on kerosene sales. The appellants argued that the kerosene should not have been taxed since it was not being used as aviation fuel.

Section 206.9815, Fla. Stat., defined the terms "kerosene" and "aviation fuel" with respect to their use for aviation purposes. However, the exemptions from taxation in Section 206.9825 were more limited. Specifically, kerosene is exempt from taxation if "the dyeing and marking requirements of Section 206.8741 are met" or if it is sold in less that five gallon containers for home heating and cooking use. In this case, the appellants had sold undyed kerosene to retailers and hardware distributors for resale. There was no dispute that the kerosene was not being used for aviation purposes.

In affirming the Department's order, the court noted that the legislative history of the act supported the appellants' argument that kerosene was only intended to be taxed when used as aviation fuel. However, the court was persuaded by the fact that the exemption language was very narrowly drawn. It concluded that the appellants' position must be rejected to avoid a statutory construction that would render part of the statute meaningless.

Due Process

Creel v. The District Board of Trustees of Brevard Community College, 26 Fla. L. Weekly 1448 (Fla. 5th DCA 2001)

Creel appealed a final order of the Board, challenging its decision that he had no reasonable expectation of employment following expiration of his annual term of employment. He argued that that issue had not been properly noticed and, thus, could not be considered by the administrative law judge. The case arose when the college sought to terminate Creel's employment when his driver's license was suspended following a conviction for DUI.

Creel argued at the administrative hearing that termination was not appropriate because the college had

not terminated the employment of other employees in the same circumstances and because the suspension of his license had not affected his performance of his duties. The administrative law judge agreed with Creel on that issue and recommended that he be suspended without pay as opposed to terminated. However, the recommended order contained additional findings that Creel was employed on an annual contract basis and that the college could terminate his employment at the end of that annual term.

On appeal, the court agreed with Creel and reversed in part. It noted that the issue of Creel's contract terms was never properly before the administrative law judge and no evidence on the contract was submitted at hearing. Moreover, the only evidence at the hearing regarding his future employment was that he would have continued to be employed if he had not lost his license. The court concluded, pursuant to Section 120.68(7)(c), Fla. Stat., that a material error in procedure required reversal of the order as Creel had been denied procedural due process.

Exhaustion of Administrative Remedies

Department of Agriculture and Consumer Services v. City of Pompano Beach, 26 Fla. L. weekly 1539 (Fla. 4th DCA 2001)

The City of Pompano, along with other Southeast Florida municipalities and counties, and several individuals, sought injunctive relief in circuit court to prevent the Department of Agriculture and Consumer Services from destroying a number of citrus trees that had potentially been infected by citrus canker.

The various plaintiffs argued, and the trial court concluded, that (1) the Department's non-rule policy of destroying any tree within a 1900 foot radius of an infected tree was invalid because it had not been formally adopted as a rule pursuant to Section 120.54; (2) the Department exceeded its delegated authority in adopting an emergency rule defining "exposed" tree in that the rule was inconsistent with the statutory definition; and (3) the Immediate Final Orders ("IFOs") issued to tree owners were unconstitutional because they did not provide procedural due process.

The Department argued that the suit should be dismissed for failure to exhaust administrative remedies. The trial court, however, held that the decision to dismiss was discretionary. It concluded that the delays inherent in the administrative process were unacceptable in these circumstances.

On appeal, the Fourth District reversed. Citing *Gulf Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*, 361 So. 2d 659 (Fla. 1978) and *Key Haven Associated Enterprises, Inc. v. Bd. of Trustees of the Internal Improvement Trust Fund*, 427 So. 2d 153 (Fla. 1982), the court held that the suit should have been dismissed for failure to exhaust administrative remedies unless there was no adequate remedy available, the agency acted without colorable authority, or the plaintiffs challenged the facial constitutionality of a statute or rule.

The court rejected the appellees' arguments that there was no adequate remedy available under Chapter 120 to challenge the IFOs. It noted that the IFO was immediately appealable under Section 120.68, Fla. Stat. The court noted that appellate courts have the authority under Section 120.68 to stay the effect of an IFO if requested and that the court may also remand the matter to the agency if it determines that there is not an adequate record on appeal. The court also rejected the argument that there was no adequate remedy to challenge the non-rule policy or the emergency rule, citing Section 120.56, Fla. Stat.

The court also rejected the argument that the Department lacked colorable authority to adopt its non-rule policy or the emergency rule under its statutory authority. It noted that Section 581.031 allows the Department to destroy plants capable of harboring pests to prevent spreading of the pest or disease.

Finally, the court found that the constitutional challenge to the Department's actions involved not the facial constitutionality of the statute or rule, but the Department's application of those laws. Under the Key Haven case, parties must exhaust their administrative remedies before pursuing a judicial challenge to the constitutionality of the agency action.

Mary F. Smallwood *is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is Past Chair of the Administrative Law Section and a Past Chair of the Environmental and Land Use Law Section of The Florida Bar. She practices in the areas of environmental, land use, and administrative law. Comments and questions may be submitted to MFS@Ruden.com.*

Administrative Law Section Executive Council Meeting Friday, June 22, 2001 — Minutes

I. Call to Order: The meeting was called to order by Chair Mary Smallwood.

Present: Mary Smallwood, Dave Watkins, Li Nelson, Donna Blanton, Clark Jennings, Bill Williams, Debby Kearney, Allen Grossman, Cathy Lannon, Dan Stengle, Elizabeth McArthur, Larry Sellers, Bill Bell, Judge Robert Benton

Participating by Telephone: Charlie Stampelos, Paul Rowell, Linda Rigot, Bobby Downie

Absent: Ralph DeMeo, Chris Moore, Patrick Imhof, Seann Frazier

II. Preliminary matters

A. Consideration of the minutes: The minutes of the January 16, 2001 meeting were unanimously approved with the correction to show Larry Sellers among those listed as present for the meeting.

B. The Treasurer's report was given by Donna Blanton and Jackie Werndli, indicating that the Section has a healthy balance in its reserves, with reference to the 5/9/01 statement of operations.

C. The Chair gave no report.

III. Committee Reports

A. Continuing Legal Education: Dan Stengle gave the CLE report in Ralph DeMeo's absence. Dan indicated that we are planning a Pat Dore Conference, hopefully to be held in the Spring. We are currently budgeted to do a fall CLE, a light spring CLE, and the Pat Dore Conference. There was discussion regarding whether it was wise to hold the Pat Dore Conference during session. Dan explained that this coming year reapportionment would affect the length of session and make it hard to avoid. Jackie is to check on available dates. Li Nelson and Cathy Lannon volunteered to assist with (but not Chair) the Pat Dore Conference.

B. Legislative Committee: Bill Williams gave the legislative report, stating that 6 bills passed during session that involved the APA. One bill that did not pass, but which the Committee had closely monitored, was SB 910. Had the bill passed, it would have increased attorneys fees available under section 57.111 to $50,000 and added mandatory "Rule 11" type provisions. We can expect this bill to reappear next year.

Bill reported that the following bills passed:

CS/HB 1803: Transferred workers compensation judges to the Division of Administrative Hearings for housekeeping purposes. The head of workers comp becomes a Deputy Chief Administrative Law Judge.

SB 1738: This bill dealt with procurement issues and allows agencies to solicit invitations to negotiate and requests for quotes. It also deals with issues related to the new State Technology office.

HB 1635: This bill provides for "notices of violations" and gives ALJs final order authority under certain circumstances

CS/SB466: This is the "Service First Amendment," which affects the hiring, retention and firing standards for state workers and transfers some workers currently in career service to select exempt service.

CS/SB1284: This bill creates a Child Support Enforcement pilot program in Volusia County and also gives DOAH final order authority in some situations.

SB 1738: Larry Sellers explained this bill, which creates a pilot program that exempts DEP from publication in F.A.W. and allows them to publish notices instead on DEP's website. The deadlines would be the same and the pilot program would last for two years.

Allen Grossman asked if this is a new trend to publish separately from Florida Administrative Weekly. Larry stated that while that issue had been the subject of some debate, no one seemed real concerned. Allen suggested that as a Section we might want to monitor the pilot program to see if people's access to notices remained the same. There was some concern that at peak times, such as during key periods during session, agency websites are inaccessible because of the high demand for information and the number of people trying to access them. Debby Kearney volunteered to spearhead monitoring for the Section.

Bill also indicated that the Senate Governmental Operations Committee is doing a summer project on competitive procurement and conflicts between Chapter 287 and 286.

Publications Committee: Charlie Stampelos thanked everyone for their hard work this year, especially those who participated by contributing to the APA "theme" issue.

The Membership Committee and Public Utilities Committee offered no report.

Law School Competition: Because there was no writing competition for this year, Debby Kearney suggested that the money budgeted for that purpose be applied to a contest this coming year. Discussion ensued regarding how to garner interest in the competition among the law schools.

Council of Sections: Cathy Lannon reported that with respect to CLE, handouts brought to CLE courses as opposed to being timely included in the materials was to be strongly discouraged. This practice makes it hard to keep all the materials together and also means that those who don't attend but buy the materials may not get everything. Cathy reported on the upcoming Section Leadership Conference and encouraged everyone to attend.

Cathy also reported on two proposed changes to the Council of Sections bylaws: 1) to delete the provision against someone representing a section for more than three consecutive years and 2) to allow for payment for the Chair and Chair-Elect of the Council of Sections to go to other Bar activities. Cathy noted that there were no guidelines related to these costs. The Section agreed that it was

not in favor of these two suggested changes.

Dave Watkins asked that anyone wanting to go to the Section Leadership Conference to coordinate with Jackie. Allen Grossman raised an issue regarding the use of reserve funds by sections. Dave Watkins asked Cathy Lannon to monitor this issue.

V. New Business:

a. Mary reported that Administrative Law Section materials will be posted on the website for the Environmental Law Section. She complimented the Environmental Law Section on the quality of their webpage and welcomed this new feature.

b. Bill Bell, General Counsel for the Florida Hospital Association, raised an issue regarding hospital certificates of need. During session, there was a perception that challengers to applicants delay the CON process through appeals and at one time the CON bill included a treble attorneys fees provision. He anticipates more activity in the next session and FHA is looking at issues prior to session and seeking input. Bill Williams agreed that there are Chapter 120 implications to the CON process and general consensus that this Section should be involved.

c. Election of Officers:

David Watkins moved the following executive council members for the coming term ending in July 2003, which was seconded by Clark Jennings and approved by acclamation: Ralph DeMeo, Allen Grossman, Booter Imhof, Elizabeth McArthur, Linda Rigot, Paul Rowell, and Charlie Stampelos.

David Watkins then nominated and Elizabeth McArthur seconded the following slate of officers for the next year, and the slate was approved by acclamation: Dave Watkins, Chair; Li Nelson, Chair-Elect; Donna Blanton, Secretary; Bobby Downie, Treasurer.

Dave then nominated Dan Stengle to replace Bobby Downie on the Executive Council. Clark Jennings seconded and Dan was approved unanimously.

d. Outgoing Remarks by the Chair: Mary commended Debby Kearney for receipt of the Claude Pepper Award, to be presented later in the day. The Section agreed that this award was well-deserved. She thanked everyone for their efforts during the last year and stated that she had a wonderful time serving as Chair. Mary gave out awards to the committee members who had served during her term. Dave Watkins then presented Mary with a crystal gavel as a token of the Section's thanks for her fine leadership.

e. Committee appointments: Dave Watkins, as incoming Chair of the Section, named the following committee assignments for the coming year:

CLE: Dan Stengle/Ralph DeMeo

Council of Sections: Cathy Lannon, with Dave Watkins as alternate

Student Writing Contest: Seann Frazier

Legislative Committee: Bill Williams and Linda Rigot

Long Range Planning Committee: Li Nelson (with strong recommendation from the Council that another Melhana retreat be planned) Suggestions were made that the legislative positions of the Council be addressed again as an agenda item at the retreat.

Membership: Chris Moore and Booter Imhof

Publications: Charlie Stampelos

Newsletter Editor: Elizabeth McArthur

Bar Journal coordinator: Debbie Kearney

Public Utilities: Joe McGlothlin

Dave named publications as a major priority for the Section during the coming year, as well as the re-invigoration of the writing contest.

Seeing no more business to be discussed at this time, the Section adjourned.

Respectfully submitted,
Lisa ("Li") Shearer Nelson

Current Events — Public Utilities Law Committee Update

by Joe Allan McGlothlin, Chair

Recently I mentioned to Editor Elizabeth McArthur that I hope in future issues to describe briefly the various issues and cases that are on the PSC's horizon. Choosing a caption for the spot proved to be difficult. I began with "Current Events" as the title. However, it occurred to me that, while practitioners in the electric field would undoubtedly approve, those who regard telecommunications law as a calling might think I was featuring the wrong group. Secondarily, I worried that those who speak fluently of effluents might find my treatment of the subject unsettling. I haven't mentioned natural gas practitioners, but do I really need to expand further? You may think that picking a title would be easy for the chair, but the thought of offending any subgroup does not sit well with me.

Then, it hit me. The phrase "Current Events" should offend no one. What do electrons, gas molecules, and water have in common? They all *flow*. Obviously, both gas and water utilities deal in pumps and valves, but the commonality doesn't end there. When a telecommunications carrier refers to the needs of a large or growing customer, does it not speak of the need to install a "bigger pipe?" Doesn't an electric utility on the verge of a blackout work to avoid a "cascading" effect?

You get the point: the technologies, services, and disciplines that comprise the "utility" area differ, but basically you practitioners of public utility law are all wet. Now I ask: What word connotes better a watery subject – what word is better fit to describe goings-on in public utility law — than *current?*

Having now channeled my thought processes, I hope to provide a short description of cases and issues that have seized center stage in the next newsletter. In the meantime, Elizabeth and I encourage Committee members to submit articles on subjects of interest. If you are in need of inspiration, here is a topic that I believe someone should tackle: Which resource is the telecommunications industry more likely to exhaust first — area codes or acronyms?

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rules could be made had to be clearly spelled out in the authorizing statute.

It was an easy impression to have. In pertinent part, the statute read as follows:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. *An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute.* No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. *Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.*[3]

Section 120.536(1), F.S. (Supp. 1996; emphasis added)

Then the First District Court of Appeal decided *St. Johns River Water Management District v. Consolidated Tomoka Land Co.*, 717 So.2d 72 (Fla. 1st DCA 1998). Writing for the Court, Judge Padovano executed a classic appellate exercise in statutory construction, in the service of a workable standard by which to adjudicate contested administrative rules under the new law. As we learned, the critical phrase, "particular powers and duties", did not necessarily mean that the agency's powers and duties had to be described in particular detail in the enabling statute. Instead, "particular powers and duties" could refer merely to particular categories, or "classes", of powers and duties given in the enabling statute[4]--especially when one considered the nearly open-ended rulemaking standard in effect prior to 1996, when authority as general as "the department shall adopt rules to implement the provisions of this chapter" was all that was needed. *Et voila*: the Water Management District's proposed rules, which had been invalidated below only in the belief that they lacked "particular" rulemaking authority, were held valid on appeal.[5]

For some, the opinion was surprising, and either delightful or disappointing. Agency attorneys may recall doing a cartwheel or two; one administrative law judge, who shall remain nameless, related to me that he "laughed like hell" upon reading the decision. Various business lobbies and members of the Legislature were obviously not pleased, and Section 120.536(1) was promptly amended in 1999.[6]

While the 1999 Legislature may have overruled the "class of powers and duties" standard set briefly by *St. Johns*, it didn't scratch the paint as far as the opinion's reasoning is concerned. As we shall see, the following passages remain required reading for anyone wishing to understand the dynamic of Florida administrative rulemaking, past and present:

> In our view, the term 'particular' in section 120.52(8) [or section 120.536(1)] restricts rulemaking authority to subjects that are directly within the class of powers and duties identified in the enabling statute. It was not designed to require a minimum level of detail in the statutory language used to describe the powers and duties.[7]

> We consider it unlikely that the Legislature intended to establish a rulemaking standard based on the level of detail in the enabling statute, because such a standard would be unworkable...A standard based on the precision and detail of an enabling statute would produce endless litigation regarding the sufficiency of the delegated power...[8]

> Specificity is a subjective concept that cannot be neatly divided into identifiable degrees. Moreover, the concept is one that is relative. What is specific enough in one circumstance may be too general in another. An argument could be made in nearly any case that the enabling statute is not specific enough to support the precise subject of a rule, no matter how detailed the Legislature tried to be in describing the power delegated to the agency.[9]

Section 120.536(1), F.S., as amended in 1999, reads as follows:

> A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. *An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute.* No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. *Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.*[10] (Emphasis added.)

It was not long after the 1999 amendment that a rule challenge, involving amended Section 120.536(1), made its way to the First District Court of Appeal. In *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So.2d 594 (Fla. 1st DCA 2000), Judge Padovano again wrote for the Court, and duly noted that the "class of powers and duties" standard of *St. Johns* had been legislatively overruled. The holding of the opinion and its result (DOAH's invalidation of rules affirmed) were predictable enough. What was curious was expressed in *dicta*:

> It follows that the authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is specific enough. Either the enabling statute authorizes the rule at issue or it does not. As the Florida Chamber of Commerce said in its brief, this question is one that must be determined on a case-by-case basis.[11]

One hardly knows whether to take this seriously. It is hard to believe that it comes from the same author of the opinion in *St. Johns*. Perhaps Judge Padovano was characterizing the Legislature's thinking, without saying so. The question, in many rulemaking cases, is indeed "whether the grant of authority is specific enough", with all of its attendant head-scratching, just as was predicted in *St. Johns*. We can demonstrate this simply by perusing the existing Florida Statutes, selecting representative examples of rulemaking authority, and applying Section 120.536(1), as will be done herein.

"General" rulemaking authority

First, let us consider the most "general" sort of rule-enabling provision. As an abstract example of such a *provision* (leave aside "statute" for the moment), consider the following:

> The board is authorized to make such rules not inconsistent with law as may be necessary to carry out the duties and authority conferred upon the board by this chapter and as may be necessary to protect the health, safety, and welfare of the public.

Section 458.309, F.S. (1979) (Florida Board of Medicine).

Both of the provision's two operative phrases--"duties and authority conferred upon the board by this chapter", and "as may be necessary to protect the health, safety, and welfare of the public"--can be seen as "general", and thus insufficient under current Section 120.536(1), F.S. The first phrase, "duties and authority conferred upon the board by this chapter", generally refers to whatever duties and authority may be conferred upon the Board of Medicine in Chapter 458, F.S.; to learn of such "duties and authority", one must rummage about in Chapter 458. By contrast, Section 120.536(1) states in pertinent part that, "An agency may adopt only rules that implement or interpret the specific powers and duties *granted by the enabling statute* (emphasis added)." Assuming Section 458.309 as the "enabling statute", no "specific powers and duties" are granted by it; instead, reference is made to the rest of Chapter 458, in which we may or may not (depending upon each statute) find specific powers and duties. The second phrase, "as may be necessary to protect the health, safety, and welfare of the public" is the sort of situational authority conferred by Section 120.54(4), F.S., for emergency rulemaking, but is even more broad, since no requirement of "immediate danger" is included. Thus, the language in this example appears to be the sort of "general" rule-enabling legislation that was, of itself, sufficient as a basis for valid rulemaking prior to 1996, probably was not sufficient after 1996, and certainly is not sufficient after 1999.

There are literally hundreds of such "general" rule-enabling provisions in the Florida Statutes. Some two-hundred-and-twenty-four of them were given a somewhat different look by the 1998 Legislature, which amended that number to include a reference to Sections 120.536(1) and 120.54 (Supp. 1996), and to tinker with certain wording.[12] For instance, Section 458.309, F.S. (the 1979 version of which is shown above), now reads in pertinent part as follows:

> The board has authority to adopt rules pursuant to ss. 120.536(1) and 120.54 to implement the provisions of this chapter conferring duties upon it.

Section 458.309(1), F.S. (1998).

Despite the facelift, it appears that Section 458.309(1) remains a "general" grant of rulemaking authority. The phrase "authority to adopt rules pursuant to ss. 120.536(1) and 120.54" can be read as nothing more than a reminder, from the 1998 Legislature, that the wide-ranging rulemaking discretion prior to 1996 was no longer available. With the inclusion of "ss. 120.536(1) and 120.54", it is appropriate to read Section 458.309(1) *in pari materia* with Sections 120.536(1) and 120.54; however, reading the statutes together does not produce "specific" rulemaking authority, since the two APA statutes are merely procedural, rather than substantive. The 1998 Legislature also rewrote the wording of Section 458.309(1): the prior phrase, "carry out the duties and authority conferred upon the board by this chapter" was modified, to "implement the provisions of this chapter conferring duties upon it", and "as may be necessary to protect the health, safety, and welfare of the public" was deleted. But the statute appears only less "general" than before 1998, rather than being transformed to "specific". Moreover, what evidence we have of legislative intent behind the 1998 legislation indicates that the Legislature's goal was simply greater uniformity among the various general rule-enabling provisions.[13]

In its outreach to "general" rule-enabling provisions, it is interesting to note that the 1998 Legislature either missed a few, or perhaps itself was confused as to what is "general" and what is "specific" (or "particular", in 1998). Consider the next example:

> The agency may adopt rules necessary to implement ss. 408.031-408.045.

Section 408.034(5), F.S. (Agency for Health Care Administration).

This provision dates from 1987, when it was a part of Chapter 381, F.S.,[14] but is shown in its current wording and location. It was not "marked" by the 1998 Legislature with a cross-reference to Sections 120.536(1) and 120.54 (contrary to the example of Section 458.309(1), given above). But the case can easily be made that Section 408.034(5) is a general rule-enabling provision: it is certainly broad, considering its cross-reference to every section of the Health Facility and Services Development Act (including Section 408.031, which does nothing more than to provide "the Health Facility and Services Development Act" as the title of the legislation).

Section 408.034(5), F.S., may be too "general" of itself to be a basis for valid rulemaking; that is, perhaps it is insufficient to make (as the provision does) a broad cross-reference to a group of statutes by number. But consider this hypothetical situation: Assume that there was no Section 408.034(5) and, instead, each of Sections 408.031-.045 concluded with a subsection stating that, "The agency shall adopt rules to implement the provisions of this section." Would the agency then have "specific" authority to make rules implementing Sections 408.031-.045? On this point, note the

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last sentence of Section 120.536(1): "Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute." In the hypothetical given, the agency could have "specific powers and duties conferred by the same statute" merely by way of the location of rule-enabling subsection. Query as to whether such a rule-enabling scheme is more efficient than to effectively grant the same authority in one breath, as is done in existing Section 408.034(5).

From the "general" to the "specific": location, location, location

The next example contains two kinds of cross-references:

> The department has authority to adopt rules pursuant to chapter 120 to implement this section and ss. 559.928, 559.929, 559.934, and 559.935.

Section 559.9355(3), F.S. (Department of Agriculture and Consumer Services).

The first cross-reference in Section 559.9355(3), to "this section", obviously refers to Section 559.9355, F.S., and is a common rule-enabling technique found as often in the Florida Statutes as the more general reference to "this chapter".[15] It may be more convenient in a given instance to employ this technique, rather than for the rule-enabling provision itself to spell out, in descriptive terms, the specific subject matter for which rules may be made. The second cross-reference in Section 559.9355(3) specifically names four sections of Chapter 559, F.S. other than Section 559.9355.

In considering this example, we must deal specifically with the second sentence and the last sentence of Section 120.536(1), and the meaning of the critical term, "statute", found in each.

The second sentence of Section 120.536(1) provides that an agency "may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute". In the context of Section 120.536(1), the term "enabling statute" may be taken to mean that statute in which the rule-enabling provision is found. If we then equate the term "statute" with a given "section" of the Florida Statutes, Section 559.9355 is the "enabling statute" in the example immediately above, since the rule-enabling provision of Section 559.9355(3) is found within it. If we then assume that Section 559.9355 is sufficiently "specific" relative to any rule or rules in question, we may conclude that the rule or rules have "specific" authority: to put it in the language of Section 120.536(1), the rule or rules would "implement or interpret the specific powers and duties granted by" Section 559.9355.

The last sentence of Section 120.536(1) imposes the limitation that "Statutory language granting rulemaking authority…shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute." If "statute" is again construed to refer to a given "section" of the Florida Statutes, then a problem is posed for Section 559.9355(3)'s cross-reference to Sections 559.928, 559.929, 559.934, and 559.935, F.S. The "statutory language granting rulemaking authority" in this example is Section 559.9355(3); if that language is to be "construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute", and if "statute" means Section 559.9355, then it follows that the rulemaking authority of Section 559.9355(3) is limited to implementing whatever specific powers and duties are found in Section 559.9355. Under this construction, the reference to "ss. 559.928, 559.929, 559.934, and 559.935" does not constitute "specific" rulemaking authority by which to implement those statutes.[16]

With the foregoing said concerning Section 120.536(1)'s use of "statute", it must be conceded that the term is not defined in the APA, and that its construction could, in a given case, be broader (or perhaps narrower) than a given "section" of the Florida Statutes. Black's Law Dictionary notes in pertinent part that, "Depending upon its context in usage, a statute may mean a single act of a legislature or a body of acts which are collected and arranged according to a scheme or for a session of a legislature or parliament."[17] It will be interesting to see whether Section 120.536(1)'s use of "statute" is, at some point, considered either by DOAH or the First DCA to be capable of more than one interpretation.

Section 120.536(1)'s seeming "location" requirement, *i.e.*, that specific subject matter be located in the same statute which confers rulemaking authority, does beg the question of what the 1996 and 1999 Legislatures contemplated. It appears evident that the most general grants of rulemaking authority, *e.g.*, "to implement the provisions of this chapter", do not meet the standard of Section 120.536(1). Similarly, the argument can be made that grants of rulemaking authority "to implement this section" are not sufficiently "specific": many, and probably most, grants of rulemaking authority to "implement this section" were on the books before Section 120.536 was enacted in 1996, and were therefore enacted under a completely different standard for valid rulemaking; more significantly, any section of the Florida Statutes may vary greatly in length, breadth, and specificity relative to another. On the other hand, the argument can be made that the Legislature should not have to spell out specific subject matter in the rule-enabling provision when the shorthand of "implement this section", or even a cross-reference to another section, will do. We can probably conclude that Section 120.536(1)'s use of "the same statute" does not require the rule-enabling provision itself to express by descriptive terms the specific subject matter; in other words, a grant of rulemaking authority "to implement this section" should pass muster, assuming that the section to be implemented contains requisite specificity of subject matter relative to the rule or rules involved. A grant of rulemaking authority in one section to implement another, cross-referenced section may present a closer question.

In addition to the rule-enabling technique of providing authority to adopt rules to implement "this section", the Florida Statutes contain numerous (though far fewer) examples of authority to adopt rules to implement "this subsection". For example:

> The department may adopt rules necessary to implement the provisions of this subsection.

Section 627.848(1)(e), F.S. (Department of Insurance).

Query as to how to apply Section 120.536(1) where the grant of rulemaking authority is limited to implementing the provisions of a "subsection". In that instance, it would appear incorrect to construe the "enabling statute" as the entire section (*e.g.*, Section 627.848) in which the subsection is found, rather than the subsection (*e.g.*, Section 627.848(1)) itself. Likewise, it would seem that "the specific powers and duties conferred by the same statute" are to be construed as limited to those found in the "subsection" to be implemented, given the plain terms of the grant of rulemaking authority. One can witness the First DCA having some trouble with the expression, and location, of rulemaking authority in *Department of Business and Professional Regulation v. Calder Race Course, Inc.*, 724 So.2d 100 (Fla. 1st DCA 1998), decided shortly after *St. Johns*. At issue in *Calder Race Course* was Rule 61D-2.002, F.A.C., authorizing searches of persons and places within a permitted parimutuel wagering facility. In reviewing Section 550.0251, F.S., for authority, the opinion vacillates from consideration of only its rule-enabling provision, on the one hand, to the entire statute, on the other:

> Subsection 550.0251(3) merely empowers the Division to "adopt reasonable rules for the control, supervision, and direction of all applicants, permittees, and licensees and for the holding, conducting, and operating of all racetracks, race meets, and races held in this state." This *general grant of rulemaking authority*, while necessary, is not sufficient to validate rule 61D-2.002 under the 1996 amendment to section 120.52(8) [120.536(1)]. A specific law to be implemented was also required, and nothing *in this subsection* identifies the power that the rule attempts to implement, i.e., to search.[18] (Emphasis added.)
>
> If the rule is to pass the test demanded by sections 120.52(8) and 120.536(1), it must do so through the powers delegated *generally* to the Division under *section* 550.0251. The pertinent provisions thereof are as follows:
>
> [text of Section 550.0251(4), (5), (6), (9) omitted].[19] (Emphasis added.)

Arguably, the *Calder Race Course* court was off-base in searching the entirety of Section 550.0251 (Supp. 1996) for rulemaking authority: the rule-enabling provision of Section 550.0251(3) uses descriptive terms rather than a cross-reference to "this section", and so appears to be self-contained; neither of the two other rule-enabling subsections of Section 550.0251 refer to "this section". Note also how the court characterizes as "general" the language, "control, supervision, and direction of all applicants, permittees, and licensees and for the holding, conducting, and operating of all racetracks, race meets, and races held in this state." On the face of it, it sounds rather specific (or "particular", in the language of the day). Perhaps the court should have said, as Judge Padovano did in *St. Johns*, that what is specific enough in one circumstance may be too general in another.

Manifestly "specific" rulemaking authority

The next example is another where "specific" rulemaking authority is given in descriptive terms:

> (1) The department shall adopt rules to carry out the provisions of this chapter.
>
> (2) Such rules shall address the number of facilities on a single parcel or adjacent parcels of land, and in addition, for ICF/MR, the rate and location of facility development and level of care.

Section 393.501, F.S. (Department of Children and Family Services).

While specificity by descriptive terms may eliminate debates that would occur by cross-referencing, another, more troubling issue may arise. In the example of Section 393.501, F.S., we first see Section 393.501(1), which refers simply to "rules to carry out the provisions of this chapter." These are terms indicating a general grant of rulemaking authority, the like of which the 1996 and 1999 Legislatures were clearly taking dead aim against. By contrast, Section 393.501(2) names specific subjects for rulemaking by DCF. The question is whether DCF's rulemaking authority is *limited to* the subjects identified in Section 393.501(2).

Prior to the 1999 amendments to the APA, an argument may have been made that to limit DCF's rulemaking authority to the subjects in Section 393.501(2) would constitute an unreasonable result not intended by the Legislature: the argument would be that the Legislature certainly intended for DCF to address the subject matter of Section 393.501(2), but not to address *only* the subject matter of Section 393.501(2). Note that it is harder to make this argument after 1999: as a general rule-enabling provision, Section 393.501(1) may be said to be "necessary" under Section 120.536(1), but it carries no weight of itself; this leaves Section 393.501(2), which is quite specific, but also limited in scope. While it is clear here that DCF can undertake valid rulemaking as to the subjects identified in Section 393.501(2), one wonders how DCF is to proceed, or if it can proceed, concerning whatever *other* powers and duties it has in Chapter 393, F.S.[20]

Our final example shows "specific" rulemaking authority at its most blunt:

> The agency shall develop and adopt by rule a methodology for reimbursing managed care plans.

Section 409.9124(1), F.S. (Agency for Health Care Administration)

There are numerous examples of grants of rulemaking authority just this specific in the Florida Statutes; these will not inspire de-

continued...

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bate over whether there is authority sufficiently "specific" for the rule or rules in question. However, it stands to reason that many litigated cases will present difficult exercises to determine whether there is such authority.[21] It can be concluded that, in many cases, whether there is "specific" authority will depend upon nothing more than the eye of the beholder.

Endnotes:

1. Laws of Florida, Ch. 96-159, s. 9. It is understood that the language of Section 120.536(1) was inserted also in a block paragraph at the end of Section 120.52(8), F.S.; for purposes of this article, only Section 120.536(1) will be cited, since the focus does not include the grounds enumerated in Section 120.52(8) for finding an "invalid exercise of delegated legislative authority."
2. *See, e.g., Department of Professional Regulation, Board of Medical Examiners v. Durrani*, 455 So.2d 515 (Fla. 1st DCA 1984); cited among other cases in *St. Johns*, 717 So.2d at 79.
3. Laws of Florida, Ch. 96-159, s. 9.
4. 717 So.2d at 79.
5. 717 So.2d at 81.
6. As was the corresponding language in Section 120.52(8), F.S. Laws of Florida, Ch. 99-379, ss. 2, 3.
7. 717 So.2d at 79.
8. 717 So.2d at 79-80.
9. 717 So.2d at 81.
10. Laws of Florida, Ch. 99-379, s. 3.
11. 773 So.2d at 599.
12. *See*, Laws of Florida, Ch. 98-200 (CS/SB 1440). This appears to have been a little-noticed development in the course of rule legislation from 1996 to the present. The reader may wish to consult staff analyses written for CS/SB 2240, the original bill (which died, but the provisions of which were transferred to CS/SB 1440).
13. *Id*.
14. Laws of Florida, Ch. 87-92, s.21.
15. *See*, Section 381.004(10), F.S. (Department of Health; HIV testing), for another example of an "implement this section" grant of rulemaking authority. On occasion, such "implement this section" provisions will contain the same "pursuant to ss. 120.536(1) and 120.54" reference inserted by the 1998 Legislature into "general" rule-enabling provisions (*see*, Laws of Florida, Ch. 98-200, and note 9, *supra*). *See, e.g.*, Section 240.529(10), F.S., providing that "The State Board of Education shall adopt necessary rules pursuant to ss. 120.536(1) and 120.54 to implement this section." The references to "ss. 120.536(1) and 120.54" in "implement this section" grants of rulemaking authority do not derive from the same 1998 legislation, and should not be thought of as evidence that the Legislature has considered any such "implement this section" provisions to be "general" rulemaking authority.
16. For a like example, *see*, Section 218.37(3), F.S. (Division of Bond Finance of the State Board of Administration), providing that "The Division of Bond Finance of the State Board of Administration may adopt rules to implement this section and ss. 218.38 and 218.385."
17. Black's Law Dictionary, Fifth Edition, at 1264-1265.
18. 724 So.2d at 102.
19. 724 So.2d at 102-103.
20. *St. Johns* noted the conundrum posed by specific powers and duties, and no rulemaking authority by which to implement them. 717 So.2d at 80. One would think that the Legislature will sort these instances out case-by-case, to the extent that political problems are presented.
21. The Division of Administrative Hearings (DOAH) itself continues to wrestle with the "specific" standard, now two years after its 1999 enactment. *See, e.g., Hennessey vs. DBPR, Division of Pari-Mutuel Wagering*, DOAH Case no. 99-5254RX (Kirkland, ALJ) (*held*, Rule 61D-6.002, F.A.C., is a valid exercise of delegated legislative authority). That matter has been briefed and is presently pending before the First DCA.

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