Administrative Law Section Newsletter

Vol. XXIV, No. 1 **Elizabeth W. McArthur, Editor** **September 2002**

Competent and Substantial Evidence in Rule Challenges: A Standard of Proof or Standard of Review?

by Donna E. Blanton

The First District Court of Appeal raised eyebrows earlier this year when it found that the phrase "competent substantial evidence" in section 120.52(8)(f), Florida Statutes, is intended to limit the scope of review by Administrative Law Judges (ALJs) in rule challenge proceedings.[1]

The court's analysis of the phrase was included in *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc.*, an opinion that upheld both proposed and existing Board of Medicine rules relating to office surgery. ALJ William R. Pfeiffer, in separate orders that were consolidated on appeal, found that some of the challenged proposed and existing rules were invalid exercises of delegated legislative authority, in part because they were not supported by competent and substantial evidence.[2]

The court's opinion reversing the ALJ is interesting for a number of reasons, not the least of which is its status as one of the first group of cases to interpret the rulemaking standard in section 120.52(8), as enacted in 1996 and amended in 1999.[3] This article focuses on the court's discussion of "competent substantial evidence," which represents the first in-depth appellate court analysis of

See "Rule Challenges," page 4

From the Chair: Considering a New Perspective

by Lisa "Li" S. Nelson

The Administrative Law Section represents a unique sector of the Bar in that its members share a common interest in a process as opposed to embracing a unified substantive position. As a result, we often find ourselves at odds because we approach the Administrative Procedure Act from sometimes opposite, and often entrenched, positions. We don't ask people to specify whether they work in the public or private sector when they join, but we seek to attain a balanced blend on the Executive Council. However, many administrative law practitioners have been in the same practice setting for their entire careers, whether they started practicing before Chapter 120 was born or were born since its arrival. As a result, many of us have developed a form of tunnel vision with respect to the APA.

For close to thirteen years, I worked in the public sector and loved doing so. In fact, my original involvement with the Section was encouraged in order to provide another state agency "voice" on the Executive Council. I convinced myself that my first three years after law school working as a judicial research aide saved me from any particular bias suffered by most advocates, and I

continued, page 2

INSIDE:

CHAIR'S MESSAGE
from page 1

blissfully developed a list of pet peeves about private practitioners: for example, those who serve mounds of discovery and write letters every third day are probably churning the bill; those who ask for a stay on appeal and then delay filing a brief are simply stalling to avoid the inevitable; and those people who represent some of the terrible characters regulated by my agency just couldn't believe they were working for the public good (which, of course, I was). Mostly, I resented those folks who said lawyers who work for the state are lawyers who can't get a job anywhere else and I resented those who made sweeping generalizations about state workers; yet I was just as willing to make the same generalizations about those "fat cat lawyers" who did not choose to wear my "white hat" and engage in public service.

The same bias shaped my view of the APA. Default proceedings should be cut and dried in view of the caseloads faced by state lawyers. Additional rulemaking requirements can be hurdles to efficiency and can thwart swift implementation of statutory mandates. The more cases that can be resolved through informal proceedings, the better. And agencies should be granted some modicum of flexibility to deal with changing circumstances.

A few years back, I "changed hats" and went into private practice. While I still resent those comments about finally getting a "real job," I have learned that at least some of my preconceived notions of private practice were untrue. While there are those who churn the bill, often the onslaught of letters sent to agencies is born out of frustration because none are answered. The person who seeks a stay and then dismisses the appeal if one is not granted is dealing with the economic reality that a person who cannot work while his discipline is reviewed simply cannot pay for an appeal, meritorious or otherwise. And not all those characters licensed by the agency are terrible. Some have meritorious defenses and some have made mistakes and need help to deal with the fallout.

Likewise, my view of the APA has shifted. I am more concerned with the individual livelihood at stake and less concerned with the number of cases confronting the agency. While delay may be based upon some legitimate action by the agency or an intervenor, delay still means thousands of dollars of lost productivity, and sometimes, lost jobs for clients and their employees. And discretion for the agency means my client has no idea what to expect.

As my vision expands to allow for a new perspective, it occurs to me that all of us could make an effort to see our practice, and the APA, from the view of someone outside our particular practice setting. This year I invite you all to take a deep breath as we discuss the APA and consider examining the issues through someone else's eyes. Instead of assuming at the outset that the motives of the "other side" are automatically suspect, take the time to find out whether there really is a problem that needs to be addressed and whether that problem stems from the workings of the APA or from something else. We might actually surprise ourselves and find that we have more in common than we thought and that we are after the same basic goal: a fair result that serves both the public and private interests.

Make no mistake: I am under no illusion that a fresh perspective will lead us unscathed to the kindly wizard at Emerald City. Even Dorothy had to kill the wicked witch. There are times when the interests at stake will be diametrically opposed, which is, course, why we have the opportunity to challenge state action via Chapter 120 in the first place. But a fresh perspective may help us all to focus on what problems must be addressed through the Act and what should be addressed through other means, whether they be legislative, budgetary, or simply better practice. It may also help us to treat our colleagues (and their views) from the other side of the fence with greater respect if we have a better appreciation for the challenges unique to their role, whether public or private.

Lisa "Li" Shearer Nelson *is the newly elected Chair of the Administrative Law Section. She is a director of the firm Holtzman, Equels & Furia, P.A., and is in charge of its Tallahassee office. Li can be contacted at 850-222-2900 or through Lilawnelson@aol.com*

Editor's Note: Case Update

In the December 2001 Newsletter, Susan Kelsey wrote an article on the *State Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Assn.*, 794 So. 2d 696 (Fla. 1st DCA 2001), noting that the First DCA certified a narrow question to the Florida Supreme Court. *See Day Cruise, on motion for certification*, 798 So. 2d 847 (Fla. 1st DCA 2001). By order dated July 16, 2002, the Florida Supreme Court declined to exercise jurisdiction (Case No. SC01-2656).

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

Equitable Tolling in Administrative Proceedings: Where is the Authority?

by John S. Yudin, Esq.

The doctrine of equitable tolling is a principle that is asserted on a somewhat regular basis in the realm of administrative proceedings. Two of the most recent and notable attempts to invoke the doctrine have been in cases involving Save the Manatee Club (the Club). In both *Save the Manatee Club, Inc. v. South Florida Water Management District et al.* DOAH Case #01-3109 (2001) and *Save the Manatee Club, Inc. v. Joseph B. Whitley et al.* DOAH Case #00-3482 (2000),[1] the Club sought to invoke the doctrine in order to prevent dismissal of an untimely filed petition for administrative proceeding. In each case, the Administrative Law Judge ("ALJ") undertook a detailed analysis of whether the doctrine should be applied given the particular facts of the case. Both ALJs ultimately determined that, based upon the facts of the case, application of the doctrine was not warranted and the cases were dismissed. Neither case, however, addressed the threshold question of whether the Florida Division of Administrative Hearings (DOAH) has legal authority to apply the doctrine of equitable tolling. Had the issue been considered, it would seem the ALJs could only have concluded that DOAH has no legal authority to apply the doctrine of equitable tolling.

The roots of the doctrine of equitable tolling trace back to at least 1874, when the United States Supreme Court recognized its existence.[2] Despite being recognized by the federal courts for more than a hundred years, the doctrine seems to have been first addressed by the Florida courts in 1986.[3]

The doctrine of equitable tolling permits, under certain circumstances, the filing of a lawsuit that otherwise would be barred by a limitations period.[4] The doctrine is generally only applied when a party has been misled or lulled into inaction, or has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.[5] The doctrine of equitable tolling is therefore a judicially created equitable remedy that, in certain instances, authorizes the untimely filing of a lawsuit.

Florida courts have, on occasion, invoked the doctrine of equitable tolling in an administrative context to authorize the untimely filing of a petition for administrative hearing.[6] Florida's appellate courts certainly have legal authority[7] and equitable authority[8] to apply the doctrine of equitable tolling if they so choose. No Florida court, however, has considered whether DOAH has legal authority to apply the doctrine of equitable tolling.

As anyone who practices administrative law knows full well, and has probably argued on more than one occasion, the only authority agencies in the State of Florida have is that which has been granted to them by legislative enactment.[9] An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction.[10] When acting outside the scope of its delegated authority, an agency acts illegally.[11] An administrative agency, therefore, has no authority to enlarge, modify, or contravene the provisions of a statute.[12]

DOAH is an administrative "agency" of the State of Florida.[13] As an agency of the State of Florida, DOAH only has that authority which has been granted to it by legislative enactment.[14] As a creature of statute, DOAH has no inherent power, cannot increase its jurisdiction,[15] and has no authority to enlarge, modify or contravene the provisions of a statute.[16] When DOAH acts outside of its delegated legislative authority, DOAH acts illegally.[17]

To this author's knowledge, there is no statute or other legislative enactment which specifically grants DOAH the authority to assert jurisdiction or preside over an administrative proceeding which has been untimely filed or commenced. Nor has the Legislature specifically granted DOAH the authority to take into account equitable considerations when determining whether an untimely commenced administrative proceeding should be allowed to go forward. In short, the Legislature has not specifically granted DOAH any authority to sit in equity or provide equitable relief when an administrative proceeding has not been timely commenced.

Consistent with the idea that DOAH has no authority to allow an untimely commenced petition for administrative hearing to proceed is the fact that the Legislature has authorized agencies to refer petitions for administrative hearing to DOAH "only if the petition is in substantial compliance with the requirements of [section 120.569(2)(c), Florida Statutes]."[18] According to the clear and unambiguous language of the statute, a petition for administrative hearing cannot be in "substantial compliance" with the requirements of section 120.569(2)(c), Florida Statutes, if it is untimely.[19] Thus, in section 120.569, Florida Statutes, the Legislature provided that untimely petitions for administrative hearings may not even be referred to DOAH.

It therefore seems clear that the Legislature has intentionally only granted DOAH jurisdiction and authority to preside over timely commenced administrative proceedings. Since DOAH has no inherent authority and cannot increase its own jurisdiction, and because DOAH has only been granted authority to consider timely commenced administrative proceedings, were DOAH to apply the doctrine of equitable tolling and allow an untimely administrative proceeding to move forward, DOAH would be increasing its jurisdiction and enlarging and modifying the provisions of Florida's Administrative Procedure Act (APA). Therefore, if DOAH were to apply the doctrine of equitable tolling, DOAH would be

continued...

EQUITABLE TOLLING

from page 3

acting illegally.

In response to this conundrum, one of the counterarguments would no doubt be that since Florida's courts have extended the doctrine of equitable tolling to administrative proceedings, the courts have authorized DOAH to apply the doctrine. This argument is fatally flawed, however, because while Florida's appellate courts have both legal and equitable authority to apply the doctrine if they so choose,[20] DOAH does not. Further, since DOAH is a creature of statute and has only those powers conferred upon it by the Legislature, Florida's courts have no authority to confer upon DOAH the ability to apply the doctrine of equitable tolling. As a result, the fact that Florida's appellate courts have applied the doctrine in the past in no way authorizes DOAH to apply the doctrine today.

In conclusion, since the Legislature has not granted DOAH any legal or equitable authority to apply the doctrine of equitable tolling, and since the Legislature has only authorized agencies to refer timely filed petitions to DOAH, the Legislature clearly intended that DOAH only preside over timely commenced administrative proceedings. Were DOAH to apply the doctrine of equitable tolling and take jurisdiction over an untimely commenced administrative proceeding, DOAH would, without authority, be increasing its own jurisdiction and enlarging and modifying the provisions of Florida's APA. As a result, DOAH's only option in dealing with an untimely filed administrative petition is to dismiss the petition for lack of jurisdiction. Based on the foregoing, it would appear that aside from an appellate court applying the doctrine of equitable tolling to allow the untimely filing of a petition for administrative proceeding, the doctrine of equitable tolling has no place in administrative law.

John S. Yudin *is a partner in the firm Guy & Yudin, LLP. in Stuart, Florida, where he practices mainly in the areas of administrative, environmental and admiralty and maritime law. He received his J.D. in 1994 from Quinnipiac College in Hamden, Connecticut. Comments and quesitons may be submitted to johnyudin@guyydinlaw.com*

Endnotes:

[1] *Save the Manatee Club, Inc. v. Joseph B. Whitley et al.* was affirmed on appeal by the First District Court of Appeal. *Save the Manatee Club, Inc. v. Whitley,* 812 So. 2d 412 (Fla. 1st DCA 2002). To the author's knowledge, no appeal was filed in *Save the Manatee Club, Inc. v. South Florida Water Management District et al.,* DOAH Case #01-3109 (2001).

[2] *See generally Bailey v. Glover*, 88 U.S. 342 (Mem) (1874).

[3] *See generally Machules v. Department of Admin*.502 So. 2d 437 (Fla. 1st DCA 1986).

[4] *Machules v. Department of Admin*., 523 So. 2d 1132, 1133 (Fla.1988).

[5] *Jancyn Mfg. Corp. v. State, Dept. of Health*, 742 So. 2d 473, 475 (Fla. 1st DCA 1999).

[6] Section 120.68(6), Florida Statutes.

[7] *See* endnote 3 *supra.*

[8] *See* endnote 3 *supra.*

[9] *Department of Environmental Regulation v. Falls Chase Special Taxing District*, 424 So. 2d 787, 793 (Fla. 1st DCA 1982); *review denied*, 436 So. 2d 98 (Fla.1983).

[10] *See* endnote 8 *supra.*

[11] *See* endnote 8 *supra.*

[12] *DeMario v. Franklin Mortgage & Inv. Co., Inc.*, 648 So. 2d 210, 214 (Fla. 4th DCA 1994), *rev. denied*, 659 So. 2d 1086 (Fla.1995).

[13] Section 120.52(1), Florida Statutes.

[14] *See* endnote 8 *supra.*

[15] *See* endnote 8 *supra.*

[16] *See* endnote 11 *supra.*

[17] *See* endnote 8 *supra.*

[18] Section 120.569(2)(d), Florida Statutes.

[19] Section 120.569(2)(c), Florida Statutes, provides: "...Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured..." Untimeliness is a defect on the face of a petition that cannot be cured via an amended petition. The plain meaning of the statute therefore contemplates dismissal of the petition with prejudice by the agency with whom the untimely petition was filed.

[20] *See* endnotes 2 & 6 above.

RULE CHALLENGES

from page 1

the phrase since it was added to section 120.52(8)(f).[4]

The phrase "competent substantial evidence" is included in the definition of "invalid exercise of delegated legislative authority" in section 120.52(8) and is one of the enumerated statutory grounds on which an ALJ may declare a proposed or existing agency rule to be invalid. The phrase was added to the definition in 1996, a year when the Legislature substantially rewrote the Administrative Procedure Act.[5]

Without question, the general thrust of the changes to rulemaking provisions in 1996 was to make it easier for substantially affected persons to prevail in rule challenge proceedings.[6] Thus, the court's determination that the phrase was intended by the Legislature to limit an ALJ's scope of review in rule challenge proceedings is surprising.

Nonetheless, the court was understandably perplexed by the inclusion of the phrase in the definition of "invalid exercise of delegated legislative authority." As the ALJ noted in one of his Final Orders that was under review, "competent substantial evidence is traditionally a standard of review, not an evidentiary standard."[7]

A rule challenge is a *de novo* proceeding,[8] and finding an appellate standard of review among the listed statutory grounds for declaring a rule invalid has undoubtedly troubled a number of lawyers and ALJs.[9] At least one former DOAH Hearing Officer (as ALJs were called then) and administrative practitioner, Bill Williams, advised the Governor's Administrative Procedure Act Review Commission ("APA Commission") in 1996 that the phrase "competent substantial evidence" had no place among the list of grounds for challenging an agency rule because it constituted a standard of review. "It fell on deaf ears," Williams said recently of his comments, noting that some private practitioners interested in making agencies more accountable for their rules viewed the phrase as one tool in accomplishing that objective.

The APA Commission recommended many of the 1996 changes to the APA that were adopted that year by the Legislature. However, inclusion of the "competent substantial evidence" ground in section 120.52(8) was not among its specific recom-

mendations. Rather, that language was picked up from a law enacted in 1995 amending the APA that was vetoed by Gov. Lawton Chiles.[10] Provisions of the 1995 Act that were not extensively discussed by the Commission were considered "noncontroversial" and were recommended as a group for inclusion in the draft legislation.[11] The additional ground for challenging a rule because it "is not supported by competent substantial evidence" was among those provisions.

ALJ Pfeiffer not only acknowledged in one of his Final Orders that competent substantial evidence was considered a standard of review, but also that it is usually applied to quasi-judicial decisions and is "highly deferential to the decision-making body."[12] He explained: "[A] decision will be found to be based on competent substantial evidence if it is based upon evidence that is sufficiently relevant and material and that a reasonable mind would accept as adequate to support the conclusion reached."[13] Pfeiffer went on to say that under the competent substantial evidence standard, "the reviewing body cannot reweigh the evidence, make determinations as to credibility, or substitute its own judgment for that of the agency, even if the record contains some evidence that may support a view contrary to that of the agency."[14]

After reciting courts' definitions of the competent substantial evidence standard of review and noting that he had reviewed the voluminous evidence considered by the Board of Medicine in adopting the office surgery rules, Pfeiffer nonetheless found that there was "no credible evidence" demonstrating that quality of care is improved by the existing rule's requirements that certain physicians performing certain types of office surgery have hospital privileges or transfer agreements with a hospital.[15]

In the proposed rule challenge case, Pfeiffer also found that no competent substantial evidence existed to require the presence of an anesthesiologist during certain office surgery procedures. "[T]here is no reliable data demonstrating that Level III office surgery is safer with an anesthesiologist than with a CRNA [Certified Registered Nurse Anesthetist]," he wrote.[16]

Reviewing the consolidated appeals of these orders, the court struggled with the "intended meaning" of the phrase "competent substantial evidence" in section 120.52(8), noting that it could find no case law or legislative history stating whether the phrase was intended as a standard of proof or a standard of review.[17] The court noted that the supreme court, in *Florida Power & Light Company v. City of Dania*,[18] had explained the difference between use of the phrase as a standard of proof and as a standard of review: "When applied by an agency at the fact-finding level, 'competent substantial evidence' refers to standard of proof. . . . However, at the appellate level, the term refers to a standard of review, and 'is tantamount to legally sufficient evidence.'"[19]

Appellees in the case[20] argued that the Legislature must have intended for the phrase to be a standard of proof, noting that a rule challenge is a *de novo* proceeding.[21] Appellants argued that the phrase was intended to be a standard of review, and the ALJ, therefore, acted improperly by reweighing the evidence and substituting his judgment for that of the Board of Medicine.

The court determined that the Appellants had the better argument, reasoning:

> Although technically a de novo proceeding, a rule challenge before an ALJ is in many respects similar to certiorari review in circuit court of quasi-judicial action by local governmental agencies. In such cases, the circuit court must review the record to determine whether the agency action is supported by competent substantial (or 'legally sufficient') evidence. . . . The circuit court may not reweigh the evidence or substitute its judgment for that of the agency. . . . Moreover, we note that, were ALJs permitted to reweigh the evidence regarding the need for rules, the rulemaking process would be turned on its head. The Division of Administrative Hearings would have the final say regarding the wisdom of agency rules, notwithstanding the special expertise possessed by agencies, and the lack thereof in the Division. Regulation of trades and professions would be taken from the boards created precisely because they possessed special knowledge and expertise, and placed in the hands of the ALJs. We believe that the legislature intended by its use of the term 'competent substantial evidence' to limit the scope of review by ALJs in rule challenge proceedings to whether legally sufficient evidence exists supporting the agency's proposal. Accordingly, in these proceedings, the ALJ should not have independently reweighed the evidence, assessed the credibility thereof, or substituted his judgment regarding the wisdom of the rules for that of the Board.[22]

The analysis surprised many administrative law practitioners, in part because the court referred to a rule challenge as "technically" a *de novo* proceeding. There's never been any question but that proceedings at DOAH, including rule challenges, are *de novo*,[23] and describing them as "technically" *de novo* clouds an issue that was not in doubt.

Administrative practitioners who represent state agencies were understandably gleeful about the opinion, in part because the "competent substantial evidence" phrase was advocated by private practitioners in the mid-1990s seeking to limit agencies' ability to adopt rules and to increase the likelihood of successful challenges to those rules. Victories for state agency practitioners in rule challenge proceedings since the 1996 amendments to the APA have been harder to come by, and this one was particularly sweet.

One result of the opinion is that challengers to proposed or existing agency rules are now much less likely to allege that a rule is invalid because it is not based on "competent substantial evidence." Of greater concern is how the court's statement that a rule challenge proceeding "is in many respects similar to certiorari review in circuit court of quasi-judicial action by local government agencies" will be treated in future cases. If applied outside of the "competent substantial evidence" context, the statement could dramatically affect rule challenge proceedings and how they are viewed by appellate courts.

continued...

RULE CHALLENGES
from page 5

Also potentially impacted by the opinion are future cases based on section 120.57(1)(e), which governs agency action that determines the substantial interests of a party and that is based on an unadopted rule. That statute specifically states that such action is "subject to de novo review by an administrative law judge" and "shall not be presumed to be valid or invalid." The statute goes on to state that the agency must demonstrate that the unadopted rule meets a variety of tests, including that it "is supported by competent and substantial evidence."[24] The language in section 120.57(1)(e) also was added to the APA in 1996, and a reasonable assumption is that the motivation for its inclusion was the same as the motivation for including the "competent substantial evidence" standard in section 120.52(2). Two commentators have described the addition to section 120.57(1)(e) as follows:

> Subsubparagraph f . . . requires the unadopted rule to be 'supported by competent and substantial evidence.' Stated another way, the record before the ALJ must demonstrate the factual and legal basis for the agency's policy. The agency must create a record foundation supporting the 'accuracy of every factual premise and the rationality of every policy choice.'[25]

It is not clear whether practitioners concerned about the court's analysis of "competent substantial evidence" in the *Board of Medicine* case will seek redress from the Legislature. Perhaps the best solution would be to remove the phrase from both sections 120.52(8) and 120.57(1)(e), as an appellate standard of review never belonged in those statutes in the first place.

Donna E. Blanton *is a shareholder with Katz, Kutter, Alderman, Bryant & Yon, P.A. She is chair-elect of the Administrative Law Section Executive Council.*

Endnotes:

[1] *See Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc.*, 808 So. 2d 243, 257 (Fla. 1st DCA 2002).

[2] *See Florida Academy of Cosmetic Surgery, Inc. v. Department of Health, Board of Medicine*, DOAH Case No. 00-1058RX (September 7, 2000); *Florida Academy of Cosmetic Surgery, Inc. v. Department of Health, Board of Medicine*, DOAH Case No. 00-951RP (November 16, 2000). The challenged rules (some proposed and some existing) included a requirement that an anesthesiologist be present for all Level III office surgeries, which involve a greater degree of unconsciousness than Levels I and II surgeries; a requirement that physicians without staff privileges at a licensed hospital who perform Level II office surgeries have a transfer agreement with a licensed hospital; and a provision allowing physicians with staff privileges at a licensed hospital to perform Level III office surgeries.

[3] *See also State Bd. of Trustees of Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc.*, 794 So. 2d 696, 701 (Fla. 1st DCA 2001); *Southwest Fla. Water Mgmt. District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

[4] 808 So. 2d at 257-258.

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

[6] *See, e.g.*, Robert C. Downie II, *Back to the Future--An Agency Perspective on Rulemaking in the 21st* Century, 75 Fla. B.J. 42, 43 (January 2001);Wade L. Hopping, Lawrence E. Sellers, and Kent Wetherell, *Rulemaking Reforms and Nonrule Policies: A "Catch-22" for State Agencies?*, 71 Fla. B.J. 20, 23-24 (March 1997); Donna E. Blanton & Robert M. Rhodes, *Florida's Revised Administrative Procedure Act*, 70 Fla. B.J. 30, 33-35 (July/August 1996).

[7] *Florida Academy of Cosmetic Surgery, Inc. v. Department of Health, Board of Medicine*, DOAH Case No. 00-1058RX, at 40 (September 7, 2000).

[8] § 120.56 (1)(e), Fla. Stat. (rule challenge proceeding to be conducted in the same manner as provided in sections 120.569 and 120.57); *McDonald v. Department of Banking and Finance*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977) ("Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily."); *Young v. Department of Community Affairs*, 625 So. 2d 831, 833 (Fla. 1993) ("[A] chapter 120 proceeding is a hearing de novo . . .").

[9] The listed grounds for declaring a rule to be invalid are:
(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.,
(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
(e) The rule is arbitrary or capricious;
(f) The rule is not supported by competent substantial evidence; or
(g) The rule imposes regulatory costs on the regulated person, county, or city whch could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.
§ 120.52(8), Fla. Stat. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of these criteria is found by the administrative law judge. *Id*. Additionally, rules must comply with the "flush left" language following these enumerated criteria in section 120.52(8).

[10] *See* CS/CS/SB 536 (1995) (vetoed by Governor).

[11] *See* Final Report of the Governor's Administrative Procedure Act Review Commission, February 20, 1996, at Appendix F, p. 3.

[12] *Florida Academy of Cosmetic Surgery, Inc. v. Department of Health, Board of Medicine*, DOAH Case No. 00-1058RX at 40.

[13] *Id*. at 40-41, *citing DeGroot v. Sheffield*, 95 So. 2d 912, 915 (Fla. 1957).

[14] *Id*. at 41, *citing Hillsborough Area Reg'l Transit Auth. v. Amalgamated Transit Union Local 1593*, 720 So. 2d 1160 (Fla. 1st DCA 1998) and *Roman v. Unemployment Appeals Comm'n*, 711 So. 2d 93 (Fla. 1st DCA 1998).

[15] *Florida Academy of Cosmetic Surgery, Inc. v. Department of Health, Board of Medicine*, DOAH Case No. 00-1058RX at 41-42.

[16] *Florida Academy of Cosmetic Surgery, Inc. v. Department of Health, Board of Medicine*, DOAH Case No. 00-0951RP at 39.

[17] 808 So. 2d at 257.

[18] 761 So. 2d 1089 (Fla. 2000).

[19] 808 So. 2d at 257, *quoting Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092-93 (Fla. 2000).

[20] Appelles in one or both of the consolidated cases were the Florida Academy of Cosmetic Surgery, Inc.; Charles Graper, M.D., D.D.S., F.A.C.S.; R. Gregory Smith, M.D.; Florida Society of Plastic Surgery, Inc., the Florida Society of Dermatology, Inc., the Florida Association of Nurse Anesthetists, and the Florida Nurses Association.

[21] 808 So. 2d at 257.

[22] *Id*. at 257-58.

[23] *Young*, 625 So. 2d at 833.

[24] § 120.57(1)(e)2.f., Fla. Stat. The tests that an unadopted rule must meet are essentially the same as those in the definition of "invalid exercise of delegated legislative authority."

[25] Wade L. Hopping & Kent Wetherell, *The Legislature Tweaks McDonald (Again): The New Restrictions on the Use of 'Unadopted Rules' and 'Incipient Policies' by Agencies in Florida's Administrative Procedure Act*, 48 Fla. L. Rev. 135, 155 (Jan. 1996) (footnotes omitted).

The Florida Bar Administrative Law Section and the Florida State University College of Law present the

2002 Pat Dore Administrative Law Conference

COURSE CLASSIFICATION: INTERMEDIATE LEVEL

One Location: October 24-25, 2002 • Turnbull Conference Center
555 W. Pensacola Street • Tallahassee, FL

Course No. 5245R
(ALCNFR)

Schedule of Events

THURSDAY, October 24, 2002

1:30 p.m. – 2:00 p.m.
Late Registration

2:00 p.m. – 2:15 p.m.
Welcome and Introductions
Lisa S. Nelson, Section Chair and Patrick L. "Booter" Imhof, Program Chair

2:15 p.m. – 3:15 p.m.
Statutory and Caselaw Update
William E. Williams, Huey Guilday Tucker Schwartz & Williams P.A.

3:15 p.m. – 3:30 p.m.
Break

3:30 p.m. – 4:50 p.m.
Perspectives on Administrative Adjudication: Institutional Perspectives Participants:
Judge Robert T. Benton, II, First District Court of Appeal
Judge Terry P. Lewis, Second Judicial Circuit
U.S. Magistrate William E. Sherrill, Jr., Northern District of Florida
Administrative Law Judge Charles A. Stampelos, D.O.A.H.
William W. Large, Department of Health

5:00 p.m. – 6:30 p.m.
Reception Honoring Supreme Court Justices, District Courts of Appeal Judges, Circuit Court Judges, Administrative Law Judges, and Federal District Court Judges
FSU College of Law, Rotunda

FRIDAY, October 25, 2002

9:00 a.m. – 10:00 a.m.
Variances - How Agencies Have Dealt with this Change
Moderator: M. Catherine Lannon, Office of the Attorney General
Francine M. Ffolkes, Department of Environmental Protection
Barbara Jo Finer, Department of Community Affairs
M. Elizabeth Keating, Public Service Commission

10:00 a.m. – 10:40 a.m.
How the APA has Changed Over the Years
Robert P. Smith, Jr., Esquire

10:40 a.m. – 11:00 a.m.
Break

11:00 a.m. – 12:00 noon
Why the APA has Changed - Problems and Solutions
Moderator: Robert C. Downie, II, Department of Transportation
David Gluckman, Gluckman and Gluckman
Wade L. Hopping, Hopping Green & Sams P.A.
Lawrence E. Sellers, Jr., Holland & Knight
Linda L. Shelley, Fowler, White, Boggs, Banker, P.A.

12:00 noon – 1:15 p.m.
Lunch (included in registration fee)

1:15 p.m. – 2:30 p.m.
Agency Rulemaking - Since the 1996 Revision
Moderator: Allen R. Grossman, Gray Harris & Robinson
Lee Ann Gustafson, Office of the Attorney General
J. Steven Menton, Rutledge, Ecenia, Purnell & Hoffman, P.A.
Mary F. Smallwood, Ruden, McClosky, Smith, Schuster & Russell, P.A.
Thomas G. Thomas, Department of Elder Affairs

2:30 p.m. – 2:50 p.m.
Break

2:50 p.m. – 3:40 p.m.
Comparison between Federal and Florida Administrative Procedure
Professor Mark Seidenfeld, FSU College of Law
Cathy M. Sellers, Moyle, Flanigan, Katz, Raymond & Sheehan, P.A.

3:40 p.m. – 4:30 p.m.
Professionalism in the Administrative Forum
Chief Justice Harry L. Anstead, Supreme Court of Florida

CLER PROGRAM

(Maximum Credit: 9.5 hours)
General: 9.5 hours
Ethics: 1.0 hour

CERTIFICATION PROGRAM

(Maximum Credit: 7.0 hours)
City, County & Local Gov't.: 7.0 hours

Credit may be applied to more than one of the programs above but cannot exceed the maximum for any given program. Please keep a record of credit hours earned. RETURN YOUR COMPLETED CLER AFFIDAVIT PRIOR TO CLER REPORTING DATE (see Bar *News* label).

REFUND POLICY: Requests for refund or credit toward the purchase of the course book/tapes of this program **must be in writing and postmarked** no later than two business days following the course presentation. Registration fees are non-transferrable, unless transferred to a colleague registering at the same price paid. A $15 service fee applies to refund requests. Registrants that do not notify The Florida Bar by 5:00 p.m., October 17, 2002 that they will be unable to attend the seminar, will have an additional $30 retained. Persons attending under the policy of fee waivers will be required to pay $30.

Registration

HOW TO REGISTER	MAIL	FAX	PHONE
	Completed form with check	With credit card info. to 850/561-5825	850/561-5623 M-F 8:00 - 5:30

Register me for the "2002 Pat Dore Administrative Law Conference."

(053) TURNBULL CONFERENCE CENTER, TALLAHASSEE, (OCTOBER 24-25, 2002)

TO REGISTER OR ORDER COURSE BOOK/TAPES, MAIL THIS FORM TO: The Florida Bar, CLE Programs, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 with a check in the appropriate amount payable to The Florida Bar or credit card information filled in below. If you have questions, call 850/561-5623. ON SITE REGISTRATION, ADD $15.00. **On-site registration is by check only.**

Name _____ Florida Bar # _____

Address _____

City/State/Zip _____ Phone # _____

(JMW) **Course No. 5245R**
(AL001)

❑ Please check here if you have a disability that may require special attention or services. To ensure availability of appropriate accommodations, attach a general description of your needs. We will contact you for further coordination.

REGISTRATION FEE (check one):

❑ Member of the Administrative Law Section: $75

❑ Non-section member: $100 (includes section membership)

❑ Full-time law college faculty or persons attending under the policy of fee waivers: $30
Includes Supreme Court, DCA, Circuit and County Judges, General Masters, Judges of Compensation Claims, Administrative Law Judges, and full-time legal aid attorneys if directly related to their client practice. *(We reserve the right to verify employment.)*

METHOD OF PAYMENT (check one):

❑ Check enclosed made payable to The Florida Bar

❑ Credit Card (Advance registration only. May be faxed to 850/561-5825)

☐ MASTERCARD ☐ VISA

Name on Card: _____

Card No. _____

Expiration Date: _____/_____ (MO./YR.)

Signature: _____

COURSE BOOK — AUDIOTAPES

Private taping of this program is not permitted.

Delivery time is 4 to 6 weeks after October 24, 2002. TO ORDER AUDIOTAPES OR COURSE BOOKS, fill out the order form above, including a street address for delivery. **Please add sales tax to the price of tapes or books. Tax exempt entities must pay the non-section member price.**

_____ COURSE BOOK ONLY: Cost $30 plus tax (AL006) TOTAL $_____

_____ AUDIOTAPES (includes course book) (5245R)
Cost: $75 plus tax (section member) $100 plus tax (nonsection member) TOTAL $_____

Certification/CLER credit is not awarded for the purchase of the course book only.

Please include sales tax unless ordering party is tax-exempt or a nonresident of Florida. If this order is to be purchased by a tax-exempt organization, the course book/tapes must be mailed to that organization and not to a person. Include tax-exempt number beside organization's name on the order form.

APPELLATE CASE NOTES

by Mary F. Smallwood

ADJUDICATORY PROCEEDINGS

Kelly v. Department of Children and Family Services, 27 Fla. L. Weekly 1619 (Fla. 3d DCA 2002)

Kelly was notified by the Department of Children and Family Services that it sought recoupment of $627 in benefits as she had failed to notify the Department of a change in address. The notice provided that she could request a hearing within 30 days either in writing or verbally. Kelly sent the Department a letter disputing its allegation that she had not notified the agency of a change of address; however, the letter did not specifically request a hearing. After the expiration of the 30-day time period, she requested a hearing.

At a convened hearing, the Department hearing officer concluded that Kelly had not timely requested a hearing and dismissed the matter.

On appeal, the court reversed. It held that the letter was sufficient to put the Department on notice that Kelly disputed the factual allegations in the notice of recoupment. The court concluded that since the only way to challenge a request for recoupment was through a hearing, the letter should have been treated as a request for such a hearing even though it didn't use that terminology.

ATTORNEY'S FEES

Fish v. Department of Health, 27 Fla. L. Weekly 1451 (Fla. 4th DCA 2002)

Fish, a licensed dentist, sought attorney's fees pursuant to Section 57.111, Fla. Stat., after the Department of Health dismissed its complaint against him before the Division of Administrative Hearings. The complaint had initially been filed after a determination by the probable cause panel that it was justified. Fish had been accused by another dentist of misrepresenting his expert witness credentials in a deposition taken during a case against that dentist. Although Fish had filed a timely response, the Department failed to make it available to the probable cause panel for consideration.

The administrative law judge found that the Department's action was substantially justified under Section 57.111. The court affirmed that decision.

The court concluded that the probable cause panel's failure to consider Fish's response was not fatal. In fact, it found that the response actually reflected that there were disputed factual issues. Moreover, the court rejected Fish's argument that the case was dismissed by the Department simply for a procedural irregularity. Instead, the record indicated that the Department dismissed the complaint at least in part because two potential witnesses had died and questions about another witness' credibility had been raised. The court recognized that the evidence considered by a probable cause panel need not be as compelling as that required to find guilt.

GOVERNMENT IN THE SUNSHINE AND PUBLIC RECORDS ACT

Times Publishing Co. v. City of Clearwater, 27 Fla. L. Weekly 1544 (Fla. 2d DCA 2002)

The Times Publishing Company sought copies of all e-mail messages sent or received by two City of Clearwater employees on their government computers. Under its procedures, the City allowed the employees to sort through the e-mail messages and divide them into personal and public messages. Only the messages determined to be public in nature were provided to the newspaper. The trial court concluded that the personal messages were not "public records" as defined in Section 119.011(1), Fla. Stat. The Times did not request an in camera review of the documents but appealed the issue of whether personal e-mails were public records.

The District Court affirmed the trial court. The court concluded that personal e-mails were not "made or received pursuant to law or ordinance" under the definition of a public record, nor were they created "in connection with the official business" of the City under Art. I, § 24(a), Fla. Const. Mere placement of a record in a public file does not make a public record. Likewise, the court rejected the Times' argument that it was inappropriate for the custodian of the public records to allow the individual employees to review their own e-mails. Without a specific provision in the law, the court concluded that the City could allow such delegation of review to the employees.

The court did recognize that part of the reason for the request by the Times was to determine whether the employees in question spent work time on personal matters; however, it noted that the Public Records Act was of limited use as a tool to ferret out such activities.

Recognizing the importance of this issue, the court certified the following question to the Supreme Court:

> WHETHER ALL E-MAILS TRANSMITTED OR RECEIVED BY PUBLIC EMPLOYEES OF A GOVERNMENT AGENCY ARE PUBLIC RECORDS PURSUANT TO SECTION 119.011(1), FLORIDA STATUTES (2000), AND ARTICLE I, SECTION 24(a), OF THE FLORIDA CONSTITUTION BY VIRTUE OF THEIR PLACEMENT ON A GOVERNMENT-OWNED COMPUTER SYSTEM IF THE AGENCY HAS A WRITTEN POLICY THAT INFORMS THE EMPLOYEES THAT THE AGENCY MAINTAINS A RIGHT TO CUSTODY, CONTROL AND INSPECTION OF E-MAILS?

Bruckner v. City of Dania Beach, Florida, 27 Fla. L. Weekly 1550 (Fla. 4th DCA 2002)

Bruckner sued the City in federal court, challenging the constitutionality of a City resolution. In a closed meeting to discuss trial strategy, the commissioners discussed three options to resolve the litigation, includ-

continued...

APPELLATE CASE NOTES
from page 9

ing accepting Bruckner's settlement proposal, proceeding with the litigation, or adopting a modification to the language of the resolution. Each of the commissioners voiced his or her support for the third option. The wording of a possible modification was also discussed. At a public meeting a week later, the Commission adopted revised language in accordance with that discussed at the closed meeting and repealed the provision that was the subject of the litigation. Subsequently, at a public meeting three months later, the Commission readopted the modified language.

Bruckner sought declaratory and injunctive relief, arguing that the Commission had violated the Sunshine Act by crystallizing its position at a closed meeting. The trial court rejected that argument and granted the City's motion for summary judgment.

On appeal, the court affirmed. It found that the City was within its rights in discussing the various options for settlement of the litigation, including the wording of modified language. The commissioners did not formally vote at the closed meeting. Instead, a vote was subsequently taken at an open meeting. Moreover, even if there was a violation of the Act, the decision to modify the resolution was readopted with discussion at a subsequent meeting. Accordingly, any possible violation was cured.

The Justice Coalition v. The First District Court of Appeal Judicial Nominating Commission, 27 Fla. L. Weekly 1645 (Fla. 1st DCA 2002)

The Justice Coalition sought access to certain records of the Judicial Nominating Commission ("JNC"), including members' notes, vote sheets, tally sheets and ballots. After the JNC refused to make such records public, the Coalition brought suit under the Public Records Act. The trial court held that the JNC was not subject to the Act and the requested records were not subject to the Public Records Act as they were exempt under the Florida Constitution.

The First District affirmed. The court held that the JNC was a constitutionally established entity that was not an agency of the state; accordingly, it was not subject to the Public Records Act. In reaching this conclusion, the court relied in part on *Kanner v. Frumkes*, 353 So. 2d 196 (Fla. 3d DCA 1977), which held that JNCs were not subject to the Government in the Sunshine Act.

In addition, the court held that the records requested were part of the JNC's "deliberations" under Art. V, § 11(d), Fla. Const., which provides that deliberations of the JNCs are not to be open to the public. While there was no precedent as to what constitutes deliberations under this provision, the court construed the term broadly, noting that it would not be rational to keep the verbal deliberations of the JNC confidential if the ultimate written records were to be disclosed. Finally, the court concluded that the members' personal notes were drafts that need not be disclosed as they did not fall within the definition of a public record.

LICENSING
Lusskin v. Department of Health, 27 Fla. L. Weekly 1546 (Fla. 4th DCA 2002)

Dr. Lusskin appealed a final order of the Department of Health revoking his license after a formal administrative hearing. The Department had accepted the administrative law judge's findings of fact and conclusions of law but rejected the penalty recommendation. The administrative law judge had concluded that the doctor suffered from a psychological illness that prevented him from exercising reasonable skill and safety in practicing his profession unless he was monitored by the Physicians Recovery Network ("PRN").

In rejecting the recommended penalty, the Department stated that there was record evidence that Dr. Lusskin was unable to comply with the requirements of the PRN. How-

Administrative Law Section Members:

We Want To Hear From You!!

What can your section do for you that it isn't now doing?
How can we improve?
What would you like to see in your newsletter that you don't see now?

This is YOUR section – we need YOUR input!

Listed below is the information you need to contact your section officers or your newsletter editor.
Please let us hear from you!

Ms. Lisa S. Nelson, Chair
524 E. Park Avenue
Tallahassee, FL 32301-2589
(850)222-2900
hkeftlh@aol.com

Ms. Donna E. Blanton, Chair-elect
P.O. Box 1877
Tallahassee, FL 32302-1877
(850)224-9634
dblanton@katzlaw.com

Robert C. Downie, II, Secretary
DOT, MS58
605 Suwannee St.
Tallahassee, FL 32399-0458
(850) 414-5265
robert.downie@dot.state.fl.us

Deborah K. Kearney, Treasurer
500 S. Duval St.
Tallahassee, FL 32399-2300-1900
(850) 922-5079
kearneyd@flcourts.org

Ms. Elizabeth W. McArthur,
Newsletter Editor
P.O. Box 1877
Tallahassee, FL 32302-1877
(850)224-9634
emcarthur@katzlaw.com

ever, the final order failed to cite with specificity the provisions in the record it relied upon.

The court reversed and remanded. It held that the Department had failed to comply with the provisions of Section 120.57(1)(l), Fla. Stat., which requires that an agency cite specifically to the record in justifying its rejection of a recommended penalty.

Threnhauser v. Department of Business and Professional Regulation, 27 Fla. L. Weekly 1699 (Fla. 5th DCA 2002)

Threnhauser appealed the final order of the Department of Business and Professional Regulation revoking his real estate license for fraudulent concealment of prior convictions. He argued that he had not intentionally concealed certain convictions, as he anticipated that the Department's investigation of his license application would reveal those convictions. The administrative law judge found as a matter of fact that there was no intent to mislead the Department.

On appeal, the court affirmed the final order. It held as a matter of law that the intentional act of concealment was sufficient to justify revocation whether or not the applicant intended to mislead the Department.

APPEALS

Department of Agriculture and Consumer Services v. Haire, 27 Fla. L. Weekly 1583 (Fla. 4th DCA 2002)
Department of Agriculture and Consumer Services v. Haire, 27 Fla. L. Weekly 683 (Fla. 2002)

The Department of Agricultural and Consumer Services sought an immediate transfer of jurisdiction of its appeal to the Supreme Court pursuant to Rule 9.125, Fla. R. App. P., arguing that an emergency situation existed in obtaining review of a trial court order enjoining the enforcement of statutory provisions relating to eradication of citrus canker affected trees. The trial court had issued a temporary injunction, concluding that the statutory 1900 foot zone around impacted trees within which any tree must be destroyed was unconstitutional. The Department argued that delays involved in the appeal process would allow the canker to spread and would add millions of dollars to the ultimate eradication costs. Moreover, the Department argued that an immediate transfer of jurisdiction would allow the Supreme Court to consolidate this case with an appeal from the Third District addressing the issue of the state's obligation to compensate property owners for destroyed trees.

The Fourth District treated the temporary injunction as a partial final judgment, finding that the constitutional issues had been finally decided by the trial court. It noted that there was very little precedent as to when an immediate transfer of jurisdiction under Rule 9.125 is appropriate. In this case, the court concluded that the impact of delays in reaching a decision on the constitutionality of the statute were great enough to justify an immediate transfer. The court even noted recent articles in the press covering the spread of the citrus canker north.

The Supreme Court declined to accept jurisdiction. In a concurring opinion, Justice Pariente characterized the trial court's issuance of a temporary injunction as a non-final order.

Mary F. Smallwood *is a partner with the firm of Ruden, McClosky, Smith, Schuster & Russell, P.A. in its Tallahassee office. She is a 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 Mary.Smallwood@Ruden.com.*

Generating Interest – The Public Utilities Law Committee in Perspective

Recurring Themes in More than 15 Years of Minutes from Public Utilities Law Committee Meetings

by Natalie B. Futch, Chair, PULC

Determining the extent of the relationship between the Public Utilities Law Committee and the Administrative Law Section; facilitating non-divisive seminars regarding topics such as the merits of deregulation in various utility industries; boosting membership and participation – these are the tasks with which the PULC has grappled during the more than 15 years of its existence. These tasks are as timely now as they were when the PULC began.

I was recently asked to serve as chair of the PULC for the coming year. I happily accepted the invitation. To provide me with perspective on the task at hand, Jackie Werndli, the ALS's administrator at the Bar, shared with me 15 years of minutes for the PULC.

The PULC was formed in 1987 from the former Energy Law Committee of The Florida Bar. The ELC was an independent substantive law committee of The Florida Bar. In 1987, then-chair of the PULC and former PSC Commissioner John Marks suggested changing the name of the Energy Law Committee to the Public Utility Law Committee. This was to signify a broadening of the Committee's mission to include the three other PSC-regulated industries – water, gas and telecommunications.

In 1993, the Public Utilities Law Committee became a part of the Administrative Law Section. This was prompted by budget considerations leading to a general proposal to the Board of Governors that all substantive law committees move to sections. Until the move, The Florida Bar funded the budget for the ELC from mandatory dues. As a Committee of

continued...

GENERATING INTEREST
from page 9

the ALS, the Committee would instead be funded by voluntary section dues.

Attorneys who have steered the PULC are among those I have come to admire most in my brief time in practice. The name of my own coworker, former PSC Commissioner Susan Clark, surfaced a number of times in the minutes. I enjoyed tracking the evolution of Susan's participation in Committee activities from the 1988 minutes when she was in the Legal Division of the PSC to the minutes of a September 5, 1991, meeting when the Committee congratulated Susan for her appointment as a Commissioner. Later, as a Commissioner, Susan spoke regarding ethical issues involved in PSC practice at a CLE seminar held at the Walt Disney Hilton in January of 1994.

Other former Commissioners, such as Diane Kiesling and Mike Wilson, have actively participated in the PULC before, during and after their tenure as Commissioner. Diane Kiesling planned a number of CLE seminars before relinquishing her duties upon being appointed to the Commission. Mike Wilson participated in selecting seminars with topics of current interest in the industry.

As is still the case, a stated goal in planning the CLE seminars was to have presenters from all sides of the various issues, including the utilities, competitors, regulators and the Office of Public Counsel. John Marks planned two seminars during his 1988 tenure as chair of the PULC that could as easily take place in 2002. One was titled "Regulation/Deregulation of Public Utilities – Ma Bell lookalike?" and the other was a presentation by Mike Twomey, then a supervisor in the Legal Division of the PSC, who discussed PSC jurisdiction.

Respected attorneys have served the PULC by generating awareness of issues in the industry and by keeping the membership abreast of the latest developments. Attorneys participating through the years have included Suzanne Brownless, Tom Tart, Floyd Self, Jim Stanfield, Jeff Stone, Cindy Miller, Mario Villar, Rob Vandiver, Cathy Beddell, Vicki Kaufman, Joe McGlothlin, Lee Willis and Rich Zambo, among many others.

Though minutes reflect that CLE seminars have been well attended, a recurring topic of discussion at PULC meetings has been a concern that the PULC may cease to exist as an independent Committee unless membership increases. Currently, there are 39 members of the PULC, notably including the Honorable Lila Jaber, Chairman of the PSC. Those who have an interest in industries regulated by the Florida PSC, but who have not yet become members of the PULC, are urged to complete a committee membership.

Please contact me if you are interested in helping to plan CLE seminars, or if you would like to write an article for the newsletter. I look forward to working with you to continue the PULC tradition of bringing all sides together to address topics of interest in public utilities practice.

Natalie B. Futch
106 E. College Ave., Suite 1200
Tallahassee, FL 32301
(850) 577-6706
nfutch@katzlaw.com

Join the Public Utilities Law Committee

The Public Utilities Law Committee of the Administrative Law Section is concerned with the legal, technical and economic issues related to regulated providing electric, gas, water, wastewater, and telephone services. If you are a member of the Administrative Law Section and would like to become a member of this committee, please complete and return the form below:

_____ I would like to become a member of the Public Utilities Law Committee. (AL709)

Name: _____ Fla. Bar No. _____

Address: _____

City/State: _____ Zip Code: _____

Telephone: (____) _____ Telecopier: (____) _____

Please return completed form or a copy to: Jackie Werndli, Program Administrator, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

Petitions for Declaratory Statement – To Answer or Not To Answer

by M. Catherine Lannon

There are three ways for an agency to express its interpretation of the laws it administers: rulemaking, adjudication, and responding to Petitions for Declaratory Statements.

The recent case of *Novick v. Board of Medicine*, 816 So. 2d 1237 (Fla. 5th DCA 2002) deals with the issue of when it is appropriate for an agency to decline to issue a Declaratory Statement. The purpose of a Declaratory Statement is for an agency to respond to a substantially affected person's questions about proposed conduct, i.e., if I do this, will I violate law x, rule y, or order z? In the *Novick* case, the Petitioner asked the Board of Medicine whether compliance with specific contract terms would violate specified statutory provisions -- but the Petitioner had entered into the contract and performed under the terms of the contract for about two years before filing the Petition! The admitted intent behind the Petition for Declaratory Statement was to get the Board to declare that performance under the contract by licensed physicians would violate the law -- and thereby, in practical effect, relieve the physicians of the duty to carry out their part of the bargain.

On this issue the Court stated,

> Although there may be valid exceptions, a petition for declaratory statement which seeks approval or disapproval of conduct which has already occurred is properly denied.

816 So. 2d at 1240. In so ruling, the Court reasserted the position stated in *Chiles v. Department of State, Division of Elections*, 711 So. 2d 151 (Fla. 1st DCA 1998) that "[t]he purpose of a declaratory statement is to allow a party to select a proper course of action in advance."

There were two other bases for the Court's affirmance in *Novick*. One was that the Petition said that the legality of its contract was unclear in light of the *Bakarania*[1] case. However, the Board and the Court pointed out that the Board's *Bakarania* decision was issued before the parties had entered into the subject contract and the Novick Petition was not even filed until eighteen months *after* the appellate affirmance of the Board's *Bakarania* ruling.[2]

Finally, the Court noted that during consideration of the Petition, the Board became aware that one of the parties to the contract at issue had filed a lawsuit in Seminole County seeking a declaration of its rights under the contract. As to this facet, the Court declared that "a declaratory statement is not appropriate when there is related pending litigation, as in this case." 816 So. 2d at 1240.

In summary, *Novick* did not make new law. But it did occasion the pulling together of at least three principles that had been announced in a variety of cases, giving guidance to Petitioners and Agencies alike as to the appropriate usage of Declaratory Statements in administrative practice.

M. Catherine Lannon *received her J.D. in 1978, with honors, from Florida State University. She has been the Chief of the Administrative Law Section in the Office of the Attorney General, Tallahassee, for 15 years and serves as counsel to professional licensure boards. She is Past Chair of the Administrative Law and Government Lawyers Sections of The Florida Bar.*

Endnotes:

[1] *In re Petition for Declaratory Statement of Magan L. Bakarania, M.D.*, 20 F.A.L.R. 395 (Nov. 3, 1997)

[2] *Phymatrix Management Co. Inc. v. Bakarania*, 737 So. 2d 588 (Fla. 1st DCA 1999)

Administrative Law Section's New and Improved Website

by Robert C. Downie, II

On July 1, 2002, the Section entered into an agreement with a website design firm to create a new Administrative Law Section website. The purpose of the website will be to serve as a source of information about the Section and research materials for Florida Administrative Law. Bar Journal articles and the Section Newsletter will be featured, as well as information on upcoming CLE programs, Section meetings, and the student writing competition. We are working hard to design the site so that it is useful to practitioners with all different levels of interest and experience in Administrative Law.

At this time, the substantive information is being added to the site, and it should be available for use sometime near the start of the new year. The new site will be accessible, as the current site is now, through a link at Florida Bar Online - *www.flabar.org.* (click on *Legal Links*, scroll down to *Bar Section and Committee Sites* and click on *Section* - our section is the first on the list).

The website will always be a "work in progress" and will grow and change as more and more information becomes available online, and as we receive feedback from site users. Look for more information about the new site in the next Newsletter, and make sure to visit the new site and tell us what you think.

Minutes of Administrative Law Section Executive Council Meeting – June 21, 2002

I. Call to Order:

The meeting was called to order at 10:35 a.m. by Executive Council Chair-Elect Li Nelson.

Present: Li Nelson, Booter Imhof, Charlie Stampelos, Linda Rigot, Catherine Lannon, Donna Blanton, Robert Downie, Allen Grossman, Cathy Sellers, Larry Sellers, Clark Jennings. Participating by telephone: Bill Williams, Seann Frazier, and Jackie Werndli.

Absent: Dave Watkins, Mary Ellen Clark, Paul Rowell, Debby Kearney, Dan Stengle, Mary Smallwood, Christiana Moore, and Elizabeth McArthur.

II. Preliminary Matters

A. The minutes of the March 1, 2002, meeting were approved.

B. The Treasurer's report was given by Bobby Downie. The Section continues to be in good financial health. A contract with a web site design company has been approved effective July 1, 2002.

C. Chair Dave Watkins was absent, so there was no Report of the Chair.

III. Committee Reports

A. There was no CLE Committee Report.

B. There was no Publications Committee Report.

C. Linda Rigot and Bill Williams gave the Legislative Committee report. Bills passed during the 2002 session that affect the Administrative Procedure Act include legislation relating to statutory timeframes concerning Medicaid reimbursement and the Florida Building Code, Everglades restoration, growth management, workers' compensation, and child support enforcement. There was more extensive discussion of new legislation affecting bid protest procedures. Proposed by the Department of Management Services, the legislation changes the amount of the bond that must be posted when a protest is filed.

D. No one was present to give the report for the Public Utilities Law Committee. There was general discussion about the need to reinvigorate that committee.

E. Membership Committee: Booter Imhof reported that the section has approximately 1,200 members.

F. Seann Frazier reported that 300 flyers were sent to law schools concerning the Section's student writing contest, but only one paper was submitted. It was agreed that Cathy Sellers, who teaches Florida Administrative Practice at the University of Florida College of Law, would work with Seann to encourage more interest from students.

G. Council of Sections: No report.

H. Clark Jennings discussed the possibility of working with the Environmental and Land Use Law Section on a joint CLE program. It was agreed that those discussions would continue.

IV. Old Business

A. Bobby Downie reported on the new contract to develop a Section website. He said a draft page prepared by the Section's consultant would be circulated to Executive Council members for comment.

B. The Pat Dore Conference will be held October 24-25, 2002, in Tallahassee at the Center for Professional Development. Florida State University College of Law has agreed to co-host the program with the Section. Numerous ideas for speakers and topics were discussed. Booter Imhof is chairing the conference and has assembled a committee to work on the program.

V. New Business:

A. The following Executive Council officers for 2002-03 were elected: Li Nelson, Chair; Donna Blanton, Chair-elect; Bobby Downie, Secretary; Debby Kearney, Treasurer. The Executive Council also elected the following Council Members to serve a two-year term expiring in 2004: Richard Ellis, Seann Frazier, Clark Jennings, Catherine Lannon, Christiana Moore, Cathy Sellers, and Bill Williams.

B. Discussion was held about the Section's Long-Range Planning Retreat. It will be held at Melhana Plantation on September 6, 2002. The Executive Council will meet there for dinner on the evening of September 5. Bobby Downie suggested that one topic for discussion at the retreat should be the possibility of Bar certification in administrative law. Other issues discussed as possible agenda topics include the National Association of Administrative Law Judges' convention in Orlando in 2003, statutory changes that allow professional regulatory boards to assess costs against litigants, and the practice of some agencies imposing requirements not listed in chapter 120 or in the Uniform Rules of Procedure in order to request an administrative hearing.

C. It was agreed that the Executive Council would meet again in conjunction with the Long-Range Planning Retreat on September 6. Other meetings will be on January 10, 2003, and in conjunction with the 2003 Bar Convention in Orlando.

D. The Executive Council discussed proposed changes to Florida Bar Rule 4-4.2 relating to communication with persons represented by counsel. Several Council members indicated that they had problems with the proposed changes. It was moved and seconded that Incoming Chair Li Nelson should write a letter to the special committee working on the rule voicing our Section's concerns. The motion carried.

E. Linda Rigot informed the Executive Council that the National Association of Administrative Law Judges is planning a convention in Orlando in the Fall of 2003. The Division of Administrative Hearings (DOAH) has been involved with the national association about serving as a sponsor of the convention, along with the new Florida A&M College of Law. Judge Rigot asked if the Section would also be interested in participating as a co-sponsor. It was moved and seconded that the Section participate as a co-sponsor and make a financial contribution to the convention. The motion carried. Allen

Grossman offered to serve as liaison with DOAH for purposes of planning the convention.

VI. Final Remarks & Presentation of Awards.

Because Outgoing Chair Dave Watkins could not attend the meeting, Incoming Chair Li Nelson distributed his gifts to Executive Council members.

VII. Program Outline & Closing Comments.

Incoming Chair Li Nelson discussed some of her plans for 2002-03. She said Debby Kearney had agreed to chair the Publications Committee. Plans for the section newsletter include a series of profiles of various state agencies, including standard information about each agency, such as the name and telephone number of the Agency Clerk. Further discussion was held about the Public Utilities Committee and the need to find a Chair for that committee. Donna Blanton suggested that Natalie Futch might be interested, and it was agreed that she would be contacted.

VIII.Adjournment.

The meeting was adjourned at 12:10 p.m.

Respectfully submitted,
Donna E. Blanton, Secretary

Section Budget/Financial Operations

REVENUES:	2001-2002 Budget	2001-2002 Actual	2002-2003 Budget
Dues	$20,800	$21,130	$20,800
Affiliate Dues	250	290	150
Dues Retained by Bar	(10,600)	(10,806)	(10,520)
TOTAL DUES	**$10,450**	**10,614**	**10,430**
OTHER REVENUE:			
CLE Courses	$750	$1,293	$750
Audiotape Sales	3,000	1,441	1,500
Interest	7,732	2,375	8,265
Course Material Sales	150	26	75
Section Service Programs	5,000	1,302	5,000
Miscellaneous			50
TOTAL REVENUE	**$27,082**	**$17,051**	**$26,070**
EXPENSES			
Staff Travel	$424	$304	$473
Postage	500	270	500
Printing	300	18	300
Newsletter	2,500	1,942	2,500
Photocopying	275	75	275
Meeting Travel	500	0	500
Committees	500	0	500
Council Meetings	500	381	500
Bar Annual Meeting	1,700	1,570	1,700
Awards	500	100	500
Council of Sections	300	300	300
Section Service Programs	5,000	587	5,000
Retreat	4,500	3,577	4,500
Writing Contest	2,400	0	2,400
Officer Expense	500	0	500
Membership	500	0	500
Officer Travel	2,500	0	2,500
CLE Speaker Expense	100	0	100
Operating Reserve	2,400	0	3,410
Public Utilities	500	0	500
Supplies			50
Website			10,000
TOTAL EXPENSES	**$26,399**	**$9,124**	**$37,508**
BEGINNING FUND BAL.	**$108,644**	**$117,550**	**$119,915**
PLUS REVENUES	**27,082**	**17,051**	**26,070**
LESS EXPENSES	**26,399**	**9,124**	**37,508**
OTHER COST CENTER	**(1,025)**	**(91)**	**0**
ENDING FUND BALANCE	**$108,302**	**$125,386**	**$108,477**

SECTION REIMBURSEMENT POLICIES:
General: All travel and office expense payments in accordance with Standing Board Policy 5.61. Travel expenses for other than members of Bar staff may be made if in accordance with SBP 5.61(e)(5) (a)-(i) 5.61(e)(6) which is available from Bar headquarters upon request

We Need Your Help.....

In future issues of the newsletter, we plan to feature different state agencies and describe how the APA affects the mission of each agency. We plan to interview our General Counsels and would like to use this opportunity to build a stronger relationship with the agencies as a whole. In beginning this project, we have two hurdles to face: identifying all of the agencies and deciding what kind of information would be helpful to members of the section. That is where you can help. Departments are easy to identify, but some agencies are not so readily apparent. If you work for or have regular dealings with an agency that is not a department, let us know. Likewise, if there are specific questions that you would like to see answers to or that would be helpful to APA practitioners, let us know that as well. Listed below are some of the questions that we have thought of asking, but if we have left anything out, now is your opportunity to give some input!

The questions we have identified are:

- Agency head's name and title
- Telephone number
- Whether the agency is a cabinet or gubernatorial agency
- Name and telephone number of the General Counsel
- Educational background of General Counsel
- Name and telephone number of the Agency Clerk
- Agency's Mailing Address
- Number of lawyers on staff
- Kinds of cases handled by the Agency; percentage that involves use of the APA
- How does Chapter 120 affect the mission of the Agency?
- How does the rulemaking process affect your Agency?
- What changes would you like to see in the APA?
- What changes would you like to see in the Uniform Rules?
- What is the best part of your job?

While these questions provide a starting point, we are sure that there are practical tips that would helpful to us all. If you know of either a state agency that should be included or additional questions you would like to see asked, e-mail your suggestions to Li Nelson at *Lilawnelson@aol.com*.

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

PRSRT-STD
U.S. POSTAGE
PAID
TALLAHASSEE, FL
Permit No. 43