Administrative Law Section Newsletter

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From the Chair

by Donna E. Blanton

About two weeks before I became chair of the Section in June, I ran into a friend outside of the First District Court of Appeal. He casually mentioned that Sharyn Smith, Carroll Webb and Liz Cloud all would be retiring at the end of the month. I was shocked. It's hard to imagine anyone other than Sharyn as chief administrative law judge at the Division of Administrative Hearings. Similarly, Carroll ("Mr. Webb" to some of us) has led the Joint Administrative Procedures Committee forever, and Liz is the woman we associate with the *Florida Administrative Weekly.*

So I began my 2003-04 term as chair during a time of change. Though it's easy to feel uncomfortable with the idea of change in a familiar practice area, I remind myself that change can be healthy. That's as true in the practice of administrative law as it is in anything else. In the second half of this term we will celebrate the 30th anniversary of the enactment of the modern APA. For some of us, 1974 doesn't seem that long ago. Many of our section members were already practicing law then, and they've grown up along with DOAH. Others, including one member of our executive council, were not yet born. As we prepare to mark the milestone of the APA's 30th anniversary and note the retirement of three key players in Florida's administrative law process, we have an opportunity to reflect on what's working well and what needs improvement.

And our opinions matter. The Selection Committee that's been appointed by the Governor and Cabinet (sitting as the Administration Commission) to recommend a new chief administrative law judge at DOAH has asked for the input of the executive

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A Changing of the Guard: Three APA Icons Retire

Part I: Sharyn L. Smith

by Donna E. Blanton

When Sharyn Smith retired on June 30 as executive director and chief judge of the Division of Administrative Hearings, Florida lost a public servant who played a major role in some of the most significant legislation of the last 30 years.

Smith, 54, led DOAH from 1984 through 2003. She served as a hearing officer for four years before Gov. Bob Graham and the Cabinet tapped her to head the agency. But Smith was a major player in state government before her days at DOAH.

In 1973, after graduating from law school at the University of Miami, Smith was approached by Barry Richard (now with the Greenberg Traurig firm) about working for Attorney General Bob Shevin (now a judge on the Third District Court of Appeal). During her five years with the Attorney General's office, Smith served as head of the Opinions Section, as Chief Cabinet Aide, and as head of the office's Administrative Law Section. She worked closely with legislators in drafting Florida's open government laws, landmark legislation that provided citizens access to

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state government.

One of her first major assignments for Shevin was to monitor and participate in the development of a new Administrative Procedure Act. Proposed by the Law Revision Council, the Act revamped the way that citizens interact with government. Major players in developing the Act included former Rep. Curt Kiser (now with Holland & Knight LLP), former Supreme Court Justice Arthur England (now with Greenberg Traurig), the late Sen. Dempsey Barron, and the late FSU Law Professor Pat Dore. Smith worked closely with them all, developing a strong respect for the legislative process in the 1970s.

"Legislators sat around the table and drafted," she said. "Lobbyists watched. I don't ever remember anyone asking a lobbyist to draft. It was a different way of doing things then."

Smith worked particularly closely with House members, and in 1979 she went to work for then-House Speaker Hyatt Brown, D-Daytona Beach. She worked on legislation relating to state acquisition of conservation lands and on government reorganization, and she represented the House in court battles with the Governor's office concerning appropriations matters and other major issues of the day. "Being a House member was a big deal," she said. "It was like being in the best fraternity on campus."

Before joining the House staff, Smith worked with the Constitution Revision Commission in 1978, again working almost daily with Pat Dore. "Pat and I worked very closely together over the years," she said. "We were very good friends."

When Smith went to DOAH in 1980 as a hearing officer, she found an independent corps of decision-makers who often were misunderstood. Agency attorneys didn't always realize that the role of the hearing officer was not to represent the agency's point of view. Private practitioners didn't understand what a "hearing officer" did; they were sometimes known to refer to the hearing officer as "hey, you."

"The idea of independent decision-making was new," she said. "It took a while. But it has taken root."

Indeed, administrative law judges say that one of Smith's greatest strengths was her ability to protect the independence of the ALJs. "She has tried to maintain the integrity of the agency," said one ALJ. "The one thing she didn't want here was a bunch of dogmatic people." Added another: "I never knew her to assign a case for a result. She makes a wonderful buffer for the ALJs."

Smith acknowledges that she worked hard to keep the ALJs away from the pressures that can accompany high-stakes decisions. "So many things that come here involve the most controversial decisions government makes," she said. "Most people have come to appreciate that, at least so far as the judges are concerned, they are insulated. In many ways, I am not."

Indeed, one of the remarkable elements of Smith's tenure is that she stayed in her position so long. A political appointee of the Governor and Cabinet (sitting as the Administration Commission), she held her job through five gubernatorial administrations – three of them Democratic, and two of them Republican. (The list includes then-Democrat Wayne Mixson, who served just three days in early 1987).

She is unquestionably politically savvy, and she's worked closely with both the legislative and executive branches over the years. She's monitored and adapted to the changes in Florida government, often picking up on trends before others see them.

"The thing that amazed me the most was her uncanny ability to see long-range consequences," said Eleanor Hunter, a former ALJ and now executive director of the Board of Bar Examiners. "I equate her mind to a chess game where she's many, many moves ahead of most people."

Smith said the most significant change in state government during her 30-year government career was the shift in power from the legislative to the executive branch. "In the early 70s the Legislature was respected and ran the show," she said. "[Officials in] the executive branch and at the supreme court were getting impeached. There's been a fundamental shift in the power of the executive branch."

Consequently, DOAH, and its jurisdiction, have grown. In 1980, there were 20 hearing officers. Now there are 36 administrative law judges. (The title was changed in 1996. Says Smith: "'Hearing officer' conveyed the idea that it was sort of an informal get-together."). DOAH, since 2001, also has housed the judges of compensation claims, who hear workers' compensation cases. (There are 78 employees involved in adjudicating chapter 120 cases, compared with 197 employees involved with the compensation claims process.) Acclimating the compensation claims process into the DOAH environment has been difficult, both for the JCCs and for workers' compensation practitioners.

"We're trying to do what we were told by the Legislature," Smith says of the process of incorporating the JCCs into DOAH. "But the judges aren't happy, and the lawyers aren't happy. It's a work in progress."

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Part of the culture shock is that DOAH, under Smith, has run like clockwork. Her ALJs take charge of the cases they are assigned, often forcing attorneys to move more quickly than they are used to in other forums. "When something comes in, we set it (for hearing)," Smith said. "It's the judge's case, not the attorney's case like it is in circuit court. We have case processing standards for every step in the process. We have all kinds of statutes telling us how quickly we have to do things."

It's unclear how – or if – DOAH will change with Smith's departure. But she leaves a smooth-running agency that has provided practitioners and ALJs with state-of the-art access to information about the agency's operations and about DOAH precedent.

"One of her significant contributions is from a public access standpoint," said Administrative Law Judge Charles Stampelos. From the DOAH website, anyone can access any pleading in any DOAH case. "Part of public access is how readily you can access agency precedent and other similar-type cases," Stampelos said.

Smith's emphasis on access to administrative proceedings is not surprising, given that she spent the formative years of her career working on open government legislation and working with Pat Dore, who championed the APA's many opportunities for citizen access to government decision-making.

Eleanor Hunter, who first met Smith in the early 1970s when Hunter worked for Gov. Reubin Askew and Smith worked for Shevin, agreed with Stampelos that the ease of access to DOAH's operation is one of Smith's greatest legacies. "She deserves credit for pulling a staff of ALJs into the modern era," Hunter said. "And it was against the odds because many of us would want to just go pull a book off of the shelf."

Donna E. Blanton *is chair of the Administrative Law Section and a shareholder with Radey Thomas Yon & Clark, P.A.*

Part II: Carroll Webb

by F. Scott Boyd

Mr. Carroll Webb served the State of Florida for over twenty-eight years as Executive Director and General Counsel of the Joint Administrative Procedures Committee of the Florida Legislature.

Carroll began his career with state government in 1962 as Assistant General Counsel for the Florida Development Commission. He supervised bond validation proceedings for the issuance of road and bridge bonds for state and local government. As part of his work with the commission's Division of Tourism, he would review contracts with public relations firms and private tourist attractions. One highlight was the negotiation and contracting for Florida's participation in the New York World's Fair.

But Carroll wanted to get into the courtroom. He soon moved to the State Road Department, now the Department of Transportation, where he traveled around the state litigating eminent domain cases and acquiring rights of way for road and bridge construction.

When a decision of the Florida Supreme Court required all ad valorem taxes to be based upon the full value of the taxed property, a special task force was set up under the Comptroller's office to ensure compliance with the decision. Most counties had been basing taxation on a percentage of the actual property values, so it became necessary to revise taxation procedures throughout the state. Carroll was selected as Special Counsel to the task force, where he advised county tax collectors, county tax assessors, boards of county commissioners, school boards, and special taxing districts on how best to revise their operations to meet the new requirements.

In 1967, Carroll was appointed as General Counsel to the Comptroller. The legal division he managed provided the Comptroller with legal opinions and advice on the payment of all charges against the state, and the issuance of all warrants for payrolls and other state payments. The Comptroller's office at that time not only oversaw the assessment and collection of ad valorem taxes, it also regulated banks, savings and loan associations, credit unions, mortgage bankers and brokers, consumer finance companies, trading stamp companies, and the issuance of all securities in the state. All of this was in addition to the responsibilities of the Comptroller as a member of the Cabinet, which brought its own set of legal issues.

Carroll enjoyed his work at the Comptroller's office, but wanted to do still more. In 1972, he decided to run for public office and was elected to the Florida House of Representatives. He served on the Agriculture, Education, and Appropriations Committees, as well as the Speaker's Leadership Committee. He sponsored the legislation that to this day allows state employees to be paid upon retirement for a percentage of their unused sick leave. Carroll Webb greatly impressed his colleagues and was voted the Allen Morris Award as the most outstanding freshman by the entire membership of the House.

In 1974, Representative Webb joined in the unanimous House vote for the new Administrative Procedure Act. After he lost a primary election bid later that year for the Florida Senate, he was asked to set up the Joint Administrative Procedures Committee that had been created in the new Act. He began that task in October 1974, three months before the January 1, 1975, effective date of the new APA.

The new Committee was to be composed of three members appointed by the President of the Senate and three members appointed by the Speaker of the House. The Committee was given general responsibility to review agency action pursuant to the Act, but very specific duties with respect to agency rules. The Committee was to examine proposed agency rules to determine if they were in proper form, if the notice given was sufficient to inform the public of the effect of the rule, and most importantly, if the rules were within the delegated statutory au-

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thority of the agency.

The first chairman of the Committee, Senator Phil Lewis, who was to remain a guiding light of the Committee for many years to come, told Carroll that the purpose of the new Committee was to act as the "eyes and ears of the Legislature" to ensure that the new Act worked. But the new Act was so different from its predecessor that no one really knew exactly how it was going to work. Carroll soon came to realize that the key to the Administrative Procedure Act was to balance the need for agencies to act efficiently with the need for democratic accountability to the elected representatives of the people. He tried to ensure that careful balance throughout his many years of service.

After some initial resistance from agencies, the Committee's rule review efforts were generally well received. Agencies came to realize that Carroll's considerable administrative law expertise helped them create a better rule by identifying possible defects even before the rule was adopted, making the resulting rule less vulnerable to legal attack at DOAH or in the courts.

In 1993, concerned that certain court cases were construing agency rulemaking authority more broadly than intended by the Legislature, Carroll testified before governmental reform committees. His concerns were addressed in a bill that passed the Senate in 1994, again in a bill that passed both houses in 1995 but was vetoed by the Governor, and finally in a bill enacted into law in 1996 as part of a more comprehensive APA reorganization. Carroll's "map tack" provision, now expressed in §120.536(1), F.S., was arguably the most significant part of that bill, and continues to shape Florida administrative law.

During Carroll Webb's time at the Committee, it has conducted a careful review of over 130,000 administrative rules regulating the people of Florida. The annual reports of the Committee indicate that these rules contained nearly 32,000 substantive errors — provisions that for one reason or another lacked adequate statutory authority. The Committee review prompted changes to the rules to address its concerns. But for the efforts of Carroll Webb and the Committee, there would be nearly 32,000 invalid rules on the books in Florida today.

The Administrative Law Section, the Florida Bar, and all of the people of the State of Florida owe a great deal to Mr. Carroll Webb. We extend to him our heartfelt thanks and our best wishes for a happy retirement.

***F. Scott Boyd** is Acting Executive Director and General Counsel of the Joint Administrative Procedures Committee. He received his J.D., with honors, from the Florida State University College of Law.*

Part III: Liz Cloud – The Short-Lived Retirement

by Debby Kearney

How will Liz Cloud spend her retirement? Well, working, of course. After five years in the state's DROP program, Liz was required to retire on June 30 this year. But she's just not ready to hang it up, so she will forego her retirement temporarily and retake the reins of the Bureau of Administrative Code after a mandatory break in service.

"I have the most interesting job. No day is ever the same. I work with good people throughout the state and every day is a challenge." It's no wonder that Liz Cloud, Bureau Chief for the Department of State's Bureau of Administrative Code, is taking the shortest possible "retirement"—a grand total of 31 days.

Liz Cloud is an institution in APA circles. For 23 years she has been responsible for seeing to the publication of the *Florida Administrative Code* and the *Florida Administrative Weekly*. Liz coordinates and schedules the publication of notices, public hearings, and proposed rules, as well as overseeing and supervising the typesetting, proofreading, and billing for the *Weekly*. All materials submitted by each agency for publication in the *Weekly* must be approved by the Bureau. But best of all, Liz has been available over these many years to assist all users of the office, from new and confused agency employees charged with getting a rule published, to members of the public unfamiliar with administrative procedures and seasoned veterans needing her assistance.

In 1980, the Legislature determined that publication of the *Florida Administrative Code* should be contracted out to a private publisher. While that early example of outsourcing has worked well, in recent years there was a growing demand for these public documents be made available on the Internet. In addition to receiving the undying thanks of agencies throughout the state who had to purchase compilations of their own rules, Liz and her team at the Bureau received a Davis Productivity Award for that effort.

Outside her responsibilities in the area of administrative law, Liz oversees the processing, classification and assignment of chapter numbers for laws enacted by the Florida Legislature. She implements the Secretary of State's role as custodian of the official acts of the State of Florida and also as the repository for municipal charters, county ordinances, annexations, extraditions, and executive orders and proclamations.

All of the 37 years of Liz's career in state government have been with the Florida Department of State. Beginning in 1966 as a Clerk III with the Corporations Division, Liz moved to the Laws Division (a precursor to the Bureau of Administrative Code), where she spent six years learning the ropes as a clerk and typist. Liz has spent the last 31 years supervising the Administrative Code Section and then the Bureau of Administrative Code.

When Liz began working with the *Florida Administrative Code*, it consisted of eleven volumes, totaling about 9,000 pages, and costing $250. Today the Code comprises 14 volumes, about 17,000 pages, and costs over $2,000.

Liz has weathered and helped the

rest of us weather some of the major changes to the APA. When the Legislature required each agency to maintain an index of agency final orders and a subject-matter index of other designated orders and rules, it fell to the Bureau of Administrative Code to adopt procedural rules for indexing and to approve the indexing procedures of agencies. The Bureau also had responsibility for reviewing the requests of agencies for the exclusion of certain types of orders from the indexing requirements.

In 1995, the Legislature set in motion a total rewrite of the Model Rules of Administrative Procedure. Once the rules were revised and adopted by the Administration Commission, they became the procedural rules for every agency and any diversion was required to be approved as an exception to the uniform rules. Liz was an invaluable resource for the task force that developed the new uniform rules and to those charged with the adoption procedures and those applying for exceptions.

In 1996, the Legislature enacted legislation requiring each agency to review its rules to determine whether any were invalid under new, more restrictive, rulemaking parameters. The exercise resulted in unprecedented numbers of rules being repealed, revised, or adopted and required the reliable issuance of all the publications that ensued. Some of us might remember that in the wake of the 1974 adoption of our modern APA, unless an existing rule had been adopted following a public hearing, agencies were required to review any rule on the written request of a substantially affected person and initiate rulemaking procedures as provided in the new act. Failure of the agency to initiate rulemaking within 90 days of the request caused the rule to be suspended. Liz remembers that more than a few rules were suspended and everyone ultimately dug in to quickly learn the new processes.

Liz has worked under eight Secretaries of State, seven Governors and ten division directors. While all provided a grand adventure, Dorothy Glisson stands out as a favorite Division Director and the person instrumental in helping Liz obtain her appointment as the Bureau Chief for the Administrative Code Bureau. It was especially heartening when Dot Glisson was later herself appointed as Secretary of State.

Liz has been a member of the Administrative Codes & Registers Section of the National Association of Secretaries of State since 1978. The ACR is a group dedicated to improvements in the publication and distribution of administrative codes and registers, fostering better rule writing skills and review techniques and increasing the knowledge of administrative law. This service culminated in one of the highlights of Liz's career when she served as President of the organization from 1996 to 1998. Liz is also proud to display the plaque presented by the Administrative Law Section in 1998, which sums up Liz's contributions: "Liz Cloud ... one of the unsung heroes in Florida government, she has exhibited unfailing courtesy, competence and diligence in the performance of her duties, smoothing the transfers made necessary by amendments to chapter 120 and by agency transfers."

Debbie Kearney *serves as Deputy Staff Director of the House Appropriations Committee. She received her J.D. (1981) and B.S. (1978) degrees from Florida State University. She has enjoyed a long career in state government, serving in all three branches. Her practice has focused principally on state constitutional law and administrative law issues. During her tenure as General Counsel to the Department of State, she had the privilege of serving as a legal advisor to Liz Cloud–a task she recalls fondly.*

Uniform Rules of Procedure Review Committee

The Executive Council has formed a committee to review the uniform rules of procedure to consider possible changes. Anyone with comments or suggestions for changes to the current rules is encouraged to submit them by October 15 to Chris Moore, Committee Chair, at *cmoore@psc.state.fl.us* or c/o Florida Public Service Commission, 2540 Shumard Oak Blvd., Tallahassee, FL 32399-0850.

APPELLATE CASE NOTES

by Mary F. Smallwood

LICENSING

Wax v. Horne, 28 Fla. L. Weekly 1196 (Fla. 4th DCA 2003)

Wax, a seventh grade teacher, appealed from the revocation of her teaching license. The Education Practices Commission found that she had sent pornographic or sexually explicit materials over the internet to a number of her students. Wax requested an informal hearing and did not dispute the factual allegations. Instead, she pled mitigating circumstances including the recent death of her husband and her young age (25). The Commission revoked the license, finding that the action was not inadvertent or isolated and that she showed no remorse.

On appeal, Wax argued that the penalty was inappropriate because it was out of line with penalties in comparable cases where the teacher's license was merely suspended. She cited factual circumstances where a teacher (1) had shown an R-rated movie in class, (2) had accessed a website with nudity during a class, and (3) had purchased beer for underaged students at a party. In contrast, in other cases where a license had been revoked, there had been actual sexual contact between a teacher and a student.

The court affirmed the revocation of Wax's license. It noted that the statute allowed for revocation of a license under the circumstances involved in this case. Since the penalty imposed by the Commission was within the range authorized by statute, the court could not substitute its judgment for that of the agency. Moreover, the court found that the cases cited by Wax as justification for a lesser penalty were all factually distinguishable from her situation.

Robert v. Department of Insurance, 28 Fla. L. Weekly 1590 (Fla. 2d DCA 2003)

Louis Robert, a licensed insurance agent, was charged by the Department with multiple fraudulent and dishonest practices related to the sale of annuities to two elderly customers. In one case, Robert sold a new annuity to a woman who only wanted to remove the name of her deceased husband from an existing annuity. In the second case, occurring two years later, he sold additional annuities to a woman who simply wanted to change the beneficiaries on existing annuities. The final order imposed a penalty of suspension of Robert's license for a period of 18 months. Under the applicable statutory provision, the maximum penalty was 9 months suspension for any violation.

On appeal, the court found there was competent substantial evidence supporting the Department's conclusions that Robert had engaged in two instances of fraudulent and dishonest practices. However, it reversed the Department's imposition of an 18-month suspension. Citing *Werner v. Department of Insurance*, 689 So. 2d 1211 (Fla. 1st DCA 1997), the court concluded that a single instance of fraud or dishonesty does not meet the statutory requirement of multiple practices and, thus, cannot support the imposition of a penalty. Accordingly, the court remanded the case for the Department to recalculate the penalty.

AGENCY ACTION ON RECOMMENDED ORDERS

United Wisconsin Life Insurance Co. v. Office of Insurance Regulation, 28 Fla. L. Weekly 1597 (Fla. 1st DCA 2003)

The Department issue an administrative complaint against United Wisconsin Life Insurance Company alleging certain violations of the insurance code. United Wisconsin requested a formal hearing to challenge the complaint. The administrative law judge issued a recommended order dismissing all eight counts in the complaint. In its final order, the Department rejected several findings of fact made by the administrative law judge and reinstated two counts. In particular, the Department concluded that United Wisconsin failed to provide a form to an insured desiring to apply for a conversion policy and that it illegally engaged in tier rating, a prohibited practice, by annually reevaluating insureds within the same actuarial class and changing rates.

On appeal, the court reversed. With respect to the count alleging a failure to provide an application to an insured for a conversion policy, the court found that the administrative law judge's findings of fact had been improperly rejected. The judge had found in her recommended order that the insured had never actually asked for information about a conversion policy as she said she didn't know what such a policy was, even though there was notice in her certificate of her conversion rights. The judge found that United Wisconsin was therefore not on notice that the insured wanted information about the conversion policy. As there was competent substantial evidence in the record to support the conclusion that United Wisconsin complied with the converstion policy statute, the Department should not have rejected it.

Likewise, the court found that the conclusions regarding whether United Wisconsin violated the law by tier rating were supported by the record. Section 626.9541, F.S., provides that it is unfair discrimination to distinguish between "individuals of the same actuarially supportable class and essentially the same hazard." The Department presented an expert witness who testified at the hearing that all of the company's insureds in Florida fell within the same actuarial class and that the health status of these individuals could only be evaluated at the initiation of the policy. The administrative law judge, however, found that the statute did not give notice of a one-time-only limit on evaluating health status, and there was evidence of conflicting opinions within the Department. This finding was based on an official publication of the Department that suggested the Department

had no statutory authority over out-of-state insurers to prohibit tier rating. Moreover, the judge noted that United Wisconsin's expert disagreed with the opinion of the Department.

On appeal, the Department cited Section 627.6425, F.S., which prohibits the use of claims experience or health status as a basis for refusing to renew or discontinuing a policy, as a basis for prohibiting tier rating. However, the court held that the Department's failure to charge United Wisconsin with a violation of the statute in the count at issue prevented it from relying on it in the administrative proceeding.

Verleni v. Department of Health, 28 Fla. L. Weekly 1653 (Fla. 1st DCA 2003)

Dr. Verleni filed a timely challenge to a failing grade he received on the National Board of Podiatric Medical Examiners licensure examination. The administrative law judge found that Verleni should have been given credit for six additional questions, resulting in a passing grade. The Board of Podiatric Medicine voted at a noticed meeting to adopt exceptions to the recommended order filed by the Department of Health and rejected the administrative law judge's findings of fact. In the final written order, however, the Department stated that the findings of fact were not being specifically overruled. Instead, it characterized the findings of fact as conclusions of law.

On appeal the court reversed. First, the court noted that the Board's oral rejection of the findings of fact at the noticed hearing controlled over the conflicting written order. At its hearing, the Board clearly rejected findings of fact without stating with specificity the basis for doing so. In addition, the court held that the Department could not avoid the requirements of Section 120.57(1), Fla. Stat., by recasting the findings as conclusions of law.

STANDING

Ybor III, Ltd. v. Florida Housing Finance Corporation, 28 Fla. L. Weekly 1004 (Fla. 1st DCA 2003)

Ybor III, Ltd. applied to the Florida Housing Finance Corporation for funding for low income or affordable housing as part of the Corporation's competitive bidding process. Based on the Corporation's initial scoring of applications in that cycle, Ybor III did not receive funding because a competing applicant, Windsong II, received a higher score. Ybor III asserted that the Corporation had incorrectly scored Windsong II's application, but that assertion was rejected by the Corporation. Ybor III then filed a petition for a formal hearing.

Applicants for Corporation funding are allowed to appeal their own scores under the Corporation's rules. However, Rule 67-48.005(1), Fla. Admin. Code, provides that no applicant may "intervene in the appeal of another Applicant." On this basis, the Corporation denied Ybor III's request for a formal hearing.

On appeal, Ybor III argued that the "no intervention" rule did not apply to its right under Chapter 120, Fla. Stat., to seek an administrative hearing where its substantial interests were determined by the agency. The court found that Ybor III had standing under Chapter 120, citing *Agrico Chemical Co. v. Department of Environmental Protection*, 406 So. 2d 478 (Fla. 2d DCA 1981). Ybor III demonstrated that it had a substantial interest in the outcome of the proceeding under the first prong of the *Agrico* standing test by showing that the scoring of its competitor's application resulted in Ybor III failing to receive funding. The court also held that the allegations in Ybor III's petition that the Corporation had failed to score the competing application in accordance with its rules and regulations met the second prong of the test that the injury be of a type which the proceeding is designed to protect.

Nedeau v. Gallagher, 28 Fla. L. Weekly 1537 (Fla. 1st DCA 2003)

Several state employees, who had voluntarily enrolled in the Government Employees' Deferred Compensation Plan, filed suit challenging the assessment of administrative fees by the state and a private entity providing recordkeeping services to the state. The fees were charged to qualified investment providers who then contracted with the individual state employees. The contract between the investment provider and the employees specifically stated that the administrative fees would be passed through to the employees. The suit was brought against the State, and the providers were not made parties. The circuit court entered a summary judgment in favor of the State.

On appeal, the District Court affirmed. It held that the employees did not have standing to challenge the statutory authority of the State to assess administrative fees against the investment providers. The court held that the employees were not the real parties in interest. In addition, it found that the employees would not necessarily benefit from the suit since it was not clear that they could recoup the amount of the fees from the providers, even if successful in the suit.

NOTICE OF HEARING

Shelley v. Department of Financial Services, 28 Fla. L. Weekly 1076 (Fla. 1st DCA 2003)

The Department sent a copy of an administrative complaint to the Shelleys by certified mail at a Montana address provided at a previous date by the Shelleys. The Department also served copies of the complaint on the Secretary of State pursuant to the long-arm statute. The complaint stated that the Shelleys had 21 days from receipt to request an administrative hearing. When there was no response from the Shelleys for more than 21 days, the Department entered a final default order. Initially, the Shelleys, acting *pro se*, sought to vacate that order. Subsequently, in accordance with the provisions of the default order, they filed a direct appeal. On appeal, they argued that they had never received notice. In fact, the record indicated that the certified letter had been returned to the Department after entry of the default order.

The majority affirmed the entry of the default order, holding that the mailed notice was sufficient to meet due process requirements. Judge Ervin dissented. He opined that the Shelleys should have been afforded an evidentiary hearing to determine whether the Shelleys failed to receive notice through their own fault. Although there is a presumption of receipt of notice upon mailing, Judge Ervin noted that parties to an administrative proceeding are entitled to

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an opportunity to refute such receipt. Moreover, he noted that the attempt to effect substituted service under the long-arm statute was inadequate as there was no demonstration by the Department that there was compliance with any of the substitute methods of service.

TIMELINESS

Whiting v. Department of Law Enforcement, 28 Fla. L Weekly 1646 (Fla. 5th DCA 2003)

Whiting received notice from the Department of Law Enforcement that he was being dismissed from his career service position by certified mail on March 20, 2002, and by personal service on March 21, 2002. Assuming the time for filing an appeal to the Public Employees Service Commission (PERC) ran from March 21st, the filing deadline was April 4, 2002. Whiting faxed his appeal to PERC on the morning of April 5th after his attempts to transmit the appeal by facsimile on April 4th were unsuccessful. PERC dismissed the appeal as untimely.

On appeal, the court affirmed. It held that Section 120.569(2)(c), Fla. Stat., compels dismissal of an untimely petition. Moreover, the court did not find any support for a claim of equitable tolling since Whiting failed to demonstrate that he was misled or lulled into inaction. Instead, he elected to wait until April 5th when the fax was unavailable to him the preceding day.

IMMEDIATE FINAL ORDERS

Premier Travel International, Inc. v. Department of Agriculture and Consumer Services, 28 Fla. L. Weekly 1651 (Fla. 1st DCA 2003)

The Department of Agriculture and Consumer Services (DACS) issued three immediate final orders requiring the appellants to cease acting as sellers of travel and sellers of business opportunities. As justification for the issuance of an immediate final order, the orders stated that Florida buyers, particularly senior citizens, would suffer financial losses and could be taken advantage of due to their age and infirmities.

On appeal, the court reversed. It held that, while the potential of financial losses could justify an immediate final order, the facts cited by DACS were insufficient to demonstrate that there was a pattern of conduct that was likely to continue. Moreover, there were no factual allegations supporting the contention that elderly citizens were at greater risk than other portions of the population. Finally, the court held that DACS could have fashioned a narrower penalty than suspension of the appellants' licenses, including such remedies as restricting certain advertising practices or mandating compliance with contract rescission provisions.

STATUTORY CONSTRUCTION

Colonnade Medical Center, Inc. v. Agency for Health Care Administration, 28 Fla. L. Weekly 1021 (Fla. 4th DCA 2003)

Colonnade Medical Center had received supplemental Medicaid payments for nursing home patients being treated for HIV. However, Colonnade had failed to comply with the institutional provider handbook which provided that receipt of such payments was dependent on (1) receiving prior authorization and (2) demonstrating that the patient had been diagnosed as HIV-positive and was receiving active treatment for an AIDS-related disease. AHCA sought to recover the monies from Colonnade as "overpayments." At the formal administrative hearing, Colonnade argued that AHCA had no statutory authority to recoup the funds as overpayments. AHCA relied on Section 409.913(14), Fla. Stat., which provides that AHCA may seek "any remedy provided by law" where the regulated party has failed to keep records required to demonstrate the appropriateness of services rendered or where the provider fails to comply with requirements of Medicaid provider publications. Colonnade argued that only Section 409.913(10) specifically contemplated AHCA seeking reimbursement of payments.

On appeal, the court noted that an agency's interpretation of its own statutes is entitled to considerable deference. Furthermore, the court found no conflict between subsections (10) and (14). It held that the plain meaning of subsection (14) allowed the agency to seek restitution of the overpayments.

CONSTITUTIONALITY OF STATUTE

State of Florida v. Treworgy, 28 Fla. L. Weekly 1517 (Fla. 3d DCA 2003)

The State appealed an order of the circuit court for Monroe County which held that rules of the Fish and Wildlife Conservation Commission were unconstitutional as applied. The first rule in question provided that it was illegal to harvest a spiny lobster with a carapace measurement of three inches or less or a tail measurement of five and a half inches or less when the tail is separated from the body. The second rule prohibited individuals from removing a spiny lobster from the water without possessing a measuring device to measure the carapace. The circuit court held that the rules were unclear as to whether both parts of the size test must be met and were internally inconsistent.

The District Court reversed. It held that an internal inconsistency between the rules, assuming one existed, did not necessarily result in a finding of unconstitutionality. Instead, rules of statutory construction would require that any such inconsistency be resolved in favor of the defendant. In this case, however, the court did not find an internal inconsistency. The court noted that the carapace of the lobster could be measured in the water and the tail portion after the lobster was removed from the water.

APPEALS

Miami-Dade County v. Peart, 28 Fla. L. Weekly 1073 (Fla. 3d DCA 2003)

The Pearts filed an appeal from the order of an administrative hearing officer 31 days after the decision was rendered. The County moved the circuit court to dismiss the appeal for lack of jurisdiction, but the court denied the motion. On appeal, the District Court granted the County's request for a writ of prohibition. It held that Rule 9.110(c), Fla. R. App. P., required dismissal of an appeal where it was not timely filed.

FORMAL OR INFORMAL HEARINGS

Schafer v. Department of Business and Professional Regulation, 28 Fla. L. Weekly 1143(Fla. 1st DCA 2003)

Schafer, an electrical contractor, appealed a final order of the Department imposing a fine pursuant to Section 489.533(1)(m)4., Fla. Stat., which provided for a fine where an electrical contractor failed to comply with a judgment within 18 months. Schafer argued that the Department erred in entering an order after an informal hearing stating that the respondent did not dispute any material facts. In fact, Schafer requested a formal hearing, which request was denied by the Department.

On appeal, the court affirmed the Department's order. It held that the Department did not have to afford Schafer a formal hearing where there was no dispute as to the relevant facts supporting imposition of the fine. In this case, Schafer admitted that a money judgment had been entered against an entity for which he was the qualifier, that the judgment remained unpaid for more than 18 months, and that the judgment related to the practice of electrical contracting. Since those were the only facts necessary to establish the violation of the statutory provision, the Department was free to proceed informally. The fact that the final order incorrectly stated that Schafer had not contested any facts did not affect the validity of the order.

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 Mary.Smallwood@Ruden.com.*

FROM THE CHAIR

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council concerning what kind of person we would like to see in the job. After some lively discussion, we responded with a "position statement" that can be found elsewhere in this newsletter. By the time you read this, the Selection Committee will have met several times and perhaps even made its recommendation to the Governor and Cabinet. Members of our executive council will attend each meeting of the Selection Committee.

We also hope to be working with the Governor and Cabinet (sitting as the Administration Commission) this term in suggesting revisions to the Uniform Rules of Procedure. Chris Moore, a member of our executive council and an attorney at the Florida Public Service Commission, has agreed to chair a 10-person committee that will review the rules and recommend changes to the full executive council. In turn, we hope to ask the Administration Commission to consider our recommended changes. Serving with Chris on the committee are Mary Ellen Clark, Robert Downie, Rick Ellis, Seann Frazier, Cathy Lannon, Elizabeth McArthur, Cathy Sellers, ALJ Charlie Stampelos, and Bill Williams. Please let any of our committee members know if you are aware of provisions of the rules that should be revised.

The Legislature almost every year considers legislation that could substantially change the APA. These bills often provoke considerable discussion at our executive council meetings, though not always agreement. Our section has adopted several legislative positions that are reviewed periodically. For the last few years, council members Bill Williams and ALJ Linda Rigot have carefully reviewed every piece of legislation that affects the APA and, when appropriate, they have vigorously defended our legislative positions. Thankfully, Bill and Linda have agreed to chair the Legislation Committee again this term. I am extremely appreciative of the time they both devote to this important job.

In recognition of the 30th anniversary of the APA, CLE Committee Chair Li Nelson is planning a special Pat Dore Conference in 2004 that will examine not only passage of the original act, but the year 1974 itself. (No word yet on whether 1974-era attire is required). Li's boundless energy and creativity, along with the able assistance of Andy Bertron, will undoubtedly result in an entertaining and informative program. Public Utilities Chair Natalie Futch also is planning a CLE program in December concerning practice before the PSC. All current members of the PSC are expected to participate in the program.

One of the other projects we're working on this year is creating a section in every issue of the newsletter devoted to a particular agency. Mary Ellen Clark, an attorney with the Division of Highway Safety and Motor Vehicles, has agreed to coordinate this effort. The idea is to provide some general information about each agency and the way it operates. We hope to provide names, locations, and practice tips. This should be helpful to attorneys who may only encounter certain agencies occasionally.

We're always interested in articles for the newsletter and the Bar Journal on administrative practice. If you would like to write an article, please contact Cathy Sellers, our Publications Chair, at *csellers@moylelaw.com*, or Elizabeth McArthur, our Newsletter Editor, at *emcarthur@radeylaw.com*. Cathy is a prolific writer, who along with her husband Larry, probably could use a break from cranking out the APA articles year after year. Elizabeth is an accomplished editor who is always enthusiastic about new material. We look forward to hearing from you.

Our section also has finally launched its web page. Take a look at *www.flaadminlaw.org*. Thanks to Paul Flounlacker for taking on the job of coordinating our website. We welcome suggestions about how to improve it so that it can be most useful.

As I begin this term as chair, I am excited about working on these and other projects. Thank you for giving me this opportunity, and I look forward to working with all of you.

Donna E. Blanton*, chair of the Administrative Law Section, is a shareholder with Radey Thomas Yon & Clark, P.A.*

Administrative Law Section Executive Council Position Statement Regarding Selection of Chief Administrative Law Judge

The Administrative Law Section of the Florida Bar appreciates the opportunity to offer its views regarding factors to consider in selecting Sharyn Smith's successor as Chief Judge of the Division of Administrative Hearings. The Section believes that this position is pivotal in ensuring that proceedings related to governmental actions are heard in a manner fair and impartial to all participants in the process. With this objective in mind, we offer the following:

- The Division is responsible for providing hearings for a wide variety of proceedings, with new types of proceedings added virtually every year. Appropriate allocation of resources requires a solid understanding of not only Chapter 120 but its interplay with the substantive subject areas dealt with. **The Section recommends that while minimum requirements may be that a person be a member of The Florida Bar for five years, preferred candidates should have no less than ten years experience, with at least five years experience with Chapter 120, Florida Statutes.**

- The Division is charged with providing a fact-finding function for agencies that should be impartial at all costs. Because this function is at the heart of providing due process to the private citizen and to agencies alike, the person holding the Chief Judge position must be seen as an example of balance and impartiality. **Accordingly, the Section recommends that experience in both the private and public sectors should be preferred.**

- In order to be an effective manager of the administrative law judges under his or her direction, the Chief Judge must understand the perspective of someone who is charged with being an impartial factfinder. He or she must also have a working knowledge of the day-to-day challenges that professional and clerical staff face at the Division. **Accordingly, the Section recommends that the preferred candidate have judicial or quasi-judicial experience where at least two years of his or her experience was spent actively hearing cases.**

- The Division is a governmental unit with a multi-million dollar budget and its administration requires regular and consistent interaction with both the Legislature and the Governor's office. **The Section recommends that the successful candidate have prior administrative experience as well as prior experience dealing with the legislative process.**

Section Budget/Financial Operations

	2002-2003 Budget	2002-2003 Actual	2003-2004 Budget
REVENUES:			
Dues	$20,800	$21,485	$21,500
Affiliate Dues	150	150	200
Dues Retained by Bar	(10,520)	(10,863)	(10,910)
TOTAL DUES	**$10,430**	**10,772**	**10,790**
OTHER REVENUE:			
CLE Courses	$750	$3,031	$1,000
Audiotape Sales	1,500	4,088	1,500
Interest	8,265	(1,006)	4,034
Course Material Sales	75	29	75
Section Service Programs	5,000	0	5,000
Miscellaneous	50		50
TOTAL REVENUE	**$26,070**	**$16,914**	**$22,449**
EXPENSES			
Staff Travel	$473	$240	$450
Postage	500	153	500
Printing	300	27	300
Newsletter	2,500	2,126	2,500
Photocopying	275	128	275
Meeting Travel	500	0	500
Committees	500	0	500
Council Meetings	500	670	500
Bar Annual Meeting	1,700	1,321	1,700
Awards	500	508	500
Council of Sections	300	0	300
Section Service Programs	5,000	0	20,000
Retreat	4,500	3,928	4,500
Writing Contest	2,400	1,400	2,400
Officer Expense	500	0	500
Membership	500	0	500
Officer Travel	2,500	849	2,500
CLE Speaker Expense	100	0	100
Operating Reserve	3,410	0	4,358
Public Utilities	500	0	500
Supplies	50	0	50
Website	10,000	1,200	4,000
Miscellaneous	0	0	500
TOTAL EXPENSES	**$37,508**	**$12,550**	**$47,933**
BEGINNING FUND BAL.	**$119,915**	**$125,390**	**$115,243**
PLUS REVENUES	**26,070**	**16,914**	**22,449**
LESS EXPENSES	**37,508**	**12,550**	**47,933**
OTHER COST CENTER	**0**	**3,042**	**2,800**
ENDING FUND BALANCE	**$108,477**	**$132,796**	**$92,559**

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.

Administrative Law Section Executive Council Meeting – June 27, 2003

MINUTES

I. Call to Order: The meeting was called to order at 10:35 a.m. by Chair Li Nelson.
Present: Li Nelson, Linda Rigot, Booter Imhof, Charles Stampelos, Bill Williams, Donna Blanton, Natalie Futch, Clark Jennings, Elizabeth McArthur, Bobby Downie, Allen Grossman, Cathy Sellers, Cathy Lannon, Debby Kearney, Rick Ellis, Mary Ellen Clark, Francine Ffolkes, June McKinney Bartelle, Andy Bertron, Paul Flounlacker, and Jackie Werndli.
Absent: David Watkins, Chris Moore, Paul Rowell

II. Preliminary Matters
A. The minutes of the January 10, 2003, and April 4, 2003, meetings were approved.
B. Debby Kearney gave the Treasurer's report. The Section is financially sound.

III. Committee Reports
A. CLE - Booter Imhof reported that the Nuts and Bolts CLE Program was well received. Cathy Lannon gave the Bar update.
B. Publications - Debby Kearney and Elizabeth McArthur reported that the Newsletter will be publishing a three-part interview series of Sharyn Smith, Liz Cloud, and Carroll Webb. All are retiring. The idea came from Donna Blanton.
C. Legislative - Bill Williams reviewed this year's APA bill, HB 23. Bill also discussed what is now Florida Law 2003-62, the Material Mining Recovery Act that places final order authority at DOAH on claims for damages resulting from mining activities, primarily blasting. Cathy Lannon questioned whether the law is contrary to any Section legislative positions. Linda Rigot stated that DOAH had no input into the legislation. Bill opined that the law raises constitutional issues. The new law that continues limited noticing of agency action via the internet was discussed, as were new exemptions from the APA for the Florida Keys Aqueduct Authority, certain utilities, and Metropolitan Planning Organizations. The medical malpractice legislative reform effort is ongoing. There are two APA related issues. The first is the proposal that health care licensing boards be empowered to review and reweigh evidence presented at DOAH. The second is that the burden of proof for health care license discipline cases be changed to the preponderance standard from the clear and convincing requirement.

Bruce Lamb of the Health Law Section reported that that Section opposes these changes, as well as an expansion of the definition of the terms "costs" assessed licensees in those cases. The Health Law Section is hiring a lobbyist for the upcoming special sessions to oppose changes to the APA or changes that reduce due process. After discussion, Donna Blanton moved that the Administrative Law Section participate with the Health Law Section in the lobbying effort consistent with the Administrative Law Section's existing legislative positions, that the Administrative Law Section share 50/50 in the lobbyist up to $10,000 with the Health Law Section, and that Bill Williams be our Section's liaison to the Health Law Committee working on this issue. The motion passed. A budget amendment for the expenditure was also passed.
D. PULC - Natalie Futch said a CLE is being planned on ethical practice before the PSC. Fall dates are being considered.
E. Membership - no report.
F. Law School/Student Writing Liaison - Cathy Sellers is now in charge of the writing competition.
G. Council of Sections - Li Nelson reported that neither she nor Bobby Downie had been able to attend the most recent Council meeting, but that nothing had happened at the meeting.
H. Web Page - Bobby Downie introduced Paul Flounlacker as the new web page liaison. The web page should be up and running in the new few weeks. The Section voted to renew the ALS contract for 2003-04 fiscal year.
I. ELULS Liaison - Clark Jennings reported that a joint CLE is being discussed.

IV. Old Business
A. ALJ Conference - Linda Rigot updated the status of the conference. Co-sponsors are the Florida Bar and the Administrative Law Section. Speakers are lined up. The Section is considering sponsoring a luncheon.

V. New Business
A. Officer/Executive Council Election - the new slate of officers are Donna Blanton, Chair, Bobby Downie, Chair-elect, Debby Kearney, Secretary, and Booter Imhof, Treasurer. New Executive Council members are Andy Bertron in Paul Rowell's slot, and Dave Watkins remains on the Council in Booter Imhof's spot.
B. Long-range Planning Retreat - Bobby Downie is chair. New venues were discussed.
VI. Final Remarks and Presentation of Awards - Li Nelson recognized Bill Williams and Linda Rigot for their work on legislative matters, Natalie Futch for her PULC work, Booter Imhof for his efforts on the Pat Dore Conference and CLE in general, Elizabeth McArthur for her Newsletter work, and Jackie Werndli for the "real" work.

VII. Program Outline and Closing Comments - Donna Blanton went through her committee assignments.

CLE Committee:
Li Nelson
Andrew Bertron

Florida Bar CLE Committee Liaison:
Cathy Lannon
Cathy Sellers (alternate)

Council of Sections Liaison:
Donna Blanton

continued...

MINUTES
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David Watkins (alternate)
Clark Jennings (alternate)
Law School Student Writing Contest:
Cathy Sellers

Legislation:
Linda Rigot
Bill Williams

Long Range Planning:
Robert Downie

Membership:
(Vacancy to be filled)

Publications:
(Vacancy to be filled)
Betsy Daley
- Newsletter Editor: Elizabeth McArthur
- Casenotes: Mary Smallwood
- Agency Reporters: Mary Ellen Clark
- Bar Journal Coordinator: Rick Ellis

Public Utilities:
Natalie Futch

Web-Page Liaison:
Paul Flounlacker

Uniform Rules:
Chris Moore

Environmental & Land Use Law Section Liaison:
Cathy Sellers

Health Law Section Liaison:
Allen Grossman

IX. Time and Place of Next Meeting - Fall 2003 in Tallahassee.

X. Adjournment at 12:30 p.m.

Respectfully submitted,
Robert Downie, Secretary

ARE YOU CONNECTED???

Thanks to all the hard work by Chair-elect Robert C. Downie, II, Jackie Werndli with The Florida Bar, and Diann Bradley of Applied Computing Solutions, the Administrative Law Section now has a website. Its address is *www.flaadminlaw.org*. The site contains information that administrative law practitioners should find interesting and useful.

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