ADMINISTRATIVE LAW SECTION NEWSLETTER

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Governor's Rules Freeze: Supreme Court Says Legislative Power Trumps "Supreme Executive Power"

by Lawrence E. Sellers, Jr.

On August 16, 2011, the Florida Supreme Court issued an opinion holding that Governor Rick Scott "impermissibly suspended agency rulemaking to the extent that Executive Orders 11-01 and 11-72 include a requirement that the Office of Fiscal Accountability and Regulatory Reform (OFARR) must first permit an agency to engage in the rulemaking which has been delegated by the Florida Legislature." Two justices dissented, arguing that Governor Scott was completely within his authority as the chief administrative officer in issuing Executive Order 11-72.

The Executive Orders and the Legal Challenge.

One of Governor Scott's first official acts was to issue an executive order suspending (some called it "freezing") all rulemaking by agencies under his direction and prohibiting agencies from promulgating rules unless they obtained prior approval from the newly created OFARR. This executive order prompted a legal challenge from Rosalie Whiley, a blind woman, who asked the Florida Supreme

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Chair's Column

by Allen R. Grossman

As I assume leadership of the Administrative Law Section of The Florida Bar, I must take a moment to acknowledge and thank several individuals who have contributed significantly to the good and welfare of the Section and its more than 1200 members. First, I would like to recognize and thank Cathy Sellers who has dedicated significant effort to the betterment of the Section for many years. Her dedication and devotion to the Section were repeatedly displayed during the past year in her outstanding service as the Chair of the Administrative Law Section. At the same time that Cathy completed her term as Section Chair, two other individuals also completed extended terms on the Section's Executive Council. Both William "Bill" Williams and Andrew "Andy" Bertron decided, after long and distinguished years of service, during which each accepted the responsibility of serving as Section Chair and then returned to extended service as active and reliable members of the Section's Executive Council, to step aside and allow newer members to move up and take their places in the leadership of the Section. The leadership and expertise exhibited by these three individuals have been consistent and stellar for so many years and I hope and expect that they will each continue to contribute to the continued growth and

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CHAIR'S COLUMN
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productivity of the Section as we turn to the next page and move forward.

The current environment in Florida has created a sea of unrest in the usually rather placid waters in which administrative law practitioners have historically plied our trade. The recently concluded legislative session directed significant attention to administrative law issues and the issues were so robust and volatile that the proverbial dust is still settling. The new Governor has shown a determination to change the existing norms and practices involved in exercising the duties of state government. His broad and somewhat extreme reconfiguring of state government processes has been intended to alter the fundamental and historic premises of government action and has created new realities requiring intervention by the Courts to protect the integrity of the distinct branches of government and the constitutional exercise of authority on behalf of the citizens of Florida. This Governor has indicated that he intends to take further steps to change the manner in which state government operates and such steps are very likely to have a dramatic impact on how the administrative process in Florida works.

It appears that we are entering into one of those periodic moments in time when it is quite likely that we will be able to look back and recognize that we experienced a pivotal instance influencing the course of our state's future and the future of the body of law that is so integral to our practice as administrative lawyers in Florida. It is my hope that we can position our Section to continue to be a conduit of administrative law expertise to those who are going to play a significant role in determining the direction and course of Florida's progress. Obviously, the ability to share such expertise depends completely on the depth and breadth of the expertise of the Section's membership. I hope that you will consider either joining the Section if you are not currently a member or, if you are already a member, increasing your participation in the activities and programs the Section offers. We are always in need of the new personalities and the new energy that will contribute to the consistent success of our continuing education programs, law school outreach programs, legislative endeavors, efforts to advise and consult on substantive legislative and legal issues, and even the leadership and administration of the Section.

Please take the time to visit the Section's website and take a look at what the Section has been doing. I am sure that if you choose to make the commitment to actively participate in the programs and activities sponsored by the Administrative Law Section, you will discover and experience the significant benefits that such participation can bring. We are always looking to embrace new members and new ideas and I have no doubt that your participation will contribute significantly to the enhancement of our mission and goals.

Here is to a good year and an active year for the Administrative Law Section of The Florida Bar and all of our members. Come join us as we strive to raise awareness of the principles and issues inherent in the practice of administrative law; strive to contribute to the professional enhancement of all those who practice in our field; and strive to make sure that those in authority make Florida a better place for all of its citizens. I look forward to seeing you during the year and hearing from you if there is anything that you believe the Section can or should be doing.

What Does an Agency Do with a Rule That is Both Unrepealable and Invalid? One Case's Solution to This Vexing Problem

by Richard J. Shoop

The case of *Broward Children's Center, Inc. v. Plantation Nursing and Rehabilitation Center,* 66 So. 3d 1063 (Fla. 1st DCA 2011)[1], concerns an interesting scenario whereby an agency confronted with a challenge to a rule that it believed was invalid yet was unable to repeal conceded the rule's invalidity. A third party then attempted to intervene in the rule challenge only to find itself alone in defending the validity of the rule. This article will give some background information on the case and subsequent appeal along with discussing the implications of the opinion and whether there could be other avenues for achieving the same result.

Background

Plantation Nursing and Rehabilitation Center ("Plantation") is a 152-bed nursing home located in Broward County, Florida.[2] Plantation was looking to expand its pediatric program but was unable to do so because of the limitations found in Rule 59A-4.1295(7)(e), Florida Administrative Code ("the rule"), which states:

> (7) For those nursing facilities who admit children age 0 through 15 years of age the following standards apply in addition to those above and throughout Chapter 59A-4, F.A.C.
>
> * * *
>
> (e) The facility shall be equipped and staffed to accommodate no more than sixty (60) children at any given time, of which there shall be no more than 40 children of ages 0 through 15 at any given time, nor more than 40 children of ages 16 through 20 at any given time.

Plantation first tried to obtain a waiver of the rule by filing a petition for waiver with the Agency for Health Care Administration (AHCA), but AHCA denied the petition.[3] Next, it filed a Petition for Determination of Invalidity of Existing Rule ("Rule Challenge Petition") with the Division of Administrative Hearings (DOAH).

In the Rule Challenge Petition, Plantation alleged the rule was invalid because: 1) the agency exceeded its grant of rulemaking authority; 2) the rule enlarged, modified or contravened the law it implemented; and 3) the rule was arbitrary or capricious.[4] AHCA declined to defend the rule. Instead, it filed a response to the Rule Challenge Petition stating it agreed there was no statutory authority for the bed cap in the rule and, therefore, the rule was invalid.[5] AHCA, however, objected to Plantation's request for attorney's fees and costs because it had acted in good faith.[6] The day after AHCA filed its response, Plantation filed a Motion for Summary Final Order in which it requested that the administrative law judge ("ALJ") enter a summary final order concluding the rule was an invalid exercise of delegated legislative authority based upon AHCA's response to its Rule Challenge Petition.[7] Plantation also agreed to waive its right to attorney's fees and costs.[8] It appeared at that point that the case would quickly be resolved.

However, one day after Plantation filed its Motion for Summary Final Order, Broward Children's Center, Inc. ("BCC") filed a Petition for Leave to Intervene in the rule challenge. In the Petition for Leave to Intervene, BCC alleged that it had standing to intervene in the matter because it was "the only free standing skilled nursing facility for children requiring sophisticated medical treatment in the Southeast United States" and would be "immediately and substantially affected if Plantation's challenge [was] successful."[9] It defended the validity of the rule by stating that "[i]t is entirely reasonable, appropriate and within the Agency's delegated legislative authority to place a limit on the size of a skilled nursing facility, or unit of a facility, where children reside for skilled nursing home care."[10] As evidenced by its Petition for Leave to Intervene, BCC's primary motive was financial. Indeed, a victory by Plantation would place BCC—a much smaller, specialty facility—in direct competition with Plantation for patients. But, was financial harm alone enough for BCC to establish standing? And, if so, could BCC defend the validity of the rule by itself when both AHCA and Plantation had agreed that it was invalid?

AHCA and Plantation argued that the answer to the first question was "no." As Plantation pointed out in its Motion to Dismiss, BCC's alleged injury was speculative and conjectural at best.[11] Furthermore, because BCC's desire to intervene in the proceeding was based solely on protecting its market share, BCC did not have standing to intervene in the matter.[12] AHCA and Plantation, however, did not specifically address the second question in their motions to dismiss. BCC responded to the motions by asserting that economic interests were sufficient to establish standing to intervene and again defended the validity of the rule.[13]

The ALJ entered a Summary Final

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VEXING PROBLEM
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Order, agreeing with both AHCA and Plantation that the rule was invalid. In doing so, the ALJ noted that

> [t]his case is in an unusual, if not unique, procedural posture. That is, [AHCA] agrees with [Plantation] that the challenged Rule is invalid, and asserts that it has been trying to repeal this Rule. [BCC] seeks to intervene into this case to defend the validity of the Rule. However, it finds itself with no party with which to align, as neither party believes the Rule is valid.[14]

First, the ALJ addressed the issue of the rule's validity by concluding that the statute the rule claimed to implement did not contain any language setting a bed limit for pediatric patients in a particular facility.[15] Thus, the rule exceeded AHCA's specific grant of rulemaking authority.[16] Then, the ALJ turned to the issue of intervention, stating that "[a] fundamental characteristic of intervention is that it is subordinate to and in recognition of the propriety of the main proceeding."[17] Because neither AHCA nor Plantation was defending the validity of the rule, the ALJ concluded that it could not grant BCC's request for intervention without inappropriately elevating BCC to the status of a principal party to the litigation.[18]

The ALJ based her ruling, in part, on the case of *Humana of Florida, Inc. v. Department of Health and Rehabilitative Services,* 500 So. 2d 186 (Fla. 1st DCA 1986). In *Humana*, a party had filed a petition for formal hearing to contest the Department of Health and Rehabilitative Services' (HRS) preliminary approval of a certificate of need application.[19] Humana filed a petition to intervene in the proceeding, which was granted by the hearing officer.[20] Thereafter, the party that had filed the petition for formal hearing voluntarily dismissed the petition and the hearing officer closed the case at DOAH.[21] HRS then entered a final order concluding that the party had an absolute right to dismiss its petition for hearing, and such dismissal effectively ended the proceeding.[22] In affirming HRS' final order, the First District Court of Appeal held that Humana had joined the proceeding subject to the original petitioner's action, and that, when the petitioner had dismissed its petition, there was no longer a valid proceeding in which Humana could participate.[23] According to the court, "[t]o hold otherwise would be to vest in the intervenor greater status than the original petitioner."[24] BCC disagreed with the ALJ's ruling in the summary final order and appealed to the First District Court of Appeal.

The First District Court of Appeal affirmed the ALJ's summary final order. It concluded that "[t]he ALJ correctly reasoned that intervention was inappropriate in this case because Appellant, who wished to defend the rule's validity and who could not be aligned with either party, would be improperly elevated to the status of a principal party if intervention were permitted."[25] The court reasoned that "[i]ntervention is a dependent remedy in the sense that an intervenor may not inject a new issue into a case, and the rights of an intervenor are conditional in that they exist only as long as the litigation continues between the parties."[26] Thus, because both AHCA and Plantation had agreed the rule was invalid, the "litigation" had ended and BCC's defense of the rule's validity was a "new issue." If BCC had been granted leave to intervene it would be a "principal party" to the case at that point. The court also noted that AHCA "is afforded wide discretion in interpreting a statute which it is given the power and duty to administer," and that the ALJ "was mindful of this discretion when ruling that the rule was invalid."[27] Thus, according to the court, the ALJ properly denied BCC's Petition for Leave to Intervene under the facts of the case.[28]

Is an Agency's Concession that a Rule is Invalid a Violation of Chapter 120?

While the *Plantation* case decided the issue of whether BCC had standing to intervene, the decision raises an additional question that was not addressed: Does an agency violate section 120.54, Florida Statutes, by agreeing that a rule is invalid? After all, section 120.54(3)(a), Florida Statutes, mandates that:

> Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency, upon approval of the agency head, shall give notice of its intended action, setting forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the grant of rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented or interpreted.

(Emphasis added). Indeed, BCC implied in its pleadings that AHCA violated Chapter 120, Florida Statutes, and thus engaged in a "backdoor rule repeal" during its appeal.

While the court's opinion does not directly address this question, it does make pointed mention of the fact that AHCA had made two unsuccessful attempts to repeal the rule previously (note: it is not clear why AHCA was unsuccessful in its attempted repeal or what AHCA's reasons were for attempting the repeal). Perhaps the court thought the fact that AHCA first tried to repeal the rule, coupled with the fact that the ALJ found the rule to be invalid, weighed heavily against this case being a "backdoor rule repeal." Or perhaps, the court concluded that, as a practical matter, an agency cannot be made to defend a rule it believes is invalid regardless of the requirements of section 120.54(3).

In theory, the "backdoor rule repeal" scenario could happen. An agency could find a "straw man" to challenge the validity of a rule it wished to repeal and then not oppose a motion for summary final order. Presuming the motion raises an adequate basis for invalidation, the ALJ could enter a summary final order granting the motion and rendering the rule invalid. Voilá! The rule is eliminated in a much shorter period of time than it would take to pursue a repeal of the rule under Chapter 120, Florida Statutes. In this way, agencies could effectively circumvent the procedures set forth in section 120.54, Florida Statutes.

There are, however, some major flaws with this theoretical scenario. First, there are likely only a few existing rules that are both unrepealable using the process set forth in section 120.54, Florida Statutes, and invalid. Second, an agency would have to locate a "straw man" with standing to challenge the validity of the rule. Depending on the rule, the pool of "straw man" applicants available could be quite shallow. (Note that, in *Plantation*, AHCA did not go looking for a "straw man." Plantation initiated the proceeding on its own. AHCA merely conceded the invalidity of the rule once the proceeding had begun instead of defending it.) Finally, and perhaps most importantly, it is an ALJ who makes the final determination on a rule's validity, even if there were such collaboration by the parties.

The *Plantation* case also raises some speculation as to whether there might be other avenues for dealing with unrepealable rules that are also invalid. Could an agency not simply petition a circuit court for a declaratory judgment finding that a rule is invalid? Or, could a party seek a declaratory statement from an agency, and that agency issue a declaratory statement interpreting the rule to be invalid as it applies to the party's particular circumstances? Both of these avenues would also appear to be plausible solutions to the problem.

Conclusion

The court in *Plantation* realized that AHCA was confronted with an untenable situation and acted in good faith by conceding the invalidity of the rule. It determined that the ALJ was correct in finding that the rule was invalid, and that BCC did not have standing to intervene in the matter because it would have been improperly elevated to the status of a principal party left to defend the validity of the rule by itself. Other agencies might wish to act accordingly when confronted with a similar scenario, provided that they have first attempted a proper repeal under Chapter 120, Florida Statutes. The *Plantation* case also gives rise to speculation as to whether there could be other possible scenarios under which an unrepealable, yet invalid, rule could be eliminated. It will be interesting to see if a similar scenario occurs in the future, especially given the recent increased focus on rules in Florida.

Endnotes:

[1] DOAH Case No. 10-010313RX (Summary Final Order entered December 14, 2010); *aff'd* 66 So. 3d 1063.
[2] *See generally* Petition for Determination of Invalidity of Existing Rule, DOAH Case No. 10-010313RX, available at www.doah.state.fl.us by searching under the DOAH Case Number.
[3] *See In Re: Petition for Waiver of Rule 59A-4.1295(7)(e), Florida Administrative Code*, AHCA Case No. 2010008143 (AHCA Oct. 29, 2010).
[4] *See generally* Petition for Determination of Invalidity of Existing Rule, DOAH Case No. 10-010313RX.
[5] *See* Agency for Health Care Administration's Response to Petition for Determination of Invalidity of Existing Rule, DOAH Case No. 10-010313RX.
[6] *Id* at 2.
[7] *See* Motion for Summary Final Order, DOAH Case No. 10-010313RX.
[8] *Id* at 8.
[9] *See* Petition for Leave to Intervene, DOAH Case No. 10-010313RX.
[10] *Id* at 3.
[11] *See* Motion to Dismiss Petition for Leave to Intervene, DOAH Case No. 10-010313RX at 3.
[12] *Id* at 3-4.
[13] *See generally* Intervenor's Response to Motions to Dismiss Petition for Leave to Intervene, DOAH Case No. 10-010313RX.
[14] *See* Summary Final Order, DOAH Case No. 10-010313RX at 3.
[15] *Id* at 5.
[16] *Id* at 6.
[17] *Id*.
[18] *Id* at 7.
[19] 500 So. 2d at 187.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id* at 188.
[25] 66 So. 3d at 1063.
[26] *Id* at 1064.
[27] *Id*.
[28] *Id*.

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Section Budget/Financial Operations

	2010-2011 Budget	2010-2011 Actual	2011-2012 Budget
REVENUE			
Dues	28,750	27,112	28,750
Affiliate Dues	425	400	500
Dues Retained by Bar	(20,465)	(19,973)	(20,525)
Administrative Fee Adjustment	0	0	0
CLE Courses	7,000	2,647	7,000
Section Differential	2,500	3,157	2,500
Section Service Programs	2,500	1,600	2,500
Investment Allocation	9,431	23,741	10,418
Miscellaneous	0	0	0
TOTAL REVENUE	**30,141**	**38,684**	**31,143**
EXPENSE			
Staff Travel	1,291	215	1,411
Internet Charges	408	417	420
Postage	100	69	220
Printing	150	1	150
Officer Expense	500	0	500
Newsletter	6,500	4,515	6,500
Membership	500	0	500
Supplies	50	19	50
Photocopying	125	43	125
Officer Travel	1,500	650	1,500
Meeting Travel	3,000	0	3,000
CLE Speaker Expense	100	0	100
Committees	500	37	500
Council Meetings	600	236	600
Bar Annual Meeting	2,100	1,573	2,200
Section Service Programs	500	460	500
Retreat	3,000	0	3,000
Public Utilities	500	0	500
Awards	600	863	600
Writing Contest/Law School Liaison	3,000	0	3,000
Website	1,000	1,692	1,000
Legislative Consultant	5,000	5,000	5,000
Council of Sections	300	300	300
Misc.	100	0	100
Operating Reserve	3,421	0	3,450
TFB Support Services	2,788	2,828	2,800
CreditCard Fees	0	28	30
TOTAL EXPENSE	**37,633**	**18,946**	**38,056**
BEGINNING FUND BALANCE	**188,616**	**211,462**	**208,362**
PLUS REVENUE	**30,141**	**38,684**	**31,143**
LESS EXPENSE	**(37,633)**	**(18,946)**	**(38,056)**
ENDING FUND BALANCE	**181,124**	**231,200**	**201,449**

SECTION REIMBURSEMENT POLICIES:

General: All travel and office expense payments are 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) or 5.61(e)(6) which is available from Bar headquarters upon request.

APPELLATE CASE NOTES

by Mary F. Smallwood

Adjudicatory Proceedings

Diaz v. Agency for Healthcare Administration, 65 So. 3d 78 (Fla. 3d DCA 2011) (Opinion filed June 15, 2011)

Diaz operated two group homes for persons with severe developmental disabilities. As such, she was licensed by the Agency for Healthcare Administration ("AHCA") and had entered into a contract with the Agency for Persons with Disabilities ("APD"). In June 2010, approximately a month before the contract with APD was to expire, APD terminated the contract as a result of a number of disputes between Diaz and inspectors for APD. Subsequently, AHCA notified Diaz that her Medicaid provider number was being terminated as a result of the termination of the contract. Diaz filed petitions for hearing with both agencies under the Administrative Procedure Act. Both AHCA and APD dismissed the petitions with prejudice on the grounds that the contract allowed APD to voluntarily terminate the contract and that circuit court was the appropriate forum to resolve a contractual dispute.

The court affirmed. It noted that the contract between Diaz and APD specifically provided for voluntary termination by either party without cause upon 30 days notice. The court found no contractual or statutory provision calling for the dispute to be resolved outside circuit court. In addition, the court held that Diaz' substantial interests were not affected by the decision to terminate the contract under the voluntary termination provision as the statute provided that qualified providers were not entitled to enrollment in a Medicaid provider network.

Licensing

Alliance Nursing Care, Inc. v. Agency for Healthcare Administration, 64 So. 3d 742 (Fla. 3d DCA 2011) (Opinion filed June 29, 2011)

In May 2009, the Agency for Healthcare Administration ("AHCA") issued an administrative complaint alleging a violation by Alliance Nursing Care, a licensed home health agency, for failure to provide a service for a period of 60 days. Alliance waived its right to a hearing and consented to the entry of a final order imposing a $1000 penalty. During the 2009 legislative session, the Legislature adopted amendments to section 400.471, Fla. Stat., providing that AHCA deny an application for license renewal if the applicant has been administratively sanctioned by AHCA within the preceding 24 months. AHCA subsequently denied Alliance's application for renewal of its license on the basis of the amended statute.

Alliance sought an informal hearing, arguing that the statute was substantive in nature and should not have been applied retroactively. AHCA adopted the informal hearing officer's recommendation of denial, concluding that the application of the statute was not retroactive.

On appeal, the court affirmed. It agreed with AHCA that the statute had not been applied to a license that was in effect at the time the statute was adopted. Instead, it was applied prospectively to an application for renewal of a license. The court declined to address Alliance's argument that the issuance of the license had created a vested right which was impaired by denial of the application for renewal.

Mendelsohn v. Department of Health, 36 Fla. L. Weekly 1934, 2011 WL 3837280 (Fla. 1st DCA 2011) (Opinion filed August 31, 2011)

Dr. Medelsohn pled nolo contendere in federal court to violating 18 U.S.C. § 371. The Department of Health then issued an emergency final order suspending his license to practice medicine pursuant to section 456.074(1), Fla. Stat., which requires the Department to issue an emergency order of suspension when a licensee enters a plea of nolo for any violation of "18 U.S.C. s. 669, ss. 258-287, s. 371, s. 1001, s. 1035, s. 1343, s. 1347, s. 1349, or s. 1518 or 42 U.S.C. ss. 1320a-7b, relating to the Medicaid program." Mendelsohn appealed, arguing that his plea did not relate to the Medicaid program.

On appeal, the Department argued that the limitation as to the Medicaid program applied only to the last statutory provision, not to 18 U.S.C. § 371. The court reversed the order. It held that a modifying phrase applies to all preceding items in a series unless there is no comma between the last item and the modifying phrase.

Rulemaking

Whiley v. Scott, 36 Fla. L. Weekly 451, 2011 WL 3568804 (Fla. 2011) (Opinion filed August 16, 2011)

Whiley, a blind recipient of food stamps, challenged the validity of two Executive Orders, 11-01 and 11-72, issued by Governor Rick Scott. The first order established the Office of Fiscal Accountability and Regulatory Reform ("OFARR") in the Governor's Office. Executive Order 11-01 also provided that all agencies under the direction of the Governor immediately suspend rulemaking activities and that no rule development occur except at the direction of OFARR. It further directed the Secretary of State to refrain from publishing any notice of agency rulemaking except at OFARR's direction. That order was subsequently amended by Executive Order 11-72 which eliminated the language regarding suspension of rulemaking and the limitation on the Secretary of State's publication of notice but provided that no agency under the Governor's direction could submit a rulemaking notice for publication without OFARR's approval. Whiley argued that the executive orders were a violation of separation of powers under the Florida Constitution.

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The Florida Supreme Court exercised original jurisdiction in considering the petition for a writ of quo warranto, concluding that the case raised serious constitutional issues regarding the respective authority of the Governor and the Legislature with respect to rulemaking proceedings under the Administrative Procedure Act.

The majority of the Court held that the Legislature has the sole right to delegate rulemaking authority to agencies and the provisions of the two executive orders that effectively suspended rulemaking by Governor-directed agencies unconstitutionally encroached on that authority. The Court rejected the Governor's arguments that the second executive order corrected any problems with the first order by removing the reference to suspension of rulemaking. Instead, it concluded that the effect of the two orders was the same.

The Court also rejected the Governor's argument that he had authority under Art. IV § 1(a) and §6, Fla. Const., as the supreme executive officer of the State with direct supervisory power over executive branch agencies to establish OFARR and regulate the rulemaking activities of such agencies.

Broward Children's Center, Inc. v. Plantation Nursing and Rehabilitation Center, 66 So. 3d 1063 (Fla. 1st DCA 2011) (Opinion filed August 4, 2011)

Plantation Nursing and Rehabilitation Center ("Plantation") filed a petition challenging a rule of the Agency for Health Care Administration ("AHCA"). Before the Division of Administrative Hearings, AHCA agreed with Plantation that the rule was invalid. Broward Children's Center had filed a petition to intervene in an attempt to support the validity of the rule. The administrative law judge, however, dismissed the petition on the grounds that Broward, as an intervenor, was not aligned with either of the principal parties.

On appeal, the court affirmed. It held that the rights of intervenors are subordinate to those of the principal parties and conditional as they exist only so long as the litigation between the parties continues.

St. Johns River Water Management District v. Molica, 36 Fla. L. Weekly 1839, 2011 WL 3627412 (Fla. 5th DCA 2011) (Opinion filed August 19, 2011)

St. Johns River Water Management District (the "District") filed an administrative complaint against the Molicas alleging that they had constructed a stormwater management system partially or wholly over a wetland without obtaining a permit. The Molicas requested a formal administrative hearing; however, prior to the hearing, they filed a complaint in circuit court seeking a declaratory judgment and temporary injunction to prevent the administrative action from proceeding. The circuit court issued an order holding that the Molicas' activities did not constitute the construction of a stormwater management system, or, alternatively, that if a system existed on the property, it was a closed system.

On appeal, the court reversed. The court determined that the District had authority to require a permit for the activities conducted by the Molicas. In a footnote to its opinion, the court noted that the determination of whether a permit was required should have been decided in a section 120.56, Fla. Stat., proceeding instead of circuit court. However, the issue of exhaustion of administrative remedies was not raised by the District before the circuit court; and the court concluded that the claim could arguably be brought in circuit court under the exemption for actions taken without colorable statutory authority.

Mary F. Smallwood *is a partner with the firm of GrayRobinson, 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@gray-robinson.com.

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

DOAH Appoints Six New Administrative Law Judges

The Division of Administrative Hearings is proud to announce the appointment of the following new administrative law judges, all of whom began their service prior to July 15, 2011:

Linzie F. Bogan graduated from Morehouse College with a business degree and from the University of Georgia College of Law. After a private law practice in Georgia where he served as assistant school board attorney in Savannah and special assistant to the Georgia Attorney General, he joined the Florida Attorney General's Office defending state agencies in complex matters in circuit court. He also spent two years as advocate for the Florida Commission on Ethics from within the AG's Office. Linzie has spent the last three years as Associate General Counsel/ Director of Labor Relations at Florida A&M University handling a variety of compliance issues, matters before DOAH, and serving as chief hearing officer at the university.

F. Scott Boyd received his undergraduate, masters, and law degrees from Florida State University where he achieved top honors (Order of the Coif). He also received a Master of Science Degree in Strategic Intelligence from the Defense Intelligence College. Scott served in the United States Air Force in active and reserve duty, retiring with the rank of Colonel. For more than 25 years, including the last eight as Director, Scott has been with the Joint Administrative Procedures Committee and has been responsible for the review and comment on over 5,000 rules promulgated by state agencies. He has been active in the Florida Bar, serving as Chair of the Certification Committee for State and Federal Government and Administrative Practice (SFGAP) and is board certified in that area. He has chaired the Pat Dore Administrative Law Conference, has written scholarly articles on administrative law, and is a frequent lecturer on the topic.

E. Gary Early received his undergraduate and law degrees from Florida State University. He spent the first 10 years of his career with the Florida Department of Environmental Regulation involved in a wide variety of matters, including rulemaking, procurement, permitting, petroleum storage tanks, and hazardous waste. He spent the next 10 years with Akerman, Senterfitt handling complex environmental matters for clients such as the Southwest Florida Water Management District, as well a wide variety of matters for private and public sector clients in the state agency realm. He is AV rated by the Martindale-Hubbell legal publication. When he joined Messer, Caparello & Self in 2001, Gary continued his representation of private clients and as special counsel for the Departments of Health and Financial Services, and has handled matters in all Florida courts, DOAH, and before the Governor and Cabinet. He is board certified in SFGAP by The Florida Bar.

Lynne A. Quimby-Pennock graduated from Queens College in North Carolina with a degree in history. She received her J.D. at the Walter F. George School of Law in Macon, Georgia. Lynne has worked primarily for the State of Florida with successful stints at the Departments of Business and Professional Regulation (and its predecessors DPR and DBR) and Health, Office of the Public Counsel, the Office of the Attorney General, the Florida Elections Commission, and, most recently, the Office of Financial Regulation. She has prosecuted cases before the major health professional boards, complex matters in state and federal court involving financial institutions, before DOAH, and the Public Employees Relations Commission. Lynne has been active in the Florida Bar, the Florida Government Bar Association (Past President), the Tallahassee Women Lawyers, Teen Court, and her church. She is board certified in SFGAP.

Cathy M. Sellers graduated from the University of Florida with a degree in biology and a Master of Education in Science Education. After serving as a high school science teacher in Fernandina Beach and Plant City, Cathy entered the Florida State University College of Law, graduating with High Honors (Order of the Coif). Since 1988, she has worked in the private sector as a partner at Steel, Hector & Davis; Moyle Flanigan; and, most recently, at Broad & Cassel. She has represented clients in a broad administrative law practice, including environmental and land use matters, rulemaking and regulatory permitting, and cases involving numerous agencies such as AHCA, DBPR, FHFC, FDOT and DOS. Cathy is the immediate past Chair of the Administrative Law Section of the Florida Bar, serves on the SFGAP Certification Committee, and has served on the Executive Council of the Environmental and Land Use Section. She is board certified in SFGAP and is AV rated by Martindale-Hubbell. She recently authored the "Overview of the Florida Administrative Procedure Act" in the 9th Edition of the Florida Bar APA Manual. Since 1999, Cathy has served as an adjunct professor at the University of Florida's Levin College of Law teaching Florida Administrative Law.

Jessica E. Varn received her B.A. in English from the University of Puget Sound, and her J.D. from the Florida State University College of Law where she served as President of the Moot Court Team and earned numerous honors for oral advocacy. She began her career as an attorney with the McConnaughhay, Roland firm handling workers'

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compensation defense litigation and appeals. She then clerked for Judge Anne Cawthon Booth at the First DCA before reentering private practice handling workers' compensation appeals while teaching legal writing and Spanish for Lawyers at the FSU College of Law. In 2002, Jessica was appointed by Governor Jeb Bush as one of the three quasi-judicial commissioners at the Public Employees Relations Commission. In that capacity, she conducts hearings concerning collective bargaining issues, unfair labor practices, age discrimination appeals, whistle blower act appeals, and monitors the state career service system. She issues final orders based upon recommended orders received from hearing officers and holds oral arguments. Jessica has been extremely involved in professional and community activities; lecturing frequently to student and professional organizations. She was involved for many years with a migrant farmworker outreach program, public school activities and mentoring, and has served as a Spanish language interpreter in Federal Court proceedings.

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Francine M. Ffolkes, Department of Environmental Protection

8:30 a.m. – 9:20 a.m.
Welcome to DOAH eALJ!
Susan T. Brown, Chief Information Officer, Division of Administrative Hearings
Claudia Llado, Clerk, Division of Administrative Hearings

9:20 a.m. – 10:00 a.m.
Evidentiary Issues in Administrative Proceedings
Amy W. Schrader, GrayRobinson, P.A.

10:00 a.m. – 10:20 a.m.
Break

10:20 a.m. – 11:10 a.m.
Expert Witnesses: Selection, Preparation, and Examination
Stephanie A. Daniel, Office of the Attorney General

11:10 a.m. – 11:50 a.m.
Preserving Issues for Appeal
Garnett W. Chisenhall, Jr., Department of Business and Professional Regulation

11:50 a.m. – 1:15 p.m.
Lunch (on your own)

1:15 p.m. – 3:30 p.m.
Mock Administrative Hearing: License Discipline Issue
ALJ: Hon. John D.C. Newton, II, Division of Administrative Hearings
Moderator: Francine M. Ffolkes, Department of Environmental Protection
Agency Attorney: Edwin A. Bayo, Grossman Furlow and Bayo, LLC
Agency's Witness: Warren J. Pearson, Tallahassee
Applicant's/Licensee's Attorney: Mary Ellen Clark, Office of the Attorney General
Applicant's Witness: Daniel E. Nordby, Department of State

3:30 p.m. – 3:45 p.m.
Break

3:45 p.m. – 5:00 p.m.
Practice Pointers and Ethical Considerations Q&A with the DOAH ALJs
Hon. John D.C. Newton, II
Hon. Bram D.E. Canter
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GOVERNOR'S RULES FREEZE
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Court to order the Governor to demonstrate the authority to issue such an order and, if the Court found there was no authority, to revoke the order. Ms. Whiley argued that neither the "supreme executive power" nor the Governor's role as the chief administrative officer allows the Governor to ignore or displace statutes that govern rulemaking. She also argued that both executive orders violate the rulemaking authority that the Legislature has given exclusively to agency heads. She summarized the narrow question presented as: whether the Governor's authority under the separation of powers authorizes him to contravene the legislative mandate in the APA by giving rulemaking power to OFARR that should, by law, lie with agency heads? In response, the Governor asserted that, as the chief administrative officer, he has the "supreme executive power" to direct those agency heads who serve at his pleasure.[1]

The Majority Opinion.

A majority of the Court determined that rulemaking is a derivative of lawmaking and that the legislative branch is responsible for the rulemaking function. The majority specifically noted that the Legislature has delegated certain rulemaking responsibilities to agency heads, such as the authority to determine whether to go forward with proposing, amending, repealing or adopting rules. The majority concluded that the executive orders, to the extent each suspends and terminates rulemaking by precluding publication of notice and other compliance with the APA absent prior approval from OFARR--contrary to the APA--infringe upon the rulemaking process and encroach upon the Legislature's delegation of rulemaking power as set forth in the APA.

The majority also rejected the Governor's argument that the Florida Constitution's grant of the supreme executive power to the Governor authorizes the Governor to suspend, terminate and control agency rulemaking, contrary to the APA. The majority concluded that the Legislature retains the sole right to delegate rulemaking authority to agencies, and held that all provisions in both Executive Orders 11-01 and 11-72 that operate to suspend rulemaking contrary to the APA constitute an encroachment upon a legislative function. The Court therefore granted Ms. Whiley's petition, but withheld issuance of the writ of quo warranto, trusting that any provision in Executive Order 11-72 suspending agency compliance with the APA will not be enforced against an agency until such time as the Legislature may amend the APA or otherwise delegate such rulemaking authority to the Executive Office of the Governor.[2]

The Dissenting Opinions.

Chief Justice Canady and Justice Polston filed dissenting opinions. The Chief Justice noted that Ms. Whiley had failed to show any specific action required by law that was prevented by the implementation of the executive orders, and that the majority had not come to terms with the absence from Florida law of any restrictions on the authority of the Governor to supervise and control policy choices made by subordinate executive branch officials with respect to rulemaking. He opined that the Governor's right to exercise supervision and control flows from the Florida Constitution, which vests in the Governor the "supreme executive power" and the power to appoint executive department heads who serve at the Governor's pleasure. He also was of the view that the majority unjustifiably concluded that the Legislature had implicitly divested the Governor of his supervisory power with respect to executive officials who serve at his pleasure.

Likewise, Justice Polston found that the Governor, as the chief administrative officer charged with faithfully executing the law and with managing and ensuring that the agencies under his control also faithfully execute the law (including the APA), was completely within his constitutional authority in issuing Executive Order 11-72. Following a detailed review of the rulemaking process established in the APA, Justice Polston argued that agency heads may comply with both the APA and the executive order, and that the record discloses not a single instance where the executive order has caused any actual violation of the rulemaking requirements in the APA. In addition, he argued that any actual violation of the APA should be challenged using the remedies provided by the APA, and not in an extraordinary writ proceeding before the Supreme Court. He therefore would have denied the petition for writ of quo warranto.

Some Interesting Questions.

The majority opinion raises a number of interesting questions. Here are a few:

Who knew one could file a challenge to agency action directly in the Florida Supreme Court?

Ms. Whiley's attorneys knew, but don't try this at home, or otherwise plan to add the petition for writ of quo warranto to the APA's "impressive arsenal of varied and abundant remedies for administrative error."[3] Here, the majority found that this case raised a serious constitutional question relating to the authority of the Governor and the Legislature, respectively, in rulemaking proceedings, and believed that a decision on this issue would provide important guiding principles to other state courts. This won't be the case with most challenges to agency action.

What is the effect of the opinion on the Executive Order?

Technically, the Court granted relief only "to the extent that the Executive Orders 11-01 and 11-72 include a requirement that OFARR must first permit an agency to engage in the rulemaking which has been delegated by the Florida Legislature."[4] As such, it appears that the other provisions of Executive Order 11-72--which the majority recognized were not at issue in this proceeding--remain valid and in force. Among other things, these unaffected provisions require review of proposed and existing rules to determine if they unnecessarily restrict entry into an occupation, adversely affect the availability of services, unreasonably affect job creation or retention, impose unreasonable restrictions on those seeking

employment, or impose unjustified costs on businesses and consumers. A memorandum from the Governor's office indicates that OFARR will adjust its policies and procedures to comply with the Court's order and that these changes will be memorialized in a forthcoming executive order.[5] The memorandum also states that OFARR will continue to advise the Governor on rulemaking, that OFARR will continue to require agencies to provide information on rulemaking activities and that OFARR will continue to provide advice and commentary on proposed rulemaking actions. Agencies should continue to provide the requested information to OFARR prior to publication of rulemaking actions; however, no formal authorization to publish is required from OFARR.

What is the practical effect of the opinion on Ms. Whiley?

The particular proposed amendment to the online application for food stamps that was of concern to Ms. Whiley was reportedly approved by OFARR the day after it was submitted to the office by the Department of Children and Families.[6] Similarly, it appears OFARR has approved the proposed rules identified by Amici Florida Audubon Society and Disability Rights Florida. Of course, this doesn't mean that the agencies have adopted rules that are to the liking of the challenger and amici; it simply means that these rulemaking proceedings are no longer being delayed pending OFARR review.

What is the practical effect of the opinion on agency heads?

The Governor argued that the OFARR approval process does not violate the Florida Constitution because the Governor has the power to inform agency heads who serve at his pleasure of the considerations that will govern their retention and removal, and that as the chief administrative officer and the supreme executive, the Governor may direct those agency heads who serve at his pleasure. While the majority rejected this argument, it seems likely that these agency heads who serve at the Governor's pleasure will continue to "voluntarily" consult with OFARR, particularly with respect to significant rulemaking initiatives.[7]

What is the practical effect of the opinion on the rule reviews required by HB 993?

The Florida Legislature enacted HB 993 during the 2011 Regular Session.[8] HB 993 specifically refers to Executive Order No. 11-01 (but not to No. 11-72). The bill establishes an enhanced biennial review and compliance economic review process for rules in effect on November 16, 2010.[9] However, the measure provides that an agency is exempt from these reviews "if it has cooperated or cooperates with OFARR in a review of the agency's rules in a manner consistent with Executive Order No. 11-01, or any alternative review directed by OFARR."[10] The majority found that this legislation could not provide any authorization for the challenged parts of the executive orders that purport to suspend or terminate rulemaking, since HB 993 applies to rules already in effect on November 16, 2010. Presumably, this also means that agencies need not comply with the challenged (and now invalidated) provisions of the executive orders to qualify for the exemption provided in HB 993.

Will the Legislature amend the APA to authorize the Governor to suspend or terminate rulemaking?

The majority expressly recognized that the Legislature may amend the APA or otherwise delegate such rulemaking authority to the Executive Office of the Governor.[11] Will the Legislature do so?[12] Alas, it seems we have run out of space. But stay tuned, as the next Regular Session will begin in just a few months, on January 10, 2012.

Endnotes

[1] For a summary of the executive orders and the parties' arguments as presented to the Court, see Lawrence Sellers, *Governor's Rules Freeze Draws Legal Challenge: Governor Asserts "Supreme Executive Power,"* Administrative Law Section Newsletter, Vol. XXXII, No. 4 (June 2011).

[2] Executive Order 11-72 expressly supersedes Executive Order 11-01, so presumably the latter is no longer in effect.

[3] State ex rel. Dep't of General Services v. Willis, 344 So. 2d 580, 589 (Fla. 1st DCA 1977).

[4] Slip Op. at 1-2.

[5] Memorandum from Stephen R. MacNamara to agency heads re interim guidance regarding Office of Fiscal Accountability and Regulatory Reform (Aug. 19, 2011).

[6] Slip Op. at 48 (Polston, J., dissenting). Counsel for Ms. Whiley reports that the agency has not yet revised the online application to address Ms. Whiley's substantive concerns.

[7] See Memorandum cited in n. 4, supra ("With respect to any requests for authorization that OFARR had previously denied, agencies may proceed with such rulemaking if they so choose, but agencies should note that OFARR's previously expressed guidance with respect to such proposed rulemaking represents the strongly held views of the Office of the Governor as to the efficacy and the propriety of the proposed action.").

[8] HB 993 was approved by the Governor on June 24, 2011. See Chapter 2011-225, Laws of Florida, available at http://laws.flrules.org/files/Ch_2011-225.pdf.

[9] For a summary of the new reviews required by HB 993, see Eric Miller, *HB 7253 & HB 993:The Legislature's Policy of Economic Review and the 2011 Amendments to the APA,* Administrative Law Section Newsletter, Vol. XXXII, No. 4 (June 2011).

[10] HB 993, s. 5, *to be codified as* s. 120.745(9)(a), Fla. Stat.

[11] Slip Op. at 27. The majority also recognized that the Legislature had in specific terms and circumstances delegated to the Executive Office of the Governor certain responsibility for the oversight of agency rulemaking. Id. at 25.

[12] At one point during the Legislative Session, HB 993 included a section providing for the summary repeal of rules by the Governor and other statewide elected executive officers within the first six months of their elective terms. See CS/CS/HB 993, s. 3. This provision was removed from the bill and was not enacted.

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