ADMINISTRATIVE LAW SECTION NEWSLETTER

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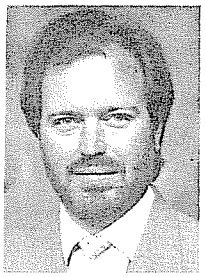
Chairman's Column

Rulemaking Redux

by William L. Hyde



What is a "rule," what is "rulemaking," and what place do rules and rulemaking have in the cosmos of Florida's Administrative Procedure Act? The answers to the first two questions are reasonably clear; however, the place that rules and rulemaking have in Florida's APA is subject to some considerable uncertainty.

Section 120.52(16), Florida Statutes, defines the term "rule" as

> [E]ach agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule.

This statutory provision then goes on to discuss various items that are not "rules."

The process of rulemaking, in turn, is set forth in considerable detail in Section 120.54, Florida Statutes. This statutory provision, which is quite lengthy, specifies just how the adoption of a rule is accomplished under Florida's APA.

The relative importance of rules and rulemaking in Florida's administrative process, however, is at best uncertain and at worst in decline. Why has this occurred, and what steps, if any, should be taken to remedy the situation?

Clearly, the authors of the modern APA intended rules and rulemaking to be the very center of Florida's APA cosmos. They were expressly concerned with the "shadow government" that existed under the former Administrative Procedure Act and were particularly keen about providing affected persons with appropriate remedies to challenge agency policies, whether set forth in a proposed or existing rule or in some unpublished document, memorandum or other policy statement. Early judicial decisions construing the modern APA emphasized both this central role of rules and rulemaking and repeatedly excoriated more than a few administrative agencies for their inability or unwillingness to adopt rules pursuant to Section 120.54 procedures.

Early on in this judicial construction of the modern APA, however, there emerged a seemingly innocuous exception to the APA's strong focus on rules and rulemaking. In *McDonald v. Department of Banking and Finance*, 346 So.2d 569 (Fla. 1st 1977), former Judge Robert P. Smith wisely recognized that it was extremely difficult, if not impossible, for an agency to set forth all of its policies in rule form and that some leeway was needed in order to allow the agencies to develop

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their policies before they engaged in formal rulemaking. This seemingly limited exception, called by Judge Smith "incipient agency policy," thus entered the lexicon of Florida's APA.

Even though this exception had been created (for quite logical reasons), subsequent decisions by Judge Smith and other appellate court judges continued for a while to emphasize the primacy of rules and rulemaking in the APA process. Thus, even though agencies were permitted to develop policy on a case-by-case basis, they were still urged by the courts to move inexorably toward rulemaking. Furthermore, the agencies were admonished, where non-rule policy is being employed, the burden rested with the agency to prove up its policy by evidence and testimony appropriate to the issue. This, Judge Smith and others reasoned, would push agencies toward rulemaking if for no other reason than as a matter administrative convenience.

Unfortunately, things have not quite worked out as Judge Smith and others hoped, and the primacy of rules and rulemaking has given way, it seems, to the primacy of procedural due process. The reasons for this decline in the importance of rules and rulemaking appear to be several.

First of all, agencies have found that rulemaking pursuant to Section 120.54's dictates can be extremely difficult and time-consuming, especially on hotly contested matters for which there are many divergent opinions. Thus, it would often seem, there is little incentive to engage in formal rulemaking. For example, virtually any Certificate of Need ("CON") rule proposed by the Department of Health and Rehabilitative Services is going to be challenged by some affected health care provider. Existing providers try their hardest to maintain the status quo and to prevent the entry of new competitors into the market; other health care providers, not yet possessed of the requisite CON, extol the benefits of competition (at least until they get their CON) and thus try to increase the number of providers of a given service. Faced with this onslaught, which can come from a variety of different directions, HRS often finds itself in the untenable position of having to act upon a CON application by applying policy that may not have been legitimized by formal rulemaking. So why bother?

A second reason for this relative decline is a series of opinions, mostly emanating from the First District Court of Appeal, which seem to say that it no longer matters any more whether an agency policy is adopted as a rule, so long as affected persons are afforded a point of entry and a hearing at which they can contest the validity of the non-rule policy. There is some appeal to this reasoning. After all, agencies have an obligation to exercise their statutory duties and thus (presumably) advance and protect the public health, safety, and welfare, and should not be thwarted in the legitimate exercise of their statutory powers because a rule has not been adopted. Furthermore, the affected person still has an opportunity to contest the validity of the non-rule policy. In other words, procedural due process has been afforded. This reasoning, however, ignores several important considerations. First, Florida's APA was intended to provide something more than mere compliance with constitutional notions of procedural due process; it was intended also to make agency decision-making on broad policy issues a matter of public debate and public input, and a Section 120.57 hearing does not necessarily serve these ends. Second, administrative rules perform an important due process function in their own right: They provide affected persons, in the *Florida Administrative Code*, with readily accessible published notice of an agency's policies. Without that published notice, however, only the most sophisticated persons (presumably with the assistance of Tallahassee counsel) can be reasonably expected to know the nuances, or even existence of, an agency's non-rule policies. Third, and just as importantly, an affected person should not have to endure the rigors and expense of a Section 120.57 proceeding just to find out what an agency's policy is or, more importantly, whether that policy is, in fact, justified by the facts. Affected persons should know, at the front end of whatever the administrative process is (i.e., licensing, license revocation, etc.), just what the agency policy is so that they

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may govern themselves accordingly. Fourth, if procedural due process is all that is required, what sanction remains for the agency that, for one reason or another, simply refuses to adopt its policies as rules?

A third reason for this relative decline, it seems, is that some agencies have simply found it advantageous to not adopt their policies as rules. By applying policy, incipient or otherwise, on a case-by-case basis, an agency can employ its considerable resources on one or a limited number of affected persons. Moreover, it allows the agency considerable flexibility to apply a policy in situations where it desires to do so and to not apply it when it suits its purposes, politically or otherwise. Unfortunately, this can lead to inconsistent, perhaps even arbitrary, application of that policy, an evil which rulemaking is specifically intended to prevent. For these baser motives, however, there is little, if any, sanction left in the APA so long as the administrative agency affords to affected persons the opportunity to contest the policy in a Section 120.57 proceeding.

There are, of course, other reasons for agencies' not adopting their policies as rules. Most notably, the Florida Legislature has a regrettable tendency to adopt new laws but not provide the agencies with the requisite money and, more importantly, personnel to implement those laws through rulemaking. Political interference by well-connected persons or regulated industries can also undermine any initiative toward rulemaking.

Where does all this leave us? What, if any, sanctions can be levied against an administrative agency that either wilfully or negligently fails to adopt rules pursuant to Section 120.54? When do "incipient agency policies" cease being "incipient" and must then be adopted as rules? The courts have provided little, if any positive guidance in this area; indeed, recent decisions appear to give the agencies even greater latitude in deciding whether to formulate a rule.

One might expect the Florida Legislature to step in and correct things and, in recent years, a bevy of bills have been introduced to essentially curtail the use of non-rule policy. Such legislative initiatives, however, are not usually of great interest and die in committee not because they are opposed, but because they don't have the necessary champions or aren't considered sufficiently deserving of attention in Florida's hectic two-month legislative session. Should we just then accept the status quo?

Of course, not all agencies indulge in such practices or, if they do, they do so only in limited circumstances. Indeed, some agencies, or divisions of agencies, have been quite good in adopting rules, even in the face of enormous pressure. For example, one need only look to the provisions of Chapter 17, Florida Administrative Code, to recognize the Department of Environmental Regulation's long-established practice, over many years, of commendably adopting as many of its policies as possible in rule form.

Other agencies, however, have been quite derelict. Indeed, to the extent that some agencies adopt rules at all, those rules are little more than a paraphrasing of their implementing statutes and do little to clarify and focus that agency's policies. Other agencies just simply don't seem to be able to get around to adopting rules. I know of one agency, for example, which has been charged for more than fifteen years with the responsibility of implementing an inherently subjective statutory criterion which literally begs for clarification through the rulemaking process. Despite its having been on the books for so many years, no

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implementing rules have been adopted. Indeed, until recently the statute was essentially ignored by the agency.

When queried about this long delay in adopting implementing rules, the agency essentially responds that it needs the latitude to develop its policies on a case-by-case basis before engaging in rulemaking and that, by the way, this really wasn't a concern until recently and a rule wasn't really needed until recently. That may well be the case, and it is not the author's intent to preclude an agency from meaningfully implementing a statute that has long been entrusted to its care, but has been neglected, for one reason or another, for many years. However, regardless of whether this agency felt in the past that this was not an important criterion, that is not its judgment to make. The Florida Legislature decrees the public policy of the State of Florida, and it long ago enacted a statute which required this particular agency to consider certain factors in evaluating applications. An agency cannot pick and choose among the statutory provisions which its chooses to enforce. That decision has already been made by the Florida Legislature, and it is the agency's duty and responsibility to implement that statute or seek its amendment or repeal.

I know of another agency which very strictly employs a certain standard in evaluating applications for permits and has done so for at least six years. This standard is plainly a rule, i.e., an agency statement of general applicability. In fact, when this agency sends out application forms it sends along a separate page informing the prospective applicant that his application will be evaluated in light of this standard. It has even been subject to a Section 120.56 rule challenge on the basis of its being an unadopted rule; the hearing officer, however, declined to invalidate it, saying the "policy" could be challenged in a Section 120.57 proceeding. That was five years ago, and still there is no rule.

It is not the author's intent to pick on certain agencies. They have considerable pressures on them. Moreover, in the former case the present administration is implementing a statute that, quite frankly, had been ignored or neglected by previous administrations. This example, however, is illustrative of the problem, and regardless of the many reasons that the agency may have for not having adopted rules in this area, the fact remains that 15 years is a long time. In any event, at some point an incipient agency policy must cease being incipient and codified in a rule, and an agency should not be allowed to indefinitely excuse its failure to engage in rulemaking because of administrative inconvenience or the dereliction of previous administrations.

In my opinion, rules and rulemaking should be restored to the position which the Florida Legislature originally intended when it adopted the modern APA. Rules and rulemaking should be, indeed must be, at the very heart of Florida's APA. Else, our APA will begin to resemble more and more the Federal APA, which, in theory and in practice, is skewed in favor of the agencies. The Florida Legislature intended a quite different result: the striking of a balance between an agency's legitimate exercise of the statutory powers delegated to it by the legislature, and the protection of affected persons from arbitrary or capricious agency action and, as mentioned earlier, "shadow government." It is my hope that Florida's judiciary, legislators, and administrative law practitioners, whether they be in the employ of the state or in private practice, will restore rules and rulemaking to their central position in Florida's administrative process. I invite your feedback, whether pro or con, for I would truly like to foster a spirited debate on this subject and would specifically like to hear your suggestions as to what should be done or, for that matter, if anything should be done.

Stephens Joins Messer Vickers Firm

Charles "Gary" Stephens, Chair-elect of the Administrative Law Section, has become a shareholder in the Tallahassee law firm of Messer, Vickers, Caparello, French, Madsen & Lewis, P.A. and will be joined by Cass Vickers of that firm to establish its Tampa office. The firm also has an office in West Palm Beach headed by Terry E. Lewis, Past Chairman of the Environmental and Land Use Law Section. Stephens, who taught Florida Administrative Law at Stetson during the Spring semester, will continue to practice in the fields of environmental, land use and administrative law.

Effective October 1, 1990, the address of that office will be:

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Recent Cases in Administrative Law

by Ann Cocheu, Allen R. Grossman, and M. Catherine Lannon

Due Process—Rezoning by Rulemaking

Allen vs. Martinez and Florida Department of Community Affairs, Case Nos. 89-1023 & 89-2377 (1st DCA Opinion filed June 21, 1990) [15 FLW D1666]

The salient facts of this case are that the Administration Commission of the State of Florida, at the request of the State Department of Community Affairs, adopted rules which, in effect, down-zoned thirteen parcels of land. The procedure used to accomplish the rulemaking did not include notice to the property owners of the thirteen parcels, nor did it offer the owners of the thirteen parcels opportunity to be heard by the Administration Commission. The state agencies argued that the Administration Commission had been statutorily authorized to take such action without affording owners notice and an opportunity to be heard, violated due process. The court declined to hold Section 380.0552(9), Florida Statutes, unconstitutional, but did rule that to the extent that it purports to authorize the action noted above, it is an unconstitutional denial of due process to the affected property owners.

Consistent Application of Rules—Evidence to Support Change in Policy Must Be in Record

Board of County Commissioners of Glades County v. Florida Department of Transportation, (1st DCA, Opinion issued August 6, 1990) (15 FLW D2007)

In this case the Department of Transportation in defining the term "Rural Road" chose not to adhere to the clear language of its own rule. While considering a hearing officer's recommended order, the agency decided to deviate from its usual interpretation and as a result rejected conclusions of the hearing officer relating to application of the rule. The court found that absent a foundation in the record to support a policy, that does not conform to the rule, the agency was constrained to apply the rule and could not rely on its divergent policy to support a rejection of the hearing officer's conclusion. Rather than vacating the DOT order, the court cited the failure of either side to argue application of the relevant rule before the hearing officer and remanded for further proceedings on this issue.

Discipline—Consideration of Stipulation Is Not a Hearing and Offer of Counter-Stipulation by Board May Not Be Binding on Parties

Hunt v. Department of Professional Regulation, Case No. 89-3098 (1st DCA, Opinion filed July 10, 1990) [15 FLW D1830]

The Board of Psychological Examiners, having been presented with a stipulation to resolve disciplinary charges against a licensed psychologist, scheduled the matter for consideration at a Board meeting. Although the Board referred to the consideration as a hearing pursuant to Section 120.57(3), the court found that "there is no such thing as a Section 120.57(3) hearing." Upon consideration the Board rejected the stipulation and proceeded to explore the development of an alternative stipulation. After concluding the discussion, the Board voted on a counter-stipulation and asked the licensee if he "would" agree to the terms of the counter-stipulation. The Court found that the licensee's affirmative answer was not an unequivocal and unconditional agreement because "the word 'would' connotes future action, not present action." Furthermore, the court found that although exploration of potential areas of agreement is appropriate after rejecting a stipulation, the proceeding may not be converted into a 120.57 hearing without providing prior notice and absent such notice the licensee might not be bound by any agreement prior to further review with legal counsel.

Discipline—Civil and Criminal Statutes of Limitations Inapplicable

Evidence of Mitigation Must Be Entered in Record at Hearing

Ong v. Department of Professional Regulation and Florida State Board of Dentistry, Case No. 89-1280 (5th DCA, Opinion filed August 13, 1990) [15 FLW D2127]

In proceedings before an administrative agency to discipline a license, civil and criminal statutes of limitations do not apply unless specific legislative authority exists for such application. In this case a dentist's argument that DPR was barred from prosecuting his license by the two-year medical malpractice statute of limitations was rejected. The court also rejected the dentist's argument that the doctrine of laches or procedural

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due process should be applied because of DPR's delay in prosecuting the complaint. The court found that the dentist had contributed to the delays and that he failed to show any prejudice from the delay in prosecution.

The court also rejected an argument by the dentist that he should have been permitted to offer new evidence relating to mitigation of penalty at the time of the Board's consideration of the recommended order. Instead, the court stated that although argument as to mitigation is permissible at the time of the Board's consideration, such argument must be based on the record and all evidence relied upon in support of mitigation should be part of the hearing record. The court distinguished its own decision in *Hodge v. Department of Professional Regulation*, 432 So.2d 117 (Fla 5th DCA 1983), because that decision was made prior to the 1984 amendment of Section 120.57(b)9, (now 120.57(1)(b)10.) which now requires boards to state with particularity and cite to the record for justification on changing the recommended penalty of the hearing officer.

A Final Order May Not Be Untimely Modified

Kalbach v. Department of Health and Rehabilitative Services, Case No. 89-01725 (2d DCA, Opinion filed June 27, 1990) [15 FLW D1768]

Mother had assigned her child support rights to HRS. On April 13, 1988, an HRS hearing officer entered a Recommended Order finding that HRS and the father agreed to an arrearage of $1020.40, as of March 22, 1988. This recommendation became a final order on June 15, 1988, and HRS intercepted father's IRS refund in the amount of $1,020.40. The parties were advised of their appellate rights. No appeal was taken.

On January 6, 1989, HRS sent father a letter stating that the March 22, 1988, figure was wrong, that the arrearage was actually $2084.97. Additionally, during the IRS intercept, HRS only kept $365.60, and mistakenly returned $1020.40 to the father. A second recommended order was adopted approving the recalculation of arrearage and a second IRS interception.

On appeal, the Second District Court of Appeal held that the first order was final. Since HRS had not reconsidered or appealed that first order on a timely basis, it was error to modify that arrearage. The first order had, the court stated, passed out of HRS's control, and no change in circumstances or demonstrated public need or interest was argued. HRS could still pursue an interception but must use $1020.40, as the arrearage figure.

Discipline—Discovery Prior to Issuance of Administrative Complaint

R.W. v. Department of Professional Regulation Board of Osteopathic Medical Examiners, Case No. 89-2877 (3d DCA, Opinion filed August 14, 1990) [15 FLW D2039]

The Appellant, an osteopathic physician, sought upon review to overturn a judgment of the Circuit Court for Dade County requiring his compliance with a subpoena to produce certain patient records and rejecting his request for discovery prior to issuance of an administrative complaint. The appellate court found that pursuant to Section 455, the Department of Professional Regulation was permitted to subpoena the physician's medical records during its preliminary investigation of a complaint. However, the court determined that there is no provision for participation by the physician in the investigatory process-for the purpose of discovery-prior to the filing of an administrative complaint.

Disciplinary Action—Violations Not Charged—Retroactive Penalty—Authority to Impose Penalty Not Fine

Willner v. Department of Professional Regulation, Board of Medicine, Case No. 89-2237 (1st DCA, Opinion filed June 26, 1990) [15 FLW D1723]

In this case, the Board of Medicine adopted the Recommended Order of the Hearing Officer finding a physician guilty of certain violations of the Medical Practice Act. The relevant findings of the Appellate Court in reversing certain aspects of the Board's action were that three of the violations, and the penalty imposed for them, were set aside because the violations were not charged in the administrative complaints filed against the doctor. The second finding was that the amount of the fine imposed for remaining violations was based on a law which was passed in 1986. Since the violations occurred prior to that statutory amendment, the court ruled that the maximum fine was $1,000 per violation and not the $5,000 imposed because the application of the newer amendment to the acts which had occurred would be an *ex post facto* application of the law. Finally, the Hearing Officer had recommended as a special condition of probation that the doctor be required to pay $60,000 to the Department of Legal Affairs for the consumer protection activities of that agency. The court held that the imposition of that special condition of probation was an unlawful penalty and violated the Florida Constitution.

The *general* grant of authority that allows the Board to place a physician on probation "subject to such conditions as the Board may specify," was not enough, the court said, to authorize the Board to exact monetary penalties as conditions of probation.

Legislative Report

by Betty J. Steffens

The 1990 Florida Legislature did very little in the area of administrative law this session. Although several bills of great interest to the Administrative Law Section were heard in committee, they did not pass. Those bills are:

- **Agency Remand** (SB2020/HB3213)—This concerns the authority of an agency to remand a case for additional findings of fact to a hearing officer. There was a medical board case that spawned this bill. The bill was not successful in reaching light of day. Each version in the House and Senate died in their respective Governmental Operations Committees.

- **Attorneys' Fees** (SB346)—This bill provided for attorneys' fees and costs to be awarded in 120.57 cases against a defaulting party. This bill, which was filed in the Senate, was reported favorably out of Governmental Operations but died in the Senate Judiciary-Civil Committee.

- **Unadopted Policies**—This was the House Governmental Ops composite bill which incorporated ideas generated by our Administrative Law Conference. This bill required agencies to adopt policies through rule making procedures when it was reasonable to do so and provided for the invalidation of agency unadopted policies under certain circumstances and required agencies to initiate rule making when they failed to adopt rules as required. The economic impact statement was to be eliminated. Also, an agency could not substantially alter the substance of a proposed rule after notice and prior to the adoption of the rule. The Division of Administrative Hearings was required to adopt a code of conduct and to help unrepresented parties in understanding DOAH procedures. This bill passed the House unanimously on May 23, was sent to the Senate in messages and held in Senate Gov. Ops. It is my understanding that the Senate bill which is outlined below, on indexing, was to be added to this bill in the Senate and returned. However, the indexing bill never made it to the floor of the Senate and this House bill on unadopted policies was never voted upon by the Senate and therefore died.

- **Indexing** (SB2550)—This was Senator Kiser's bill which required agencies to provide better indexing or start indexing as well as providing for a form of uniform publishing of the indexes. The Senate bill passed the substantive committee of Governmental Operations but was also referred to Senate Appropriations due to the fiscal impact on the Secretary of State's Office. Despite repeated efforts from various interested parties, including individuals and staff interested in the passage of the unadopted policies bill, the Senate Appropriations Committee would not let this bill out of committee and thus the indexing bill died in Senate Appropriations.

- **DOAH Hearing Officers**—In the budgetary process, two hearing Officer positions were eliminated. Both of the positions are, in effect, vacant and thus no hearing officer will be displaced from his or her position. There was language in the "tax court" bill which would have given DOAH final authority in tax disputes and also give hearing officers the title of administrative judges. While this bill passed the Senate it did not pass the House.

The legislation which did pass affecting administrative lawyers is as follows:

- **Private Legal Services** (CS/HB1443, Chapter 90-147)—This allows the Attorney General to adopt by rule procedures governing state agencies requesting private legal services. The Attorney General will also develop by rule a standard fee schedule for private legal services engaged by state agencies. This law takes effect October 1, 1990.

The next legislative session is scheduled to start April 2, 1991. However, there is a referendum which will be on the November ballot to change the schedule for the legislative session. If the referendum passes the 1991 session will run from March 5 through May 3, 1991.

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Who Is This Guy, Anyway?

by Betty J. Steffens

Those of you who practice before DOAH Hearing Officers often times see nothing more than institutional justice being meted out by a competent colleague who disappears to Tallahassee and finally issues a recommended order. As a recent litigant once queried "Who are these guys anyway?" As you can imagine, the cadre of 29 hearing officers includes lots of interesting individuals. Take, for example, Bob Meale. Bob Meale has the usual boring credentials of a bachelor's degree from Florida State, magna cum laude, a J.D. from University of Florida, with honors and an LL.M. from the University of Florida Law School in Taxation. He also became a member of the Order of the Coif, Phi Beta Kappa and was Executive Editor of University of Florida Law Review. Meale worked in large, grind-it-out, law firms until one day he decided he was willing to cash in his shares and move to Tallahassee to become an administrative hearing officer. Meale's claim to fame, at least for the time being, is his assignment to the cases arising out of the Growth Management Act. On August 13, 1990, Hearing Officer Meale issued his order in the Sarasota County Comprehensive Plan case. The order itself consisted of 215 pages. Meale estimated he spent close to 350 hours in writing the recommended order. He sifted through 350 proposed findings of facts and reduced his rulings to four pages. This weighty document is still second best to his 245 page order (the DOAH record) in the Charlotte County Comprehensive Plan case. An avid lap-top desk jockey, Meale suffered pulled hamstrings from sitting too intensely for hours at a time in order to produce the Sarasota County opinion. When unable to plug his lap-top computer into an outlet and unable to work, Meale devours other written material. The last book he read was "What Entropy Means to Me," a book which he is circulating among the other administrative hearing officers. Meale has a reputation for being a patient hearing officer. In a recent dredge and fill permitting case he watched a 45 minute video of a stationary boat ramp in Orange County from different angles. Meale has also been known to be indefatigable. DOAH folklore includes the true story of a Meale hearing which began at 8:00 a.m. and concluded at 4:00 am. with no breaks for meals. When asked what his greatest moment has been Meale replied "When I was in the lobby of a hotel and I was mistaken for Woody Allen.