Administrative Law Section Newsletter

Vol. XXIV, No. 3 **Elizabeth W. McArthur, Editor** **March 2003**

From the Chair

by Lisa "Li" S. Nelson

One of the many benefits of a conference such as the Pat Dore Administrative Law Conference is the opportunity to see other lawyers who practice the same kind of law that we do and to share our experiences with others who will understand them. At the other end of the spectrum, I am always awed by the breadth of subject matter embraced under the single procedural vehicle we call the Administrative Procedure Act. Having worked with licensing agencies most of my career, I tend to view the Act with those proceedings in mind. But the Act encompasses so much more. Most of us are familiar with bid protests, rule challenges, certificates of need, disciplinary actions and permitting proceedings. But how many of us encounter NICA proceedings on a regular basis, paternity issues and child support payment determinations; medical malpractice damage awards; challenges to HMO and insurance coverage decisions; or Baker Act cases?

These examples may highlight the breadth of issues decided under our APA, but they also merely scratch the surface. Given the wide variety of interests that can be affected by agency action, it is a wonder that this single procedural vehicle is able to accommodate access to address government's involvement in so many areas affecting our lives. So, says the skeptic, the procedural rules followed in circuit court face the same challenge. However, in some instances the civil rules have more particularized rules depending on subject matter, as the Court has recognized the need for dealing with the unique nature of some types of pro

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OFFA v. SFWMD – Agencies Need Not Successfully Adopt a Challenged Statement to Avoid a Final Order and Attorney's Fees

by Cathy M. Sellers and Lawrence E. Sellers, Jr.

Florida's Administrative Procedure Act is intended to force agencies to go to rulemaking rather than relying on their uncodified or so-called "nonrule" policies.[1] Each agency statement that meets the definition of a rule[2] must be adopted by the prescribed rulemaking procedure as soon as feasible and practicable.[3] Any person substantially affected by such an agency statement may seek an administrative determination that the statement violates the rulemaking requirement.[4] Upon entry of a final order determining that all or part of an agency statement violates the rulemaking requirement, the agency must immediately discontinue all reliance upon the statement or any substantially similar statements as a basis for agency action.[5] In addition, the Administrative Law Judge (ALJ) must award reasonable attorney's fees and reasonable costs to the petitioner.[6]

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Rulemaking is presumed "feasible," but the agency may avoid this presumption if the agency currently is using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.[7] In addition, an agency may continue to rely on the challenged agency statement as a basis for agency action if, prior to the entry of a final order, the agency publishes proposed rules that address the statement and proceeds expeditiously and in good faith to adopt rules that address this statement.[8] But, may the agency rely on this provision to avoid an adverse final order (and the resulting liability for attorney's fees), if the agency seeks to, but cannot, successfully adopt the proposed rules because they have been declared invalid? "Yes," according to a recent opinion from the Fourth District Court of Appeal in *Osceola Fish Farmers Association, Inc. v. South Florida Water Management District*.[9]

This article discusses the Section 120.56(4) "agency statement" challenge and the Fourth DCA's opinion affirming a final order that denied a Section 120.56(4) challenge to a South Florida Water Management District statement addressing lake level drawdowns. The article concludes with some suggestions for possible legislative fine-tuning to address and clarify some of the issues raised by the opinion.

OFFA v. SFWMD.

The Controversy.

The Osceola Fish Farmers Association (OFFA) is a non-profit trade association representing tropical fish farmers in Osceola County, Florida. Many of OFFA's members' fish farming operations are located on properties within the Alligator Chain of Lakes and are dependent on groundwater and groundwater levels.[10] Periodically, the South Florida Water Management District (SFWMD) draws down lake levels in the Alligator Chain of Lakes to enable the Florida Fish and Wildlife Conservation Commission (FFWCC) to remove lake bottom muck and nuisance vegetation to enhance aquatic habitat.[11] OFFA claimed that drawdowns in the Alligator Chain of Lakes caused substantial lowering of groundwater levels on OFFA's members' properties, resulting in significant losses to their tropical fish farming businesses.[12]

Under Chapter 373, Part II, Florida Statutes, and SFWMD rule, permits must be obtained, with limited exception, for water uses or withdrawals unless the uses or withdrawals are expressly exempt by law or SFWMD rule.[13] SFWMD historically had not required itself or the FFWCC to obtain a water use permit to draw down lake levels for de-mucking activities, on the theory that the drawdowns did not constitute the consumptive use of water.[14] At the time OFFA initiated this case, SFWMD had not adopted a rule exempting the drawdown of lakes from the water use permitting requirement.[15]

The Section 120.56(4) Challenge to Agency Statement Defined as a Rule.

In an effort to prevent future drawdowns in the Alligator Chain of Lakes, OFFA filed a Petition Challenging Agency Statement Defined as Rule[16] under Section 120.56(4). OFFA sought to have SFWMD's statement that its historic and consistent practice was not to require a water use permit for the "drawdown of a lake" to implement its responsibilities for managing the water body for environmental, recreational, and flood control purposes[17] determined to be a rule that had not been adopted pursuant to the rulemaking requirements in Section 120.54, in violation of Section 120.54(1)(a). Before the hearing in the Section 120.56(4) challenge,[18] SFWMD filed a notice indicating that it was publishing a proposed rule to amend Chapter 40E-2, F.A.C., to address the agency statement. The Section 120.56(4) hearing was conducted, and the proposed rule ultimately was published in the *Florida Administrative Weekly* shortly after the conclusion of the hearing. At the hearing's conclusion, the parties requested the ALJ to enter a final order in the proceeding, notwithstanding the impending publication of the proposed rules addressing the agency statement.[19] However, shortly thereafter, the ALJ issued an order placing the Section 120.56(4) challenge in abeyance pending SFWMD's adoption of the rule, and explaining:

> ... an agency can avoid an adverse ruling in a Section 120.56(4), Florida Statutes, proceeding, and the consequences of such a ruling, such as an award of fees and costs, if prior to the entry of a final order, the agency publishes pursuant to Section 120.54(3)(a), Florida Statutes, a proposed rule which addresses the statement and proceeds expeditiously and in good faith to adopt rules which address the statement... . On the other hand, if the agency fails to adopt rules which address the statement within 180 days after publishing the proposed rules, for purposes of

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

> this subsection, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules.[20]

Section 120.56(4)(e), Florida Statutes.

Because SFWMD had published the proposed rule addressing the statement, the ALJ determined that SFWMD thus far had complied with Section 120.56(4)(e), so OFFA was not then entitled to a final order granting its Amended Petition.[21] He also determined that issuance of a final order dismissing the case was not appropriate, because SFWMD had not yet adopted the rule. Thus, the proper approach was to place the case in abeyance pending SFWMD's adoption of the proposed rule.[22]

Following abeyance of the Section 120.56(4) challenge, OFFA challenged the validity of SFWMD's proposed rule pursuant to Section 120.56(2), Florida Statutes. A hearing was held and the proposed rule ultimately was invalidated on the grounds that it exceeded SFWMD's rulemaking authority, enlarged the specific provisions of law being implemented, did not contain adequate standards for agency decisions, and vested unbridled discretion in the agency.[23]

Following invalidation of the proposed rule, OFFA moved to reopen the Section 120.56(4) challenge and proceed to a determination on the merits;[24] SFWMD argued that the case should remain in abeyance pending the outcome of its appeal of the final order invalidating the rule.[25] The ALJ denied both motions and entered a final order denying OFFA's Section 120.56(4) challenge.[26] In the final order, the ALJ reasoned that the Legislature's purpose in enacting Sections 120.54(1)(a) and 120.56(4) – to force agencies to rulemaking – is met "if, at the very least, the agency publishes a proposed rule and proceeds expeditiously and in good faith to adopt the rule."[27] In the ALJ's view, that purpose had been achieved by SFWMD's publication of the proposed rule and its efforts toward adopting a rule that were interrupted by OFFA's successful rule challenge.[28] Moreover, the ALJ reasoned that, aside from an award of fees and costs, OFFA also had obtained the result it sought because SFWMD had proposed a rule addressing the statement in the Affidavit and proceeded toward rule adoption, which was interrupted by OFFA's successful proposed rule challenge.[29] The ALJ found that because SFWMD had published the proposed rule and proceeded expeditiously and in good faith toward rulemaking, SFWMD had complied with Section 120.56(4)(e); accordingly, it was appropriate to deny OFFA's Section 120.56(4) challenge.[30]

On Appeal to the Fourth DCA.

OFFA appealed the final order denying its Section 120.56(4) challenge; the Fourth DCA affirmed the final order.[31] The court disagreed with OFFA's position that regardless of whether SFWMD had complied with Section 120.56(4)(e), OFFA nonetheless was entitled to entry of a final order determining that SFWMD had violated Section 120.54(1)(a), Florida Statutes.[32] Reading Sections 120.54(1)(a) and 120.56(4) *in pari materia*, the court concluded that the purpose of Section 120.56(4) proceedings "is to force or require agencies into the rule adoption process. It provides them with incentives to promulgate rules through the formal rulemaking process."[33] Thus, the court reasoned that if, prior to entry of a final order in the case, the agency initiates rulemaking and proceeds expeditiously to rule adoption, Section 120.56(4)(e) allows the agency to avoid an adverse ruling in a Section 120.56(4) proceeding, and liability for attorney's fees and costs.[34]

Discussion

The Fourth DCA's opinion in *Osceola Fish Farmers Ass'n* arguably is at odds with the language and intent of Section 120.56(4), and also is inconsistent with prior administrative cases in which final orders were entered under Section 120.56(4)(c) determining that agency statements violated Section 120.54(1)(a).[35] As ALJs and courts grapple to discern the Legislature's intent in enacting Section 120.56(4) and to apply the law in a fair, consistent manner, these conflicting decisions indicate a lack of clarity in Section 120.56(4).

Section 120.56(4)(a) allows persons substantially affected by an agency statement defined as a "rule" to seek an administrative determination that the statement violates Section 120.54(1)(a). Section 120.54(1)(a) requires each agency statement that meets the definition of a "rule" to be adopted by the prescribed rulemaking procedures in Section 120.54 as soon as feasible and practicable. Rulemaking is presumed "feasible," but the agency may avoid this presumption if it demonstrates the agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.[36] As such, the agency may prevail in a Section 120.56(4) challenge by demonstrating that it is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement. Importantly, the statute plainly places the burden of proving this on the agency.[37]

Under Section 120.56(4)(c), if an ALJ determines that an agency statement violates Section 120.54(1)(a),[38] the ALJ is to enter a final order. Section 120.56(4)(d) establishes the general rule that an agency is to immediately discontinue reliance on the statement upon entry of a final order under Section 120.56(4)(c). Section 120.56(4)(e) then creates an exception to Section 120.54(4)(d), which allows the agency to continue to rely on the statement as a basis for agency action if three conditions are met: (1) prior to the entry of a final order, the agency must publish proposed rules that address the statement; (2) the agency must proceed "expeditiously and in good faith" to adopt rules that address the statement;[39] and (3) the statement must meet the requirements of Section 120.57(1)(e).[40]

In *Osceola Fish Farmers Ass'n*, the court determined that Section 120.56(4)(e) was satisfied, so that a final order under Section 120.56(4)(c) should not be issued. This appears to be contrary to the plain language of Section 120.56(4) for two reasons. First, Section 120.56(4)(e) does not establish an "absolute defense" to entry of a final order under Section 120.56(4)(c). That is, while Section 120.56(4)(e) allows an agency to continue to rely on the statement if (and only if) the three conditions are met, it does not expressly disallow the subsequent entry of a final order finding that the agency violated Section 120.54(1)(a).[41] Nonetheless, the Fourth DCA appeared to impute an

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"absolute defense" to Section 120.56(4)(d) into Section 120.56(4)(e), and in doing so, arguably removed at least some incentive for agencies to take the initiative to commence rulemaking when they have developed statements defined as rules and it is feasible and practicable to go to rulemaking, rather than commencing rulemaking only after their statements are challenged under Section 120.56(4). Second, SFWMD's proposed rule had been determined invalid, so as a matter or law, SFWMD could not meet the requirements of Section 120.57(1)(e).

The court's determination that OFFA's Section 120.56(4) challenge became moot when SFWMD published its proposed rule and proceeded expeditiously to rule adoption[42] also is at odds with some previous administrative decisions interpreting Section 120.56(4). In these cases, ALJs have reasoned that Section 120.56(4)(e) only allows an agency to rely on a statement that has been determined to violate Section 120.54(1)(a) in defending the application of its statement in a Section 120.57 proceeding, and that its invocation by the agency has no bearing on whether a determination should be made and a final order entered under Section 120.56(4)(c) determining that the agency statement violates Section 120.54(1)(a).[43] That is, Section 120.56(4)(e) serves only to allow an agency to rely on its unpromulgated rules from the time they are published through their adoption, and does not serve to relieve an agency of the responsibility and consequences for having relied on an unpromulgated statement that violates the Chapter 120 rulemaking requirements.[44] At the very least, these conflicting decisions highlight the statute's lack of clarity and the need for legislative clarification of Section 120.56(4).

Legislative Suggestions

As noted above, the decisions in this case and other cases decided to date involving similar issues[45] suggest that the Legislature may wish to fine-tune some of the pertinent provisions in Section 120.56(4). Here are six issues the Legislature may consider addressing:

1. Should the statute expressly provide a "safe harbor" during which the agency may pursue rulemaking?

As noted, an agency may continue to rely on a challenged agency statement as a basis for agency action if, prior to the entry of a final order, the agency publishes proposed rules that address the statement and proceeds expeditiously and in good faith to adopt rules that address this statement. The statute further provides that if the agency fails to adopt rules within 180 days after publishing the proposed rules, it is presumed the agency is not acting expeditiously and in good faith to adopt the rules.[46]

Notably, the statute does not expressly provide any presumption in favor of the agency — i.e., that the agency is proceeding expeditiously and in good faith — if the agency does in fact publish the proposed rules and adopt them within 180 days thereafter. But it appears that the statute may intend to infer such a "safe harbor" for the agency. Perhaps the Legislature should expressly provide a similar presumption in favor of the agency.

2. Should a "safe harbor" require the agency to publish the proposed rule at an earlier date?

The statute provides that an agency may continue to rely on the challenged agency statement as a basis for agency action if, prior to the entry of a final order, the agency publishes proposed rules that address the statement and proceeds expeditiously and in good faith to adopt rules that address this statement. Section 120.56(4)(e), F.S. This means that the agency may receive the benefits of the statute even if it publishes the proposed rule after the final hearing has been held and the proposed orders have been submitted. To prevent the petitioner (and the agency) from unnecessarily expending resources preparing for and trying the case — and thereby increasing the petitioner's desire to recoup, and the agency's potential liability for, attorney's fees[47] — the Legislature may wish to consider amending Section 120.56(4)(e) to require the agency to publish the proposed rule at an earlier date, such as prior to the final hearing. Recognizing that there is a period of time between the date the agency decides to publish the proposed rule and the date the rule is actually published, the Legislature thus may wish to consider allowing the agency to file a notice that it has transmitted the proposed rule for publication.

3. Must the agency successfully adopt the challenged statement to avoid a ruling in favor of the petitioner?

When an ALJ enters a final order that all or part of an agency statement violates Section 120.54(1)(a), the APA provides that the agency must immediately discontinue all reliance upon the statement or any substantially similar statements as a basis for agency action.[48] However, as previously noted, an agency may continue to rely on the challenged agency statement as a basis for agency action if, prior to the entry of the final order, the agency publishes proposed rules that address the statement and proceeds expeditiously and in good faith to adopt rules that address this statement. This requirement to "proceed expeditiously and in good faith to adopt rules" has been interpreted to not require the agency to actually adopt the proposed rules. Indeed, in this case, SFWMD could not adopt the proposed rule because the proposed rule had been challenged (by the same petitioner) and determined to be invalid.[49]

However, a careful reading of Section 120.56(4)(e), appears to suggest a contrary conclusion. That paragraph permits the agency to continue to rely on the challenged statement as a basis for agency action if the agency also demonstrates that the statement meets the requirements of Section 120.57(1)(e). Among other things, Section 120.57(1)(e) essentially requires the agency to demonstrate that the statement is not invalid, based on most of the same criteria that are used for determining whether a proposed rule constitutes an invalid exercise of delegated legislative authority.[50] Accordingly, if the proposed rules are determined to be invalid because, for example, the agency has exceeded its grant of

rulemaking authority or has proposed a rule that fails to establish adequate standards or vests unbridled discretion in the agency, then it necessarily follows that the agency cannot demonstrate that the statement meets the requirements of Section 120.57(1)(e), and, therefore, the agency may not continue to rely on the statement.

Provisions in Sections 120.54(1) and 120.56(4) also appear to support a contrary conclusion – that is, that the agency must successfully adopt the proposed rules if it is to prevail under Section 120.56(4)(e). First, the corresponding language in Section 120.56(4)(e) creates a presumption in favor of the petitioner when the agency "fails to adopt" rules that address the statement within 180 days after publication of the proposed rules. If the proposed rules are determined to be invalid, the agency cannot adopt them, and the agency ultimately will have "failed to adopt" the rules within the required time. The presumption is then created that the agency is not acting expeditiously and in good faith to adopt rules. Likewise, the language in Section 120.54(1)(a)1. that allows an agency to avoid the rulemaking requirement because it is not feasible, creates a defense only if the agency is "currently" using the rulemaking procedure expeditiously and in good faith to adopt rules that address the statement. If the proposed rules are determined invalid, then it cannot be said that the agency is "currently" using the rulemaking procedure to adopt the rules that address the statement.[51] For these reasons, the Legislature should consider clarifying whether the agency must successfully adopt the challenged statement, and conform these statutory provisions accordingly.

4. If the proposed rules addressing the challenged statement are determined to be invalid, should the agency be expressly required to discontinue reliance on the statement and any substantially similar statement?

Recall that when an ALJ enters a final order that an agency statement violates Section 120.54(1)(a), the agency must immediately discontinue all reliance upon the statement or any substantially similar statements as a basis for agency action.[52] One of the obvious benefits to the petitioner of such a final order is that the petitioner knows that the agency may not rely on the statement as a basis for agency action.[53] Accordingly, this is one of the principal reasons why some petitioners who have "forced" the agency to rulemaking, and then successfully challenged the resulting proposed rules, may wish to pursue the Section 120.56(4) challenge to a final order. Absent the entry of such a final order, with the express consequence that the agency must discontinue reliance on the challenged statement, the petitioner is left only with the potential defense provided by Section 120.57(1)(e). The Legislature could avoid the need for these additional proceedings, and any uncertainty on the part of the petitioner, by amending Sections 120.54 and 120.56 to expressly provide that, if the proposed rules addressing the challenged statement are determined to be invalid, then the agency must immediately discontinue reliance on the statement and any substantially similar statement.

5. If the proposed rules addressing the challenged statement are determined invalid, should the petitioner be entitled to attorney's fees and costs incurred in forcing the agency to rulemaking?

Upon entry of a final order that all or part of an agency statement violates Section 120.54(1)(a), the ALJ is required to award reasonable attorney's fees and reasonable costs to the petitioner.[54] Unlike cases involving a successful challenge to proposed or existing rules — where the award of attorney's fees is limited to $15,000 — there is no statutory limit on the amount of fees that may be recovered in a Section 120.56(4) challenge. Undoubtedly, this is the other principal reason why some petitioners — including the petitioner in the *OFFA* case — who have "forced" the agency to rulemaking, and then successfully challenged the resulting proposed rules, may wish to pursue the Section 120.56(4) challenge to issuance of a final order. The Legislature could eliminate this reason for additional proceedings by amending Section 120.595(2), which addresses the award of attorney's fees in challenges to proposed rules, to provide for an additional award to cover those fees and costs incurred in forcing the agency to rulemaking by way of a Section 120.56(4) challenge.

6. Should the statute expressly authorize s. 120.56(4) challenges to be placed in abeyance during rulemaking?

It has been the practice of most ALJs to place the case in abeyance when the agency responds to a Section 120.56(4) challenge by initiating rulemaking and thus apparently proceeding expeditiously and in good faith to adopt rules that address the challenged statement.[55] This seems to be a wise practice, as the rulemaking may take considerable time, especially if it is interrupted by a challenge to the proposed rules pursuant to Section 120.56(2). Provisions in Section 120.56(1) establish deadlines by which an ALJ must be assigned, must conduct the hearing, and must issue a final order. These provisions appear to apply only to challenges to the validity of a rule or proposed rule but not to challenges to statements defined as rules. Nonetheless, the Legislature may wish to make clear that these Section 120.56(4) challenges may, and perhaps should, be placed in abeyance pending the outcome of rulemaking and any proceedings involving challenges to the proposed rules pursuant to Section 120.56(2).

The Legislature will convene its 2003 Regular Session in March, and if there is interest on the part of affected entities, some or all of these issues may receive at least some attention. So, stay tuned.

Endnotes:

[1] The Legislature first addressed this issue in 1991 when it enacted Section 120.535, Florida Statutes, in an effort to require agencies to go to rulemaking instead of relying on unadopted rules or "nonrule policy" – which had become standard operating procedure for many agencies following *McDonald v. Department of Banking and Finance*, 436 So. 2d 569 (Fla. 1st DCA 1977), and subsequent cases. *See, e.g., Florida Cities Water Co. v. Florida Public Service Comm'n*, 384 So. 2d 1280 (Fla. 1980). However, because Section 120.535 allowed agencies to continue to rely on nonrule policy in

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adjudicatory proceedings during the rulemaking process, it provided remedies that were characterized as "incomplete at best." Hopping, W., Sellers, L. and Wetherell, K., *Rulemaking Reforms and Nonrule Policies: A 'Catch-22' for State Agencies?*, 71 Fla. B. J. 20, 24 (Mar. 1997).

[2] A "rule" is defined as "each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the 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...." Section 120.52(15). *Environmental Trust v. Department of Environmental Protection*, 714 So. 2d 493 (Fla. 1st DCA 1998) (agency statement explaining how an existing rule will be applied is not itself a rule); *Amos v. Department of Health and Rehabilitative Services*, 444 So. 2d 43 (Fla. 1st DCA 1984)("policy clearance" document which was generally applicable, implemented, interpreted, or prescribed law or policy, and did not derive directly or indirectly from the language of the agency's rule was a rule and was required to be adopted pursuant to Chapter 120 rulemaking procedures); *Florida Home Builders Ass'n v. Department of Insurance*, DOAH Case No. 02-3097RU (DOAH Final Order Oct. 31, 2002) (statements in Workers' Compensation Bulletin 234 constituted a "rule"); *United Wisconsin Life Insurance Co. v. Department of Insurance*, DOAH Case No. 01-3135RU (DOAH Final Order Nov. 27, 2001) (petitioner made no showing of any statement of general applicability), *aff'd*, Case No. 1D01-4798 (Fla. 1st DCA 2002); *See also* L. Sellers, "*The Environmental Trust: Will the Exception Swallow the Rule?*" ELUL Section Reporter (March 1999).

[3] Section 120.54(1)(a), Florida Statutes (all statutory references hereafter in text and footnotes are to Florida Statutes).

[4] Section 120.56(4).

[5] *Id*.

[6] Section 120.595(4).

[7] Section 120.54(1)(a)1.

[8] Section 120.56(4)(e).

[9] 830 So. 2d 932 (Fla. 4th DCA 2002)(hereafter *Osceola Fish Farmers Ass'n* or *OFFA)*.

[10] Amended Petition Challenging Agency Statement Defined as Rule, DOAH Case No. 00-3615RU (filed Sept. 20, 2000)(hereafter "Amended Petition"), at 1.

[11] According to the Amended Petition, lake drawdowns have been conducted in the Alligator Chain of Lakes for "some twenty years." *Id*.

[12] *Id*. at 3.

[13] Section 373.219; Rule 40E-2.041, Florida Administrative Code. Only domestic consumption of water by individual users is exempt by statute from the water use permit requirement.

[14] Final Order, DOAH Case No. 01-2900RP (Nov. 6, 2001)(hereafter "Final Order Invalidating Proposed Rule"), at 4.

[15] Chapter 373, Part II also does not expressly exempt lake drawdowns from the requirement to obtain a water use permit.

[16] OFFA later amended its Petition to state a claim for relief, seeking a determination that the agency statement violates Section 120.54(1)(a) and that OFFA was entitled to an award of attorney's fees and costs under Section 120.595(4).

[17] As part of its multifaceted attack on SFWMD's lake level drawdown policy and practice, OFFA also filed an action in circuit court (which was later dismissed), seeking injunctive relief under Section 403.412. In that proceeding, SFWMD provided an affidavit of the SFWMD's Director of the Water Use Regulation Division, to explain SFWMD's historic policy with regard to lake drawdowns and the controlling rules and statutes ("Affidavit"). In its Petition and Amended Petition filed under Section 120.56(4), OFFA asserted that SFWMD's drawdown policy stated in the Affidavit constituted an agency statement defined as a rule that had not been adopted pursuant to the rulemaking procedures in Section 120.54. Final Order, at 5; Parties Joint Stipulation of Facts, DOAH Case No. 00-3615RU (filed Dec. 8, 2000).

[18] Throughout the Section 120.56(4) challenge, SFWMD did not concede that its agency statement constituted a "rule" as defined in Section 120.52(15).

[19] Order, DOAH Case No. 00-3615RU (July 16, 2000) (hereafter "Order Placing 120.56(4) Challenge in Abeyance"), at 4.

[20] *Id*. at 6-7.

[21] OFFA's Amended Petition sought a determination that SFWMD's statement violated Section 120.54(1)(a), and that OFFA was entitled to an award of attorney's fees under Section 120.595(4).

[22] *Id*. at 8.

[23] Final Order Invalidating Proposed Rule, *supra* note 14, at 17-19.

[24] OFFA also moved for, and the ALJ granted, official recognition of the Final Order Invalidating Proposed Rule.

[25] Final Order Denying Amended Petition, DOAH Case No. 00-3615RU (Dec. 10, 2001)(hereafter "Section 120.56(4) Final Order), at 2.

[26] *Id*. at 10-11.

[27] *Id*. at 11. The ALJ reasoned that whether or not the rule ultimately is adopted is material *only* if it is not done within the 180-day period in Section 120.56(4), which would create the presumption that the agency is *not* proceeding expeditiously and in good faith to adopt the rule. Thus, the result in the Section 120.56(4) challenge would be the same regardless of whether the rule was invalidated and therefore not adopted, or whether it was adopted and ultimately went into effect. This is because "Section 120.56(4)(e) contemplates timely publication of the proposed rule, not necessarily success where there is a successful rule challenge which interrupts the rule adoption process." *Id*.

[28] SFWMD appealed the final order invalidating the rule, which resulted in an automatic stay of the final order pending resolution of the appeal pursuant to Fla. R. Civ. P. 9.310(b)(2). Of note is that because the status quo is maintained during the pendency of the appeal of the final order invalidating the rule, SFWMD could continue to apply the statement, *provided the statement met the requirements of Section 120.57(1)(e*). Of course, since the rule was invalidated on lack of authority and other substantive grounds, SFWMD would not be able to meet the requirements of Section 120.57(1)(e) and therefore would not be able to rely on its statement as a basis for agency action. Section 120.56(4)(e).

[29] *Id*. at 11.

[30] *Id*. at 12.

[31] 830 So. 2d 932 (Fla. 4th DCA 2002).

[32] The court considered the issues presented in the Section 120.56(4) proceeding to have been mooted by SFWMD's publication of the proposed rule and because the ALJ had determined that the agency was proceeding expeditiously and in good faith to adopt the rule. As the ALJ had explained in the Final Order Denying Amended Petition, "[m]ootness occurs in two basic situations: '[w]hen the issues presented are no longer live, or [when] the parties lack a legally cognizable interest in the outcome.'" *Id*. at 7, *citing Montgomery v. Department of Health Rehabilitative Services*, 468 So. 2d 1014 (Fla. 1st DCA 1985) and Hopping, W. and Wetherell, K., *The Legislature Tweaks McDonald (Again): The New Restrictions on the Use of "Unadopted Rules" and "Incipient Policies" by Agencies in Florida's Administrative Procedure Act*, 48 U. Fla. L. Rev. 135 (1996). Commenting on the 1996 revisions to the Florida Administrative Procedure Act, Hopping and Wetherell first suggested that once rulemaking is *initiated* prior to the entry of a final order in the Section 120.56(4) challenge, that challenge becomes "moot" under Section 120.56(4)(e), Florida Statutes. *Id*. at 150-51. Importantly, however, a determination of "mootness"upon agency *publication* of a proposed rule necessarily *assumes* that the agency also proceeds expeditiously and in good faith to adopt rules that address the agency statement; yet whether this actually occurs would seem to turn on the facts and circumstances of a particular case. In OFFA's Section 120.56(4) challenge, it appears that the ALJ concluded, based on SFWMD's actions in publishing the proposed drawdown rule and pursuing rulemaking, that SFWMD had indeed "proceeded expeditiously and in good faith to adopt rules." However, it is conceivable that in other cases, agencies could be determined not to be proceeding expeditiously and in good faith, even after publishing a proposed rule and pursuing the rulemaking process. For instance, in situations in which an agency defended against the entry of a final order under Section 120.56(4)(c) by publishing a proposed rule for which it may clearly lack statutory authority or which may clearly lack adequate standards to guide agency decisionmaking, it would not seem correct to determine that publication of the proposed rule satisfied the "proceeding expeditiously and in good faith" requirement, thus rendering the Section 120.56(4) challenge "moot" and allowing the agency to avoid entry of a final order finding its statement violated Section 120.54(1)(a).

[33] *Id*. at 934-35.

[34] *Osceola Fish Farmers Ass'n, Inc.*, 830 So. 2d 932, 935 (Fla. 4th DCA 2002). Interestingly, as support for this holding, the court cited a

case holding that a petition to initiate rulemaking was rendered moot upon agency initiation of rulemaking.

[35] *Central States Health and Life Co. of Omaha v. Department of Insurance,* DOAH Case No. 98-2767RU (DOAH Final Order Dec. 1, 1998); *Reyna v. Department of Children and Family Services*, Case No. 97-3042RU (DOAH Final Order Mar. 20, 1998).

[36] Section 120.54(1)(a)1.c.

[37] Section 120.54(1)(a)1.c.; Section 120.56(4)(b).

[38] Under Section 120.56(4)(c), an agency will have violated Section 120.54(1)(a) if the challenger shows that the agency statement is a "rule," that the rule has not been adopted pursuant to the rulemaking procedures in Section 120.54, and the agency does not meet its burden of demonstrating that rulemaking is not feasible or practicable. *See Central States Health and Life Co. of Omaha,* DOAH Final Order at 18-19.

[39] The statute further provides that if the agency fails to adopt rules within 180 days after publishing the proposed rules, it is presumed the agency is not acting expeditiously and in good faith to adopt the rules. If the agency's proposed rules are challenged pursuant to Section 120.56(2), this 180-day time period is tolled until a final order is entered in that proceeding. Section 120.56(4)(e).

[40] Section 120.57(1)(e) provides that any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge. Further, the agency must demonstrate that the unadopted rule: is within the powers and duties delegated by the Legislature or Florida Constitution; does not enlarge, modify, or contravene the specific provisions of law implemented; is not vague; establishes adequate standards for agency decisions; or does not vest unbridled discretion in the agency; is not arbitrary or capricious; is not being applied to substantially affected parties without due notice; is supported by competent substantial evidence; and does not impose excessive regulatory costs.

[41] *See, Central States Health and Life Co. of Omaha,* DOAH Final Order, at 21-22.

[42] 830 So. 2d at 935.

[43] *See, e.g., Central States Health and Life Co. of Omaha,* DOAH Final Order, at 23-23; *Chancy v. Department of Highway Safety and Motor Vehicles*, DOAH Case No. 97-1627RU (DOAH Final Order July 16, 1997). These cases have noted that one effect of entry of a final order under Section 120.56(4) is an award of fees and costs under Section 120.595(4) except in very limited circumstances. These cases have further noted that it is possible for an agency to take the requisite steps for Section 120.56(4)(e) to apply after the conclusion of the Section 120.56(4) hearing. "All that is required is that the steps be taken '[p]rior to entry of a final order ....' Therefore, it appears that the Legislature did not intend that the determination of whether Section 120.56(4) applies should be made until an agency attempts to rely on the unpromulgated rule in a Section 120.57, Florida Statutes, proceeding." *Central States Health and Life Co. of Omaha,* DOAH Final Order, at 23-24.

[44] *Central States Health and Life Co. of Omaha,* DOAH Final Order; *Chancy v. Department of Highway Safety and Motor Vehicles*, DOAH Final Order.

[45] *See Florida Electric Power Coordinating Group v. Department of Environmental Protection,* DOAH Case No. 01-4018RU (DOAH Final Order Apr. 22, 2002). In this case, unlike in *OFFA*, the agency statement was published and not challenged, and so ultimately was adopted as a rule within 180 days of publication of the proposed rule.

[46] If the agency's proposed rules are challenged pursuant to Section 120.56(2), this 180-day time period is tolled until a final order is entered in that proceeding, per Section 120.56(4)(e). If the proposed rules are determined invalid and the agency seeks judicial review, the agency is typically entitled to an automatic stay which would serve to further extend the tolling period until the appeal is resolved by the court and the mandate issued. Fla. R. App. P. 9.310(b)(2).

[47] *See Florida Electric Power Coordinating Group,* DOAH Final Order.

[48] Section 120.56(4)(d).

[49] The proposed rule was declared invalid in *Osceola Fish Farmers Ass'n, Inc. v. South Florida Water Management District,* DOAH Case No. 01-2900RP (DOAH Final Order Nov. 6, 2001), *aff'd per curiam, South Florida Water Management District v. Osceola Fish Farmers Ass'n,* Case No. 1D01-4845 (Fla. 1st DCA 2002). Under these circumstances, Section 120.56(2)(b) provides that the proposed rule declared invalid shall be withdrawn by the adopting agency and shall not be adopted.

[50] Section 120.52(8).

[51] Although it would be difficult to say that rulemaking is still "feasible" after the proposed rule has been declared to be invalid by its terms, this statutory defense does not apply in such a case.

[52] Section 120.56(4)(d).

[53] A second benefit is the availability of attorney's fees and costs. See recommendation 5 in text.

[54] Section 120.595(4). The agency may avoid such an award only if the agency demonstrates that the challenged statement is required by the federal government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

[55] *See, e.g., OFFA v. SFWMD*, DOAH Case No. 00-3615RU (order denying District's motion for disposition and placing case in abeyance, July 16, 2001); *Day Cruise Ass'n, Inc. v. Board of Trustees of the Internal Improvement Trust Fund*, DOAH Case No. 99-4437RU (order cancelling hearing and placing case in abeyance, Dec 1, 1999); *Paul David Johnson v. AHCA*, DOAH Case No. 98-3419RU (DOAH Final Order of Dismissal, May 18, 1999).

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The authors gratefully acknowledge the valuable insight provided by Kevin B. Covington, of Hopping Green & Sams, P.A., in the preparation of this article.

APPELLATE CASE NOTES

by Mary F. Smallwood

Rulemaking

Osceola Fish Farmers Association, Inc. v. Division of Administrative Hearings, 27 Fla. L. Weekly 2525 (Fla. 4th DCA 2002)

See feature article.

State of Florida v. Bodden, 27 Fla. L.Weekly 2382 (Fla. 2d DCA 2002)

Bodden submitted to a blood alcohol test and urinalysis after being stopped on suspicion of driving under the influence. The urine test results were positive for a controlled substance. At trial, Bodden filed motions in limine to suppress the results of the urine test on the grounds that the test methodology had not been adopted as a rule pursuant to Chapter 120, F.S.

Section 316.1932(1)(a)(1), F.S., states that acceptance of a driver's license is deemed to be consent to submit to an "approved chemical or physical test" to detect the presence of alcohol or controlled substances. The state argued that only alcohol test procedures were required to be adopted by rule.

The court held that the results of the urine test were not admissible. The court construed the ambiguous language of the statute in favor of the accused. Since the methodology of the urine test had not been adopted as a rule, the court held that it was not an "approved" test under the statute.

United Wisconsin Life Insurance Co. v. Department of Insurance, 27 Fla. L. Weekly 2358 (Fla. 1st DCA 2002)

The Department of Insurance filed an administrative complaint against United Wisconsin alleging that certain of the company's underwriting practices were in facial violation of applicable statutes. In a separate proceeding, United Wisconsin challenged the allegations in the complaint as unadopted rules. The administrative law judge entered a final order in favor of the Department.

On appeal, the court agreed with the administrative law judge that United Wisconsin did not have the right to file a collateral challenge to the agency policies when it could raise, and, in fact, did raise, the allegations of an unadopted rule in the Section 120.57 proceeding. Moreover, the court found no evidence that the policies being implemented by the Department were of general applicability.

Caribbean Conservation Corp. v. Florida Fish and Wildlife Conservation Commission, 28 Fla. L. Weekly 46 (Fla. 2003)

The Caribbean Conservation Corporation and other conservation organizations filed an action in circuit court for declaratory and injunctive relief arguing that provisions of Chapter 95-245, Laws of Florida, requiring the Florida Fish and Wildlife Conservation Commission ("Commission") to adopt certain regulations pursuant to Chapter 120, F.S., were unconstitutional. In particular, at issue was the statutory requirement that rules governing threatened, endangered species, or species of special concern be adopted under Chapter 120. The circuit court held that the authority of the Commission was derived from Art. IV, § 9 and Art. XII, § 23 of the Florida Constitution and could not be proscribed by the Legislature. On appeal, the First District disagreed and reversed the lower court.

On _____ review by the Florida Supreme Court, the Court addressed the question of whether the Art. IV, § 9, creating the Commission, gave it exclusive authority over all marine life. It also construed the provisions of XII, § 23 which transferred the authority of the former Marine Fisheries Commission to the new Commission.

The Court noted that it had previously determined that the ballot summary for the citizen's initiative to create the Commission did not adequately explain to voters that the initiative stripped the Legislature of what was previously its exclusive authority to regulate marine life. *Advisory Opinion to the Attorney General re Fish and Wildlife Conservation Commission*, 705 So. 2d 1351 (Fla. 1998). That opinion noted that the Legislature had split regulatory authority between the Marine Fisheries Commission and the Department of Environmental Protection. In reviewing the history of the Constitutional Revision Commission's discussion of the issue, the Court noted that it was clear that only those functions within the purview of the Marine Fisheries Commission were to be transferred to the new Commission. At the time the Constitutional amendments were placed on the ballot, the authority to regulate endangered and threatened species was delegated to the Department of Environmental Protection. However, the Court found no statutory basis for the Department to regulate species of special concern at that time. Accordingly, the Court upheld the statutory provisions at issue only as they related to threatened and endangered species.

Adjudicatory Proceedings

Winters v. Florida Board of Regents, 27 Fla. L. Weekly 2424 (Fla. 2d DCA 2002)

Winters challenged the action of the University of South Florida dismissing her as head coach of the women's basketball team. The dispute arose after Winters dismissed an African-American member of the team, allegedly for making up a song during a team trip that was disrespectful toward the coach.

The University's Office of Opportunity Affairs (EOA) investigated and concluded that the dismissal was retaliation by Winters for the student's prior allegations against the coach of racial discrimination. Winters requested a formal administrative proceeding. The administrative law judge concluded that the dismissal had not been motivated by retaliation. Moreover, the judge concluded that Winters' dishonesty in stating that she was not aware that the player had accused her of discrimination did

not warrant termination under Winters' contract. The University rejected the recommended order. It held that the coach's dishonesty did warrant dismissal and it accepted as competent substantial evidence the EOA report on the matter, which the administrative law judge had refused to consider.

The court affirmed in part, reversed in part, and remanded the case. The court agreed with the administrative law judge that the EOA report was properly excluded as evidence. It noted that the report consisted almost entirely of inadmissible hearsay evidence. Moreover, the statements of individuals interviewed for the report were unsworn. With respect to the charge of dishonesty, the court found that the recommended order supported a finding that Winters was not truthful when she stated that she was not aware of the charges of the dismissed player. The court concluded that such dishonesty was a potential grounds for dismissal under Winters' contract. However, since the University's final order was unclear as to whether Winters would have been dismissed solely for being dishonest, the court remanded the matter.

Gross v. Department of Health, 27 Fla. L.Weekly 1492 (Fla. 5th DCA 2002)

Dr. Gross appealed a final order of the Board of Medicine disciplining his license for deviating from the standard of care defined by Section 458.331(1)(t), F.S. Specifically, the Board found that Dr. Gross had failed to follow standards of care when he injected his cardiac catheterization patient with air, resulting in the patient's death, after the hospital personnel did not load the equipment with dye, as required. The administrative law judge found that Gross had no responsibility for supervising the equipment loading. The Board rejected that finding and held that Gross's performance was below the standard of care.

On appeal, the court reversed. It held that the issue of whether a person deviated from a standard of conduct is generally an issue of fact to be determined by the administrative law judge based on evidence and testimony. The court noted that the recommended order contained detailed findings of fact which were accepted by the Board. It rejected the Board's argument that the issue was one infused with issues of policy and, thus, within the Board's discretion. Despite the fact that the findings were incorrectly labeled as conclusions of law in the recommended order, the court held that the Board did not have the authority to modify or reject them.

Licensing

Hobbs v. Department of Transportation, 27 Fla. L.Weekly 2469 (Fla. 5th DCA 2002)

Hobbs purchased property adjacent to I-95 that contained a permitted outdoor sign. At the time, the sign was leased by KOA. Subsequent to Hobbs' purchase of the property, the land was rezoned as residential; however, the sign was determined to be a legally existing nonconforming use. Without Hobbs' knowledge, KOA cancelled the sign permit. When Hobbs subsequently attempted to renew the sign permit, DOT took the position that the sign was not permittable under existing land use designations. It drew a distinction between renewal of an existing permit and issuance of a new permit. An administrative law judge entered an order concluding that the sign became an illegal use when the permit was not renewed by KOA, and DOT adopted the recommended order.

On appeal, the court reversed. Relying on *Lewis v. City of Atlantic Beach*, 467 So. 2d 751 (Fla. 1st DCA 1985), the court found that grandfathered nonconforming uses relate to the property involved, not the permittee. The court found no statute or rule that supported DOT's decision.

Scott v. Department of State, 27 Fla.L.Weekly 2384 (Fla. 2d DCA 2002)

Scott requested a formal administrative proceeding to contest revocation of his license as a security guard. The petition was dismissed with leave to amend. After several attempts to amend the petition, the Department granted Scott only an informal hearing which he was not able to attend.

On appeal, the court reversed and remanded. It found that Scott had contested the primary allegation against him, impersonation of an officer. It concluded that the failure to provide Scott with a formal hearing violated Section 120.60(5), F.S., which prohibits revocation of a license unless the licensee has been given an adequate opportunity to have a formal proceeding.

Public Records and Government-In-The-Sunshine

Pinellas County School Board v. Suncam, Inc., 27 Fla. L. Weekly 2416 (Fla. 2d DCA 2002)

The Pinellas County School Board appealed an order of the trial court holding that it had violated the Government-in-the-Sunshine Act by refusing to allow Suncam to videotape a hearing of the committee evaluating the qualifications of general contractors to conduct remodeling for one of the County's high schools. The Board denied the request on the grounds that participants in the meeting would not act normally if they knew they were being videotaped.

The appellate court affirmed the trial court. It relied on *Hough v. Stembridge*, 278 So. 2d 288 (Fla. 3d DCA 1973) for the proposition that a violation of the Sunshine Act occurs where the agency violates the "statute's spirit, intent and purpose." Although the Act does not specifically address the right of the public to tape or record public meetings, the court held that the refusal in this case violated the spirit of the Act, particularly since the parties agreed that the taping would not be obtrusive. The court noted that the Attorney General's Office had issued opinions finding that a denial of all taping of public meetings was arbitrary and unreasonable.

Molina v. City of Miami, 28 Fla. L. Weekly 8 (Fla. 3d DCA 2002)

Molina, whose father was killed by a city police officer, filed suit pursuant to Section 286.011, F.S., alleging that the Discharge of Firearms Review Committee within the City of Miami Police Department was subject to the Government-in-the-Sunshine Act.

The court disagreed. It found that the review committee, composed of three deputy chiefs within the police department, served only a fact-finding advisory capacity. Meetings of agency staff members serving in such

continued...

APPELLATE CASE NOTES

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a capacity are not subject to the Government-in-the-Sunshine Act.

Weekly Planet, Inc. v. Hillsborough County Aviation Authority, 27 Fla. L. Weekly 2380 (Fla. 2d DCA 2002)

The Weekly Planet sought to obtain a copy of lease agreements between Concorde Companies, lessee of the Hillsborough County Aviation Authority (HCAA), and sublessees. It argued that the subleases were prepared in conjunction with the official business of HCAA. The trial court dismissed the complaint.

The court affirmed. It concluded that HCAA did not delegate to Concorde any governmental function. It simply leased land to Concorde which developed a private for-profit business. In addition, HCAA did not involve itself in the project to the extent that it transformed Corcorde's private business into a governmental function. Judge Whatley concurred "reluctantly." He concluded that the majority had applied the law correctly. However, he expressed concern that HCAA had failed to adequately protect the public interest.

Statutory Construction

Chappell v. Construction Industries Recovery Fund, 28 Fla. L. Weekly 216 (Fla. 3d DCA 2003)

The Chappells attempted to recover from the Construction Industries Recovery Fund monies awarded to them in a judgment against their contractor. The Fund denied their request on the grounds that the Fund only allowed recovery on contracts entered into after July 1, 1993, where the violation also occurred after that date. In this case, the Chappells had executed the contract prior to that date but had entered into a change order for additional work after the statutory date. The Fund concluded that the change order related back to the original contract.

The court reversed the Fund. It concluded that the statute in question was remedial in nature and should, therefore, be liberally construed to allow recovery. In this case, the administrative law judge had found that the violation occurred prior to July 1, 1993. However, the Chappells argued that the contractor's own admission was contrary to that finding. The court noted that the Fund apparently agreed with the Chappells on that issue and entered an order granting recovery.

Declaratory Statements

Padilla v. Liberty Mutual Ins.Co., 28 Fla. L. Weekly 23 (Fla. 1st DCA 2002)

Padilla, as putative class representative, challenged the reimbursement rate for travel to and from medical appointments under his insurance policy. Liberty Mutual moved to dismiss the case on the grounds that granting the relief sought would effectively establish state-wide mileage reimbursement rates, a matter within the jurisdiction of the Department of Insurance. The trial court granted the motion, and Padilla appealed.

At the same time, Padilla sought a declaratory statement from the Department as to its jurisdiction over the determination of mileage reimbursement. After allowing Liberty Mutual to intervene in the proceeding, the Department dismissed the request for a declaratory statement on the grounds that Padilla had not demonstrated a need for such a statement.

On appeal of that order, the court affirmed. While recognizing the doctrine of primary jurisdiction was intended to foster the work of administrative agencies where issues required the application of agency expertise, the court distinguished this case from those where an adjudicatory proceeding has been requested. The court held that the agency should refrain from addressing a request for a declaratory statement where the matter is pending in a judicial proceeding.

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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ceedings. As a result, we have separate rules for juvenile proceedings, family court proceedings, civil proceedings, criminal proceedings, etc.

In our quest to keep the APA "simple," so that it is open to all who want to participate, we have tried to make the Uniform rules "one size fits all," with an out provided for those agencies that go to the effort of seeking an exception from the Administration Commission. The same approach goes for the Act itself. By the time this issue airs, we will be in the midst of legislative session. We must be mindful that when we tinker with the Act to fix a perceived problem, there are sometimes a host of unintended consequences. And many times, those consequences are borne by people whose voices are not ignored but are simply never heard, because we don't realize the need to ask them.

This does not mean that the Act is perfect as it is, or that improvements cannot be made. However, a wise friend recently reminded me that when we view possible changes to the Act, our concern as administrative practitioners should not be on how the perceived change will affect a particular case or the cases in which we are involved, but how it will affect the process itself for everyone. Moreover, while a major corporation may be my client today, the State may be my client tomorrow. With this in mind, we all need to consider possible changes from the perspective of with what is good for Florida as a whole. Will possible changes be fair to all participants, private and public alike, and will there be a level playing field upon which to address the merits of the controversy? And how many unintended consequences will there be to those whose voices we have not heard?

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

PULC Update: Swearing in of Two PSC Commissioners; Florida Water Services Sale; PSC Jurisdiction Over Wholesale Contracts; CLE Course

by Natalie B. Futch, Chair, Public Utilities Law Committee

Returning Commissioner J. Terry Deason and new Commissioner Charles "Chuck" Davidson were sworn in on January 7, 2003, for four-year terms. The Honorable Judge Kenneth Hosford, County Judge of Liberty County, participated in the investiture by administering the oath of office to Commissioner Deason, while the Honorable Justice Raoul Cantero of The Florida Supreme Court administered the oath to Commissioner Davidson.

Commissioner Deason was first appointed to the Public Service Commission (PSC) in February 1991 and served as chairman from 1993 to 1994 and as interim chairman in 2000 following the departure of former Commissioner Joe Garcia. He has been reappointed three times since his original appointment. Before serving as a Commissioner, Deason was chief regulatory analyst for the Office of Public Counsel and served as executive assistant to the late Commissioner Gerald Gunter.

Commissioner Deason attended the U.S. Military Academy at West Point, and in 1975 received his bachelor of science degree in accounting, summa cum laude, from Florida State University. He also received his master of accounting degree from FSU in 1989.

Commissioner Davidson was staff director of the Florida House of Representatives Committee on Information Technology prior to his appointment to the PSC. Before that, he served as executive director for the State's Information Technology Task Force. From 1993 to 1999, Commissioner Davidson was an attorney resident in the New York office of Baker & McKenzie. In 1999, he joined the New York Office of Duane Morris with other attorneys from Baker & McKenzie to form an international dispute resolution practice group.

Commissioner Davidson holds a Masters of Law in Trade Regulation from New York University. He also holds a Masters in International Business from Columbia University. Davidson received his baccalaureate and law degrees from the University of Florida.

Florida Water Services Sale

In September 2002, Florida Water Services Corporation (FWSC), the State's largest investor-owned wastewater treatment utility providing service to 26 Florida counties, announced an asset transaction intended to convert its business to public ownership through a sale to the Florida Water Services Authority (FWSA). The FWSA was established by an interlocal agreement between the panhandle cities of Gulf Breeze and Milton. A December 2002 revision to the contract made the sale contingent upon PSC approval.

In October 2002, the PSC Staff opened Docket No. 021066-WS to investigate the proposed sale to FWSA. In December, Staff solicited comments on the issues of whether the FWSA was a "governmental authority" as defined by Section 367.021(7), Florida Statutes, and whether the FWSA would be exempt from PSC regulation pursuant to Section 367.022(2). Under Section 367.022(2), Florida Statutes, water and wastewater systems owned, operated, managed, or controlled by a "governmental authority" are exempt from PSC regulation. A "governmental authority" includes a political subdivision, a regional water supply authority, or a nonprofit corporation formed to act on behalf of a political subdivision with respect to a water or wastewater utility. In theory, governmental authorities are politically accountable to the residents of the area in which they serve. The cities of Milton and Gulf Breeze, however, do not answer politically to the residents of the 26 counties in which the FWSA proposes to operate.

Leaving unanswered the questions of whether the FWSA is a governmental authority and whether it would be exempt from PSC regulation, the PSC Staff issued a recommendation on January 28, 2003, that the Commissioners require FWSC to file an application for approval of the transfer in accordance with Section 367.071(1), Florida Statutes, and Rule 25-30.037(2), Florida Administrative Code, prior to the proposed closing date, which it believed to be February 14, 2003. Section 367.071(1) provides that water and wastewater utilities may not sell, assign, or transfer a certificate or facilities without determination and approval of the PSC that the sale is in the public interest. That same subsection, further, provides that the sale may occur prior to obtaining PSC approval if the contract makes the sale contingent upon approval. By contrast, a public interest determination is not required when the sale is to a governmental authority. Section 367.071(4)(a) provides that sales, assignments and transfers to governmental authorities are approved "as a matter of right."

At the February 4, 2003 PSC Agenda Conference, the Commissioners, by unanimous vote, ordered FWSC to file an application for prior PSC approval of the proposed sale, or for approval of "satisfactory contingency language." In Order No. PSC-03-0193-FOF-WS, the PSC said it found that the language making the contract contingent upon PSC approval was inadequate to protect consumers. The PSC set a July hearing date and filed for an injunction to block the sale. Second Circuit Judge, Honorable William Gary, granted the PSC's request for temporary injunction barring the sale on grounds that, without the injunction, the PSC would be unable to block the sale if it

continued...

PULC UPDATE:
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found it was in the public interest to do so. The court set a February 28, 2003 hearing to determine whether the injunction should be permanent.

The jurisdictional questions presented by this docket are unique and possible legislative changes to Chapter 367 as a result of the proposed sale are worth monitoring.

PSC Jurisdication Over Wholesale Contracts
Lee County Electric Coop. v. Jacobs, 820 So. 2d 297 (Fla. 2002)

The Court affirmed the PSC's order in which the PSC held that that it did not have rate structure jurisdiction over a retail electric cooperative's wholesale rate schedule established pursuant to contract. Lee County Electric Cooperative (LCEC), an electric distribution cooperative engaged in the retail sale of electric energy to Florida customers, purchased its power requirements from Seminole Electric Cooperative (Seminole), a generation and transmission cooperative, pursuant to a wholesale power contract between the two. The contract specified the procedure for determining the rate Lee County paid Seminole for wholesale service, and it provided that the Seminole board of trustees would review the rate schedule at least once a year.

In 1998, Seminole's board approved a new rate schedule. LCEC objected to the new rate schedule and it filed a complaint with the PSC, asking the PSC to conduct an investigation into the new schedule. LCEC based its complaint on Section 366.04(2)(b), Florida Statutes, which grants the PSC power to "prescribe a rate structure for all electric utilities." It claimed that the PSC's exercise of jurisdiction to review Seminole's wholesale rate schedule fell within the language and intent of Section 366.04 and was consistent with the PSC's duty to encourage conservation and ensure the reliability of the electric grid.

Though "rate structure" was not defined in Florida Statutes, the Court and the PSC concluded that the PSC's jurisdiction over the rate structure of electric utilities did not apply in a situation where two parties voluntarily entered into a negotiated contract for service. Where provisions of a negotiated contract are at issue, reasoned both the PSC and the Court, any contention that LCEC had with Seminole's rate schedule was "more appropriately raised in an action filed in the circuit court."

Continuing Legal Education Course

A CLE course concerning the ethics of practicing before the Florida Public Service Commission is still in the planning phase and has been tentatively scheduled for late Spring. Thank you to those who have demonstrated interest in the course.

Natalie B. Futch *is the chair of the PULC. She is an associate with Katz, Kutter, Alderman, Bryant & Yon, P.A., in Tallahassee. She can be reached at (850)224-9634, or via e-mail at nfutch@katzlaw.com.*

Please share this with a colleague

ADMINISTRATIVE LAW SECTION
MEMBERSHIP APPLICATION

This is a special invitation for you to become a member of the Administrative Law Section of The Florida Bar. Membership in this section will provide you with interesting and informative ideas. It will help keep you informed on new developments in the field of Administrative Law. As a section member you will meet with lawyers sharing similar interests and problems and work with them in forwarding the public and professional needs of the Bar.

To join, make your check payable to "THE FLORIDA BAR" and return your check in the amount of $20 and this completed application card to ADMINISTRATIVE LAW SECTION, THE FLORIDA BAR, 650 APALACHEE PARKWAY, TALLAHASSEE, FL 32399-2300.

NAME _____ ATTORNEY NO. _____

OFFICE ADDRESS _____

CITY / STATE / ZIP _____

PHONE NUMBER _____ FAX NUMBER _____

EMAIL ADDRESS _____

Note: The Florida Bar dues structure does not provide for prorated dues. Your Section dues covers the period from July 1 to June 30.

Become a

BOARD CERTIFIED LAWYER

The application filing periods for board certification are approaching. Applications may be made during a two-month period each year; certification examinations are given once each year. A summary of the minimum requirements are outlined below; each area of certification may contain higher or additional standards. Please read the standards for your desired area of certification in Chapter 6 of the Rules Regulating The Florida Bar located in your September, 2002 issue of The Florida Bar *Journal,* beginning on page 791, or you may access the rules on the Bar's website: *www.FLABAR-org.* Click on the *Member Service*s link, then *Certification.* Should you have questions regarding the certification process, please call the Legal Specialization and Education Department at (850) 561-5842.

Minimum requirements for certification:

- A minimum of 5 years in the practice of law.
- A satisfactory showing of substantial involvement in the field of law for which certification is sought.
- Passing an examination applied uniformly to all applicants.
- Peer review shall be used to assess competence in the specialty field as well as character, ethics and professionalism in the practice of law.
- Satisfaction of the certification area's CLE requirement.

You may obtain an application by downloading a copy from the website mentioned above, or to have one mailed to you, complete the form below and return it to: The Florida Bar, Legal Specialization and Education, 650 Apalachee Parkway, Tallahassee, FL 32399-2300

Applications for the following areas will be mailed out in June and must be completed and returned by **August 31, 2003:**

____ Admiralty and Maritime
____ Appellate Practice
____ Aviation Law
____ Civil Trial
____ Elder Law
_____ Immigration and Nationality
_____ International Law
_____ Labor and Employment Law
_____ Marital and Family Law
_____ Tax

Applications for the following areas will be available by August and must be completed and returned by **October 31, 2003:**

____ Antitrust and Trade Regulation
____ Business Litigation
____ City, County and Local Gov't
____ Criminal Appellate
____ Criminal Trial
_____ Health Law
_____ Real Estate
_____ Wills, Trusts & Estates
_____ Worker's Compensation

Name _____ Attorney # _____

Address: _____

City/State/Zip _____

Minutes of Administrative Law Section Executive Council Meeting — January 10, 2003

I. Call to Order

The meeting was called to order at 9:30 a.m. by Executive Council Chair Li Nelson.

Present: Li Nelson, Donna Blanton, Dave Watkins, Bobby Downie, Charlie Stampelos, Linda Rigot, Debby Kearney, Natalie Futch, Booter Imhof, Elizabeth McArthur, Seann Frazier, Clark Jennings, Bill Williams, Cathy Sellers, Chris Moore, and Jackie Werndli.

Absent: Allen Grossman, Paul Rowell, Rick Ellis, Cathy Lannon

II. Preliminary Matters

A. The minutes of the September 6, 2002, meeting were approved.

B. Debby Kearney gave the Treasurer's report. The Section is financially sound.

III. Committee Reports

Booter Imhof gave the Continuing Legal Education report. The Pat Dore Conference was well received. Approximately 175 people attended, and the net revenue is estimated at $4,000. The next CLE program will likely be in May and will be practice oriented. Andy Bertron and Kathy Kasprzak will co-chair. The location and date are as yet undetermined.

IV. New Business

A. Legislative - Linda Rigot reported on a proposed Health Law Section legislative position. The position relates to costs in disciplinary proceedings. Li Nelson explained that the position as currently drafted appears internally inconsistent. Bruce Lamb of the Health Law Section has asked whether the Administrative Law Section supports the concept. Li Nelson gave an explanation of how costs in these types of proceedings are determined today. After discussion, Dave Watkins moved to support the concepts of making costs assessable against either party and providing an appropriate forum to determine costs, but not supporting the position as drafted, including the removal of language making costs a disciplinary penalty. Linda Rigot seconded. After more discussion, the motion passed.

Linda Rigot then introduced HB 23 relating to the Administrative Procedure Act. Linda explained the proposed changes to the Act. Bill Williams expressed concern over several changes, including specific pleading requirements, assessing attorneys' fees and costs against agencies based upon reversal of conclusions of law beyond the agencies' substantive jurisdiction, and gave background information on several other proposed changes. After discussion, it was decided that Bill would continue to monitor HB 23 and report back to Li Nelson with information.

Bill Williams informed the Council that Steve Pfeiffer had notified Bill that the Florida Home Builders was exploring the idea of proposing a fast track hearing process for resolution of Florida Building Code interpretation disputes that typically occur during construction. Bill will keep the Council posted.

B. Li Nelson raised for discussion proposed amendments to Florida Bar Rule 4-8.4(i) relating to sexual conduct with clients. After discussion, it was moved that the proposed amendments be supported. After second, the motion passed.

C. The Section's proposed Budget for 2003-04 was discussed. After moving approval and a second, the Council approved the budget for the next fiscal year.

V. Informational

Linda Rigot report on the progress of the planning for the National Association of Administrative Law Judges Conference in Orlando. The University of Florida is co-sponsoring the Conference, which will be held during the week of October 10-15 at the Orlando Gaylord Hotel. The Florida Bar has been assisting with negotiations with the hotel, and also registration. At a future meeting, the Council will discuss sponsoring a luncheon or reception at the Conference.

VI. Time and Place of Next Meeting

To be announced, pending legislative activity.

VII. The meeting was adjourned at 10:50 a.m.

Respectfully submitted,
Robert C. Downie, II
Secretary

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