

# *Nova Law Review*

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*Volume 16, Issue 1*

1991

*Article 3*

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## Administrative Law

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# Administrative Law: 1991 Survey of Florida Law\*

**Johnny C. Burris\*\***

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	8
II.	CONSTITUTIONAL AND JURISDICTIONAL ISSUES .....	10
	A. <i>The Delegation Doctrine</i> .....	10
	B. <i>Separation of Powers: Prohibiting the Usurpation of Functions</i> .....	14
	C. <i>Accountability: Was the Agency Acting Within the Scope of Its Authority</i> .....	17
	D. <i>Procedural Due Process</i> .....	25
	1. Access to Transcripts of Administrative Hearings .....	31
	E. <i>Standing</i> .....	35
	1. Formal Administrative Hearing .....	35
	2. Standing in Other Contexts .....	40
	a. <i>Certificate of Need</i> .....	40
	b. <i>Declaratory Statements</i> .....	42
	3. Intervention in the Administrative Decision Process by Third Parties .....	44
	F. <i>Exhaustion of Administrative Remedies</i> .....	45
	G. <i>Res Judicata and Collateral Estoppel</i> .....	52
III.	GOVERNMENT IN THE SUNSHINE .....	53
IV.	THE ADMINISTRATIVE PROCEDURE ACT .....	55
	A. <i>Rules Versus Orders</i> .....	56
	B. <i>Adjudicatory Structure and Procedure</i> .....	64
	C. <i>Licensing</i> .....	71
	D. <i>Contract Bidding</i> .....	72
	E. <i>Emergency Rules and Orders</i> .....	74

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F.	<i>What Counts As Evidence in an Administrative Proceeding?</i> .....	78
1.	Hearsay .....	79
G.	<i>An Agency Must Follow Its Own Rules</i> .....	80
H.	<i>Rule Making Process</i> .....	82
1.	Economic Impact Statement .....	87
V.	JUDICIAL REVIEW .....	90
A.	<i>Preservation of the Right to Review</i> .....	90
B.	<i>Scope of Hearing Officer's Authority Over Factual Issues, Penalties and Questions of Law</i> .....	93
C.	<i>Deferential Judicial Review of Factual Issues</i> .....	111
D.	<i>Deferential Judicial Review of Questions of Law</i> .....	115
E.	<i>Nondeferential Judicial Review of Questions of Law</i> .....	116
F.	<i>Judicial Review of Agency Rule Making Activity</i> .....	118
G.	<i>Unenlightening Judicial Review</i> .....	123
VI.	CONCLUDING THOUGHTS .....	124

[T]he delegation of broad and undefined discretionary power from the legislature to the executive branch [and independent administrative agencies] deranges virtually all constitutional relationships and prevents attainment of the constitutional goals of limitation on power, substantive calculability, and procedural calculability.<sup>1</sup>

Where law ends, discretion begins, and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness.<sup>2</sup>

## I. INTRODUCTION

Administrative agencies, whether we approve or not, have become

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1. Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism and Administrative Power*, 36 AM. U.L. REV. 295, 296 (1987). See generally THEODORE J. LOWI, *THE END OF LIBERALISM THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979).

2. KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE A PRELIMINARY INQUIRY* 3 (Illini Books ed. 1971).

the primary institutions for creating and implementing governmental policy. Understanding how the administrative process operates and the nature of both substantive and procedural constraints the law imposes on the exercise of discretion by administrative agencies has become an essential part of the modern lawyer's repertoire. This article is designed to assist lawyers in keeping themselves abreast of recent developments in the complex and diverse area of administrative law by providing an overview of administrative law decisions<sup>3</sup> by the Florida appellate courts during the survey period.<sup>4</sup>

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3. Cases concerning the Workers' Compensation system generally are not addressed in this article, because its administrative hearing system is not subject to the Florida Administrative Procedure Act. FLA. STAT. § 120.52(1)(c) (1991) [hereinafter "the APA"] ("A judge of compensation claims shall not, in the adjudication of workers' compensation claims, be considered an agency or part of an agency for the purposes of this act.").

4. As in past years this article perhaps errs on the side of comprehensiveness. Most of the cases discussed do not, in and of themselves, raise some new and/or important development in administrative law. However, I continue to firmly believe that such a comprehensive approach is justified because each appellate court decision augments our knowledge of how the courts are interacting with administrative agencies, and thus, is valuable.

Most of the decisions discussed in this article appear in volumes 554 to 583 of the Southern Reporter, Second Series. Earlier articles on Florida administrative law have appeared in a variety of books and law reviews. See, e.g., FLORIDA ADMINISTRATIVE PRACTICE (The Florida Bar 3d ed. 1990); ARTHUR J. ENGLAND & L. HAROLD LEVINSON, FLORIDA ADMINISTRATIVE PRACTICE MANUAL (1979); Johnny C. Burris, *The Failure of the Florida Judicial Review Process to Provide Effective Incentives for Agency Rulemaking*, 18 FLA. ST. U.L. REV. 661 (1991) [hereinafter Burris IV]; Patricia A. Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 FLA. ST. U.L. REV. 437 (1991) [hereinafter Dore III]; Patricia A. Dore, *Seventh Administrative Law Conference Agenda and Report*, 18 FLA. ST. U.L. REV. 703 (1991) [hereinafter Dore II]; L. Harold Levinson, *The Florida Administrative Procedure Act After 15 Years*, 18 FLA. ST. U.L. REV. 749 (1991); Stephen T. Maher, *We're No Angels: Rulemaking and Judicial Review in Florida*, 18 FLA. ST. U.L. REV. 767 (1991); Johnny C. Burris, *Administrative Law, 1989 Survey of Florida Law*, 14 NOVA L. REV. 583 (1990) [hereinafter Burris III]; Johnny C. Burris, *Administrative Law, 1988 Survey of Florida Law*, 13 NOVA L. REV. 727 (1989) [hereinafter Burris II]; Johnny C. Burris, *Administrative Law, 1987 Survey of Florida Law*, 12 NOVA L. REV. 299 (1988) [hereinafter Burris I]; Patricia A. Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U.L. REV. 965 (1986) [hereinafter Dore I]; Murray H. Dubbin & Samuel J. Dubbin, *Administrative Law: Access to Review of Official Action—Standing Under the Florida Administrative Procedure Act*, 35 U. MIAMI L. REV. 815 (1981); Joseph Z. Fleming & David L. Mallory, *Administrative Law*, 33 U. MIAMI L. REV. 735 (1979); Arthur J. England & L. Harold Levinson, *Administrative Law*, 31 U. MIAMI L. REV. 749 (1977); L. Har-

## II. CONSTITUTIONAL AND JURISDICTIONAL ISSUES

### A. *The Delegation Doctrine*<sup>5</sup>

"There is no doubt that the development of the administrative agency in response to modern legislative and administrative need has placed severe strain on the separation-of-powers principle in its pristine formulation."<sup>6</sup> Most courts at both the federal and state levels early on abandoned their efforts at rigorously enforcing separation of powers requirements in the context of delegation of authority to administrative agencies. However, Florida courts resisted this course. In *Askew v. Cross Key Waterways*,<sup>7</sup> the Florida Supreme Court reaffirmed a commitment to rigorously enforce the delegation doctrine through a very formalistic approach to these issues. The decision in *Cross Key* cast considerable doubt on the validity of many statutory delegations of authority to administrative agencies.<sup>8</sup>

However, beginning in 1981, Florida courts gradually abandoned the formalist approach to the delegation doctrine outlined in the *Cross Key* decision that threatened the constitutional validity of many enabling statutes which delegated substantial authority and discretion to administrative agencies. The courts, while never formally abandoning the *Cross Key* philosophy on delegation issues, nonetheless functionally

old Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 617 (1975); L. Harold Levinson, *A Comparison of Florida Administrative Practice Under the Old and the New Administrative Procedure Acts*, 3 FLA. ST. U.L. REV. 72 (1975). See generally A. BONFIELD, *STATE ADMINISTRATIVE RULE MAKING* (1986) (an excellent general discussion of state administrative law issues); KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* (1978-84) (five volume set offering one of the most comprehensive overviews of administrative law).

5. This constitutional doctrine traditionally has been labeled the non-delegation doctrine. This clearly is a misnomer, as courts, contrary to the result suggested by the label, almost never find the delegation of quasi-legislative or quasi-judicial authority, or the aggregation of legislative, executive, and judicial functions in one administrative body to be constitutionally flawed. The non-delegation doctrine designation occurred because strongly worded dicta in early United States Supreme Court cases which addressed these issues indicated a hostility in principle to such actions by Congress, even though the delegations in these cases were held constitutionally sound. In keeping with legal reality, rather than myth, I have labeled this section "The Delegation Doctrine," rather than "The Non-Delegation Doctrine." See *Burriss I*, *supra* note 4, at 302 n.15.

6. *Buckley v. Valeo*, 424 U.S. 1, 280-81 (1976) (White, J., concurring in part and dissenting in part).

7. 372 So. 2d 913 (Fla. 1978).

8. See *Burriss I*, *supra* note 4, at 304-07.

adopted a pragmatic approach to delegation issues similar to that used in the federal courts.<sup>9</sup>

Under the pragmatic approach, which has been imposed under the *Cross Key* rubric, the critical inquiry in delegation cases is "whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislature's intent."<sup>10</sup> The degree of specificity required will vary with "the subject matter dealt with and the degree of difficulty involved in articulating finite standards."<sup>11</sup> The courts found that a substantial degree of flexibility and uncertainty should be tolerated so that the legislature can delegate authority to an administrative agency "with the expertise and flexibility needed to deal with complex and fluid conditions . . . which . . . make direct legislative control impractical or ineffective . . . [and] make the drafting of detailed or specific legislation impractical or undesirable."<sup>12</sup> Standardless delegation of authority to an administrative agency will not be condoned, but it takes very little in the way of direction from the legislature for a statute to move from the standardless category to the category of constitutionally sufficient minimum guidance. While courts continue to ritualistically refer to the *Cross Key* decision, the nature of the inquiries made under the delegation doctrine are now pragmatic, designed to assure in a minimalistic fashion that the legislature and not administrative agencies are making fundamental policy decisions.<sup>13</sup> The net result has been a decline in the use of the delegation doctrine to declare statutes unconstitutional.<sup>14</sup>

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9. *E.g.*, *Yakus v. United States*, 321 U.S. 414 (1944); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (the first modern statement of the "intelligible principle" approach to delegation issues); *Amalgamated Meat Workers v. Connelly*, 337 F. Supp. 737 (D.D.C. 1971). *But see* *American Textile Mfr. Inst. v. Donovan*, 452 U.S. 490, 546-47 (1981) (Rehnquist, J., dissenting) (rigorous application of the delegation doctrine would require holding these statutes an unconstitutional form of delegation); *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring).

10. *Department of Ins. v. Southeast Volusia Hosp. Dist.*, 438 So. 2d 815, 819 (Fla. 1983).

11. *Cross Key Waterways*, 372 So. 2d at 918.

12. *Jones v. Department of Revenue*, 523 So. 2d 1211, 1214 (Fla. 1st Dist. Ct. App. 1988).

13. *See* Burris III, *supra* note 4, at 730-31; *Chiles v. Children A, B, C, D, E, & F*, 16 Fla. L. Weekly S699 (Fla. 1991) (Overton, J., concurring).

14. *See* Burris III, *supra* note 4, at 585-87; Burris II, *supra* note 4, at 729-30; *see also* Burris I, *supra* note 4, at 302-12.

Of course, a different result may be achieved if the attempted delegation was

In fact, the process of abandoning or ignoring the requirements set out in the *Cross Key* decision has progressed to the point that during this survey period only one case was decided which involved a significant discussion of whether a delegation of authority to an administrative agency was unconstitutional.<sup>15</sup> In *Young v. Broward County*,<sup>16</sup> the

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viewed by the court as concerning the relatively rare circumstance of a power which was not delegable. See *Chiles*, 16 Fla. L. Weekly at S699. The first part of the opinion in *Chiles* treated budget cutting as a matter which must be decided by the legislature; but in the latter part of its opinion, the court apparently qualified its earlier position by indicating that if it was a possibility for the legislature to adopt sufficiently detailed guidance for the exercise of budget cutting authority, then the Administrative Commission could exercise some delegated authority in this area. *Id.*

In *Barry v. Garcia*, 573 So. 2d 932 (Fla. 3d Dist. Ct. App. 1991), the court considered whether the Ad Hoc Independent Review Panel of the City of Miami was properly delegated the power to issue subpoenas. The Panel was created by the City Commission of the City of Miami for the purposes of investigating the relationship between the police department and the Overtown area, and was directed to report its findings to the City Commission. *Id.* at 933. The City Commission resolution creating the ad hoc panel granted it the power to issue subpoenas.

Two individuals were subpoenaed by the Panel, but refused to testify or appear before the Panel. The Panel petitioned the circuit court to hold these individuals in contempt unless they could show cause why they should not be so found. The circuit court "found that as a matter of law, the Ad Hoc Independent Review Panel did not have the authority to issue subpoenas and to compel attendance of witnesses to its proceedings." *Id.* at 934. The City of Miami Charter provided that the Commission or any committee thereof are the only bodies authorized by the Charter to exercise the investigative subpoena power. *Id.* at 937; City of Miami Charter § 14. It was clear that any investigative subpoena could be issued either by the body carrying out the investigation or by a court, but if the investigative body wished to enforce its subpoena, then it must apply through the courts for an order concerning the matter. Because the City Charter did not currently authorize anyone other than the City Commission or a committee composed of City Commissioners to exercise the subpoena power, the City Commission acted inappropriately in delegating this power to the Ad Hoc Independent Review Panel. *Garcia*, 573 So. 2d at 938. "Generally, a city commission, which is a legislative body of a city, possesses no power to delegate their authority as prescribed in their charter. Municipal officials can only act in accordance with an express grant in their charter and not any implied grant of power." *Id.* at 939. Therefore, the Ad Hoc Independent Review Panel had no power to issue a subpoena, and accordingly, the circuit court properly determined that it could not enforce any subpoena issued by the body with a contempt citation. See generally Florida Administrative Practice § 1.9-.12 (The Florida Bar 3d ed. 1990).

15. *Chiles*, 16 Fla. L. Weekly S699, was decided too late for a full discussion in this survey article. Five other cases briefly alluded to delegation doctrine matters. See *State v. Carswell*, 557 So. 2d 183, 184 (Fla. 3d Dist. Ct. App. 1990) (A statute did not violate the delegation doctrine by incorporating by reference existing federal standards. The court did note in dicta, however, that any attempt to incorporate by reference

court addressed the issue of whether the Broward County ordinance regulating when the Broward County Animal Control Division may declare a dog to be vicious and order it destroyed involved an invalid delegation of authority.<sup>17</sup> The court concluded the ordinance could not be characterized as creating a circumstance where the administrative agency could engage in arbitrary decision making. The ordinance provided sufficient guidance to the administrative agency, because the ordinance contained an adequate definition of what constituted a vicious dog.<sup>18</sup>

However, Chief Judge Hersey in his dissent, while not directly mentioning it, apparently followed both the letter and the spirit of the *Cross Key* decision when noting the ordinance was constitutionally flawed. The ordinance was flawed because the choice of which penalty may be imposed after a determination that a dog was vicious as a result of one attack, humane disposal or an opportunity for the owner to properly provide for adequate security, was "vested solely in the unbridled discretion of the individual who, from time to time, may hold the post of Director of the Animal Control Division of Broward County."<sup>19</sup> Such a delegation of unbridled discretion was a violation of the delegation doctrine, because it left the fundamental policy choice of what was the appropriate response to the problem to the administrative agency.<sup>20</sup>

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future changes in the federal standards would violate the delegation doctrine.); *St. Johns County v. Northeastern Fla. Builders Ass'n*, 583 So. 2d 635, 642 (Fla. 1991); *Pittman v. State*, 570 So. 2d 1045, 1046 (Fla. 1st Dist. Ct. App. 1990); *Blizzard v. W.H. Roof Co.*, 556 So. 2d 1237, 1239 (Fla. 5th Dist. Ct. App. 1990); *cf. Barber v. State*, 564 So. 2d 1169, 1172 (Fla. 1st Dist. Ct. App. 1990) (vesting the prosecutor with the discretion to choose among competing statutory provisions in a criminal case was not an invalid delegation of discretion to the executive branch).

16. 570 So. 2d 309 (Fla. 4th Dist. Ct. App. 1990).

17. The court noted in dicta that the ordinance also did not violate any other tenets of constitutional law such as the due process of law guarantee. *Id.* at 310.

18. *See Young*, 570 So. 2d at 309; *see also St. Johns County v. Northeastern Fla. Builders Ass'n*, 583 So. 2d 635, 642 (Fla. 1991); *Pittman v. State*, 570 So. 2d 1045, 1046 (Fla. 1st Dist. Ct. App. 1990); *Blizzard v. W.H. Roof Co.*, 556 So. 2d 1237, 1239 (Fla. 5th Dist. Ct. App. 1990).

19. *Young*, 570 So. 2d at 310-11 (Hersey, C.J., dissenting).

20. There [wa]s absolutely no guidance in the ordinance, no standards or guidelines to control the discretion of the director of animal control as to whether, after a first bite, a dog owner [wa]s to be given the opportunity to confine his dog and to provide security as required in one section of the ordinance, or, whether the owner [wa]s simply to be advised that the dog will be disposed of under another section of the ordinance.

*Id.* at 310 (Hersey, C.J., dissenting). *See Cross Key Waterways*, 372 So. 2d at 918-21;



## B. Separation of Powers: Prohibiting the Usurpation of Functions

Florida courts have, for now at least, ceased to rigorously apply the delegation doctrine, but they remain particularly attentive to separation of powers concerns in other contexts. In addition to providing the foundation for the delegation doctrine, the separation of powers doctrine also prohibits one branch of the government from invading the core powers of another branch.<sup>21</sup> This principle was illustrated in several cases during the survey period concerning whether the core judicial functions were improperly delegated to nonjudicial officers.

In *Department of Agriculture and Consumer Services v. Bonanno*,<sup>22</sup> the court held, in part, that the legislature could delegate to a hearing officer the power to make an initial determination of the amount of just compensation to be paid for citrus trees destroyed during the citrus canker eradication program, as long as this determination was subject to judicial review. The court noted that the ultimate determination of whether just compensation was paid for private property taken by the government was a core function of the judiciary. Therefore, by providing a right to judicial review of the initial determination made by a hearing officer, the legislature exercised its constitutional power to provide for a means of determining just compensation without improperly invading the core of judicial functioning.<sup>23</sup>

In this area the issue of appropriate delegation does not always involve another branch of government invading a core judicial function. On some occasions it is the judiciary that delegated its powers. In

*Chiles*, 16 Fla. L. Weekly S699.

21. FLA. CONST. art. II, § 3; see *Chiles*, 16 Fla. L. Weekly 699; *Locke v. Hawkes*, 16 Fla. L. Weekly S716 (1991). The government also cannot delegate its police powers to a private party. Such action is beyond the legislature's authority, whether done by statute or contract. See *P.C.B. Partnership v. City of Largo*, 549 So. 2d 738, 741 (Fla. 2d Dist. Ct. App. 1989).

22. 568 So. 2d 24 (Fla. 1990) (per curiam).

23. *Id.* at 28-29. Further, in *Lampley v. State*, the court noted that the initial determination of whether a person was mentally incompetent and should be hospitalized was a core judicial function which could not be delegated to an administrative agency. 555 So. 2d 1242, 1243 (Fla. 4th Dist. Ct. App. 1989); see *Bentley v. State*, 398 So. 2d 992 (Fla. 4th Dist. Ct. App. 1981). However, once the initial determination of incompetency and involuntary hospitalization had been made by the appropriate court, then a hearing officer may determine whether the involuntary hospitalization should be continued. *Lampley*, 555 So. 2d at 1245; see *Liebman v. State*, 555 So. 2d 1242 (Fla. 4th Dist. Ct. App. 1989).

*Bradley v. State*,<sup>24</sup> the court reaffirmed<sup>25</sup> that trial court delegation to the probation and parole officer of the power to determine the appropriate amount of restitution owed by a criminal defendant was an impermissible delegation of a core judicial function.<sup>26</sup> The determination of all elements of a sentence for a defendant involves the exercise of judicial power which may not be entrusted to an executive branch employee.<sup>27</sup>

The issue of whether the legislature invaded judicial core functions can be a particularly vexing one in the area concerning the distinction between substantive law making and matters of practice and procedure.<sup>28</sup> The former is within the legislative power sphere while the latter is within the scope of the judicial power. In *Haven Federal Savings*

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24. 581 So. 2d 245 (Fla. 1st Dist. Ct. App. 1991).

25. See *Hamrick v. State*, 532 So. 2d 71, 72 (Fla. 1st Dist. Ct. App. 1988).

26. *Bradley*, 581 So. 2d at 246; see also *Weckerle v. State*, 579 So. 2d 742, 743 (Fla. 4th Dist. Ct. App. 1991); FLORIDA ADMINISTRATIVE PRACTICE § 1.12 (The Florida Bar 3d ed. 1990).

27. "However, once the court has rendered its decision, it may assign the performance of ministerial details necessary to the implementation of its decision to an executive branch employee." Burris III, *supra* note 4, at 590 (emphasis added). *cf.* *Citizens of Florida v. Wilson*, 567 So. 2d 889, 892 (Fla. 1990) In *Wilson*, while expressly disapproving of the process, the court nonetheless held that the Public Service Commission, in delegating some authority to staff to draft a revised supplemental service rider, did not inappropriately forfeit its statutory duties, because it properly set forth the conditions which it expected to see in the revised supplemental service rider. 567 So. 2d at 892. Thus, the staff was merely carrying out a ministerial task to see that these conditions were met in the revised supplemental service rider. The court found that all of the conditions which were set forth for approval of the revised supplemental service rider were addressed by the staff, so they did not exceed the scope of the ministerial duties which had been assigned to them. *Id.*

28. *Cf. Jarrell v. State*, 576 So. 2d 793, 794 (Fla. 2d Dist. Ct. App. 1991) (The court, in dicta, noted that a statute which imposed mandatory consecutive sentences for some offenses was not an unconstitutional invasion of the core judicial function by the legislature.). The legislature is also prohibited from usurping the authority of the executive branch. In *Chiles v. Public Service Commission Nominating Council*, 573 So. 2d 829, 832-33 (Fla. 1991), the court noted that the Public Service Commission was a legislatively created entity exercising legislative powers, and the statute governing the selection of individuals to fill unexpired terms on the Public Service Commission did not encroach upon the governor's constitutional appointment powers in such cases. See FLA. CONST. art. IV, § 1(f); *Chiles v. Children A, B, C, D, E, & F*, 16 Fla. L. Weekly S699 (Fla. 1991) (McDonald, J., dissenting) (In part, the argument was over whether budget reductions required by a shortfall in revenue was a legislative or executive function.).

and *Loan Ass'n v. Kirian*,<sup>29</sup> the court found that a statute requiring the severance of counterclaims for a separate trial in a foreclosure action concerned a procedural matter.<sup>30</sup> The court noted that practice and procedure matters concern the method of conducting litigation, not the establishment or regulation of rights or elements of a cause of action.<sup>31</sup> The court held that the procedural aspects of the statute were unconstitutional to the extent they were inconsistent with rules adopted by the Florida Supreme Court which made severance of a counterclaim a matter within the trial judge's discretion.<sup>32</sup>

Of course, these same principles prohibit the courts from exercising the core functions of other branches, but the precise lines of what constitutes core functions has not always been clear. This is especially so in light of the substantive law—practice and procedure dichotomy. In *State v. Florida Police Benevolent Ass'n*,<sup>33</sup> the court observed that the separation of powers doctrine did not “preclude[] the judicial branch from addressing the constitutionality of the acts of the other branches” of government.<sup>34</sup> The court noted that no special policy reasons, based upon separation of powers concerns, existed for excluding appropriation legislation from the power of the judiciary to determine the constitutionality of legislation.<sup>35</sup> In *Conley v. Boyle Drug Co.*,<sup>36</sup> the

29. 579 So. 2d 730 (Fla. 1991).

30. The court rejected the argument that this statute concerned substantive rights, because it offered greater protection to mortgage lenders. The court found no evidence that the legislature believed it was substantially altering the rights of the mortgage lenders. Rather, the legislative history demonstrated that this statute was adopted as a mere administrative convenience for the mortgage lenders. *Id.* at 733; see FLA. STAT. § 702.01 (1989).

31. *Kirian*, 579 So. 2d at 732.

32. *Id.* at 732-33; accord *Curenton v. Chester*, 576 So. 2d 969, 970 (Fla. 5th Dist. Ct. App. 1991) (following *Milton v. Leapai*, 562 So. 2d 804 (Fla. 5th Dist. Ct. App. 1990)); *In Re Adoption of a Minor Child*, 570 So. 2d 340, 342 (Fla. 4th Dist. Ct. App. 1990) (harmonizing a statutory time limit with the Florida Rule of Appellate Procedure); *Milton v. Leapai*, 562 So. 2d 804, 807 (Fla. 5th Dist. Ct. App. 1990) (time frame established in settlement offer statute was procedural, and encroached on the Florida Supreme Court's rule making authority).

33. 580 So. 2d 619 (Fla. 1st Dist. Ct. App. 1991) (per curiam).

34. *Id.* at 620.

35. *Id.*; see *Chiles*, 16 Fla. L. Weekly at S699. *But see* *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Cir. Public Defender*, 561 So. 2d 1130, 1136 (Fla. 1990) (strongly asserting that judicial review of appropriation statutes should be limited to law making procedural issues, and not reach the merits of the appropriation decisions.); *Department of Health and Rehabilitative Serv. v. Brooke*, 573 So. 2d 363, 368-71 (Fla. 1st Dist. Ct. App. 1991) (expressing great doubt about

court further noted that the common law process of evolving tort remedies in light of new experiences and circumstances did not impermissibly invade the legislative function of regulating the elements of causes of action.<sup>37</sup>

### C. *Accountability: Was the Agency Acting Within the Scope of Its Authority*

The general rule is that administrative agencies may not exercise any powers not expressly delegated to them, nor exceed the scope of the authority delegated to them by the legislature. If administrative agencies exceed their limited authority or powers, then their actions are ultra vires. However, the courts have recognized that there are some limited circumstances when an administrative agency can successfully claim some implied powers not explicitly provided for in the enabling statute. During the survey period, the courts consistently rejected such claims and reinforced the limited scope of this exception due to the possibility that it could be used to impermissibly enlarge or modify the scope of authority delegated to an administrative agency.<sup>38</sup> As the

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the courts reviewing budgetary decisions the legislature delegated to the executive branch). *cf.* Florida Assoc. of Counties, Inc. v. Department of Admin., 580 So. 2d 641, 644 & n.9 (Fla. 1st Dist. Ct. App. 1991) (rejecting any strong presumption that non-contemporaneous interpretation of constitutional provisions by implementing legislation was constitutionally correct).

36. 570 So. 2d 275 (Fla. 1990).

37. *Id.* at 283-84.

38. The implied power argument cannot be used to expand the scope of authority delegated to an administrative agency. It can only be "used to provide additional powers for implementing agency policy in an area already clearly within its delegated area of authority. Burriss III, *supra* note 4, at 594; *see* Rabren v. Department of Professional Regulation, 568 So. 2d 1283, 1288-89 (Fla. 1st Dist. Ct. App. 1990) (concluding that while the statute does not specifically authorize the Board of Commissioners to adopt policy through its exercise of adjudicatory power, it is an appropriate implied power incident to its authority to enter orders as part of its disciplinary actions.). *But see* Willner v. Department of Professional Regulation, 563 So. 2d 805, 806-07 (Fla. 1st Dist. Ct. App. 1990) (The court noted that an order containing a requirement of a payment of \$60,000 to the Department of Legal Affairs for Consumer Protection Activities was an unlawful administrative penalty. While the Department of Professional Regulation was delegated authority by the Florida legislature to impose conditions on any grant of probation, it was a "general grant of authority to the . . . Department of Professional Regulation, lacking in sufficient specificity to evince a legislative intent to authorize . . . [the Department of Professional Regulation] to exact monetary penalties as conditions of probation." (emphasis in original)).

court noted in *Department of Environmental Regulation v. Puckett Oil Co.*,<sup>39</sup> when an administrative agency files an untimely response to a petition, the hearing officer cannot use his or her discretionary authority to grant or deny permission to file an untimely response as a means of sanctioning the agency for failing to strictly adhere to the rules.<sup>40</sup> Hearing officers have not been delegated authority to impose such sanctions in any case other than enforcement of discovery orders or "failure to comply with the pleading requirements of the statute."<sup>41</sup> Even the power to impose sanctions in the case of discovery orders was limited.<sup>42</sup> Hearing officers cannot dismiss a petition or otherwise functionally deprive a party of its right to a hearing as a means of enforcing a discovery order.<sup>43</sup>

In *Cataract Surgery Center v. Health Care Cost Containment Board*,<sup>44</sup> the court held that the administrative rules<sup>45</sup> proposed by the Health Care Cost Containment Board concerning the "collection of data from freestanding ambulatory surgery centers"<sup>46</sup> were an invalid

39. 577 So. 2d 988 (Fla. 1st Dist. Ct. App. 1991).

40. The court stated:

[N]o statutory authority, either expressly or reasonably implied therefrom, empowering DOAH to set a jurisdictional time limitation on the right of an agency to respond to a petition for fees and costs. To the contrary, we consider that the division's power to permit a late-filed response is reasonably implied from the very statutes that rule 22I-6.035 referenced as authorizing its adoption: Section 120.57, Florida Statutes (1989), specifically subsection (1)(b)4, authorizing parties "to respond, to present evidence and argument on all issues," and sections 57.111(4)(c) and (d), allowing a state agency against which a small business party has prevailed to oppose an application for attorney's fees and costs by affidavit, and requiring the hearing officer to conduct an evidentiary hearing on the application. Clearly the two statutes, which the rule was designed to implement, imply that the agency shall be given a fair opportunity to defend against an application for fees and costs. We find nothing in the statutes reasonably suggesting that if an agency fails to comply with the time limitations required for its response, a summary final order, regardless of any mitigating circumstances, must thereafter be entered.

*Id.* at 992.

41. *Id.* at 993.

42. *Id.* at 992-93.

43. *Id.* at 993.

44. 581 So. 2d 1359 (Fla. 1st Dist. Ct. App. 1991).

45. The challenged proposed rules were 10N-6.002-06. See FLA. STAT. § 120.54(4) (1989) (permits challenges to proposed rules as ultra vires acts); FLA. ADMIN. WEEKLY 1378-83 (March 23, 1990).

46. *Cataract Surgery Ctr.*, 581 So. 2d at 1360.

exercise of the authority delegated to it by the legislature. The Board claimed that the proposed rules were designed to enable it to collect the data necessary for advising the legislature and the Governor on what impact the shift from institutional to ambulatory care was having on health care costs.<sup>47</sup> The court noted that “[a]ny attempt by an [administrative] agency to extend or enlarge its jurisdiction beyond its statutory authority . . . [must] be declared . . . invalid.”<sup>48</sup> In order to assure that administrative agencies do not exceed its delegated authority the courts must independently evaluate an administrative agency’s claim that it was acting within the scope of its delegated authority.<sup>49</sup> In reviewing the statutes to determine the scope of an administrative agency’s authority, the courts must look not only at the specific statutory sections cited by the administrative agency, but also at the whole statutory scheme which the administrative agency was delegated authority to administer.<sup>50</sup>

The court characterized the rule making authority delegated to the Health Care Cost Containment Board as limited to where other specific sections of the statute “confer such rulemaking power.”<sup>51</sup> The court

47. *Id.*; see FLA. STAT. §§ 407.03, .07-.08 (1990).

48. *Cataract Surgery Ctr.*, 581 So. 2d at 1361.

49. See *Cataract Surgery Ctr.*, 581 So. 2d at 1360-61 (characterizing the judicial review process as only slightly different from the usual deferential approach to an administrative agency’s interpretation of its enabling statute); *Burris III*, *supra* note 4, at 590-94.

50. *Cataract Surgery Ctr.*, 581 So. 2d at 1360-61. In doing so, the court assumes it is authorized to examine other statutory sections not noticed in the rule making process as the source of the administrative agency’s rule making authority for the proposed rule. This opens up the possibility that a defective notice of a proposed rule, because it failed to state the appropriate source of statutory authority, could be saved by the court noting the appropriate statutory section during the judicial review process and declaring the defect in the notice to be harmless error.

51. *Id.* at 1361. Compare FLA. STAT. § 407.03(1) (1989) (“Adopt, amend, and repeal rules respecting the exercise of the powers conferred by this chapter which are applicable to the promulgation of rules.”) with *Florida Beverage Corp. v. Wynne*, 306 So. 2d 200, 202 (Fla. 1st Dist. Ct. App. 1975)

Where the empowering provision of a statute states simply that an agency may “make such rules and regulations as may be necessary to carry out the provisions of this Act,” the validity of regulations promulgated thereunder will be sustained so long as they are reasonably related to the purposes of the enabling legislation, and are not arbitrary or capricious.”

Although not explicitly considered by the court, the APA provision that “[n]o agency has inherent rulemaking authority” may have influenced how the court read these statutory provisions. FLA. STAT. § 120.54(15) (1989).

rejected the claim that the Board was granted general rule making authority in all areas addressed in its enabling statute. The court also rejected the Board's claim that other statutory provisions<sup>52</sup> authorized it to promulgate these information gathering rules. The court found that when those statutory provisions were read in conjunction with the rest of the enabling act<sup>53</sup> it was clear the legislature intended that these information gathering provisions should apply only to hospitals and nursing homes.<sup>54</sup> The court observed that the only time any meaningful mention was made of ambulatory care facilities in the statute was in the section of the statute that required the Health Care Cost Containment Board to report to the legislature and the governor on the impact the shift from institutional to ambulatory care may have on health care costs. Without more than this mere mention of ambulatory care facilities, the court "decline[d] to infer that an [administrative] agency may require detailed and expensive reporting from any business which may have information relevant to the agency's purpose in situations where the agency is given no other regulatory authority, and where there is no specific legislative authority to require the collection of such data."<sup>55</sup>

*Board of Trustees of Internal Improvement Trust Fund v. Board of Professional Land Surveyors*<sup>56</sup> concerned the issue of whether a proposed rule was within the scope of authority delegated to an administrative agency by the legislature.<sup>57</sup> The Board of Professional Land Surveyors proposed rules designed to establish a uniform system for determining the ordinary high water line or mark used in determining the "demarcation between privately-owned uplands and sovereign submerged lands."<sup>58</sup> After a hearing was held, the hearing officer entered a final order finding "most of the contested rules invalid but concluding that certain specified rules constituted a valid exercise of the Board of

52. FLA. STAT. § 407.03, .07-.08 (1989).

53. See FLA. STAT. §§ 407.02, .025, .05, .09 (1989) (information gathering concerning hospitals); FLA. STAT. §§ 407.30-.34 (1989) (information gathering concerning nursing homes).

54. "Chapter 407 provides a detailed framework of regulation and reporting requirements for hospitals and nursing homes, but there is no indication of legislative intent to allow the [Health Care Cost Containment Board] to exercise jurisdiction over freestanding ambulatory surgery centers." *Cataract Surgery Ctr.*, 581 So. 2d at 1362.

55. *Id.* at 1363.

56. 566 So. 2d 1358 (Fla. 1st Dist. Ct. App. 1990).

57. FLA. STAT. § 120.54(4) (1989) (permits challenges to proposed rules as ultra vires acts).

58. *Board of Professional Land Surveyors*, 566 So. 2d at 1359.

Surveyors' delegated legislative authority."<sup>59</sup>

The court held that all of the proposed rules were ultra vires acts, because they exceeded the statutory authority delegated to the Board of Professional Land Surveyors by the legislature. The legislature delegated to the Board the power to promulgate rules concerning the minimum technical standards designed "to ensure that surveys are accurately measured, complete, and of sufficient quality *in those respects* to provide legally defensible real property boundaries."<sup>60</sup> The legislature never delegated to the Board of Surveyors the power

to define any . . . fixed point [such] as the ordinary high water line or to circumscribe thereby the legal consequences that flow from the fixing of such a point. The determination of rights of parties to a riparian boundary dispute is instead a matter subject ultimately to judicial resolution under all applicable law.<sup>61</sup>

The Board was limited to promulgating rules which assured that the boundary lines for riparian property are properly recorded by surveyors. The Board was never delegated the authority to promulgate these proposed rules, even if they did precisely recodify the case law concerning the drawing of a line between privately owned land and sovereign submerged land.<sup>62</sup> It is clear, in light of the limited scope of authority delegated to the Board, that the court correctly concluded that this was a classic case of an administrative agency acting beyond the scope of its delegated authority.<sup>63</sup>

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59. *Id.* The hearing officer held that some of the rules were an invalid exercise of delegated authority, because "they did not precisely restate or embody the case law of Florida relating to the scope of sovereign submerged land ownership and the concept of ordinary high water line." *Id.* at 1360. Conversely, those few rules which the hearing officer found to be a valid exercise of delegated authority were an accurate restatement of the decisions of Florida courts concerning the determination of the ordinary high water line. *Id.*

60. *Id.* at 1361 (emphasis in original).

61. *Board of Professional Land Surveyors*, 566 So. 2d at 1361.

62. *Id.* The court specifically noted that it was not passing on the hearing officer's determination of whether the administrative rules properly or improperly restated the case law in Florida concerning where the ordinary high water mark should be located. *Id.*

63. "If an [administrative] agency has exceeded its grant of rule making authority or if the rule enlarges, modifies, or contravenes the specific provisions of law implemented, such infractions are among those requiring a conclusion that the proposed rule is an invalid exercise of delegated legislative authority." *Id.* at 1360.



In *Browning v. Department of Business Regulation*,<sup>64</sup> the court held that the Division of Florida Land Sales, Condominiums and Mobile Homes had exceeded the scope of its delegated authority in attempting to enforce contractual rescission agreements between a developer and purchasers.<sup>65</sup> The Division was authorized by statute to seek and enforce cease and desist orders, impose civil penalties and invoke other appropriate remedies as authorized by Florida Statutes chapter 498.

In this case, the Division of Florida Land Sales, Condominiums and Mobile Homes had successfully entered an order compelling the developer, Browning, to offer all purchasers a right of rescission:

It is apparent . . . that once the developer has made an agreement to rescind with the purchaser, the applicable provisions of Chapter 498 denominate the purchaser as the proper party to resort to court action to enforce the agreement for rescission. The prevailing purchaser is protected against the expense of attorney's fees and litigation costs incurred in such action. Chapter 498 does not contain authority for the Division to file suit in court to compel the consummation of an agreement for rescission made between the purchaser and the developer, and to so construe its provisions would exceed the authority delegated to the Division by statute. [Administrative a]gencies do not have the inherent power to enforce private consumer remedies unless that authority is clearly apparent from the statutes.<sup>66</sup>

Nothing in the final judgment indicated that the Division "ha[d] authority to compel consummation of the rescission agreement on behalf of a lot purchaser after he accepted Browning's offer to rescind. Nor could the judgment validly have so provided, as such a provision would ac-

64. 574 So. 2d 188 (Fla. 1st Dist. Ct. App. 1991).

65. The court stated:

[T]he only issue we must decide is whether the trial court, on an application to enforce judgment by its contempt proceedings, is authorized to compel the developer to refund the purchase price to the rescinding purchasers or whether each purchaser must personally seek enforcement before the court once they have accepted the developer's offer to rescind. Resolution of this issue depends on the nature and extent of the remedy of rescission upon which the [administrative] agency order and, consequently, the final judgment was entered in this case.

*Id.* at 192.

66. *Id.* at 193.

cord to the Division powers beyond that authorized by statutes.”<sup>67</sup> In this case, Browning complied with the administrative order. He did so by “offering rescission and entering into private rescission agreements with those accepting that offer, enforcement of these private agreements remains up to the purchaser as authorized in [section] 498.061.”<sup>68</sup> Accordingly, the circuit court did not have authority to grant the Division of Florida Land Sales, Condominiums and Mobile Homes’ request that the court use contempt powers to enforce the rescission agreements reached between Browning and the purchasers.<sup>69</sup>

In *Schiffman v. Department of Professional Regulation*,<sup>70</sup> the court held that the Board of Pharmacy exceeded its delegated authority when it attempted through a nonrule policy to permanently bar Schiffman from petitioning for reinstatement of his license as a pharmacist.<sup>71</sup> The court relied upon *Beam Distilling Co. v. Department of Professional Regulation*,<sup>72</sup> which interpreted a similar statute that regulated the licensing of nurses, in reading the statute as having only delegated

67. *Id.* at 194. The court noted that if the Division of Florida Land Sales, Condominiums and Mobile Homes was concerned that the developer would not comply with the rescission agreements, then it should have required the developer to establish a trust fund for that purpose. *Id.* at 194 n.2.

68. *Browning*, 574 So. 2d at 194.

69. *Id.* The court noted that,

the circuit court in this case was empowered to decline enforcement of any conditional penalty imposed by the . . . [Division of Florida Land Sales, Condominiums and Mobile Homes] order that it found was inappropriate in view of the circumstances shown to exist at the time the matter came before it, including changes that occurred since the administrative order had been entered.

*Id.* The circuit court had the power to do this, because it was expressly authorized by statute to determine whether the penalty imposed was appropriate. Such is not the case when an administrative order is being reviewed by an appellate court. Compare FLA. STAT. § 120.69(5) (1989) with FLA. STAT. § 120.68 (1989). When the circuit court exercised this power, then the standard of judicial review for an appellate court was “whether the [circuit] court abused its discretion under the circumstances shown by the evidence.” *Browning*, 574 So. 2d at 195. Clearly, the circuit court had the authority to determine whether Browning still had the means to carry out the rescission imposed by the administrative order.

The court also noted that in appellate review of a contempt citation order issued to enforce an administrative order, the decision of the circuit court to impose or deny the contempt request should only be overturned when it is clearly erroneous. *Id.* at 195.

70. 581 So. 2d 1375 (Fla. 1st Dist. Ct. App. 1991).

71. See *infra* notes 259-97 and accompanying text (discussion of nonrule policy issues).

72. 530 So. 2d 450 (Fla. 1st Dist. Ct. App. 1988).

to the Board of Pharmacy the power to regulate pharmacist licensing for the purpose of protecting the public from those who are not qualified to practice the profession. This legislative purpose was not furthered by permanently banning a rehabilitated and qualified individual from seeking reinstatement of his license. The court made it clear that any attempt by the Board of Pharmacy to impose such a sanction, whether by nonrule policy or by administrative rule, would be an act beyond its delegated authority.<sup>73</sup>

In *Department of Natural Resources v. Wingfield Development Co.*,<sup>74</sup> the court considered whether the Department of Natural Resources rules<sup>75</sup> concerning what constitutes "under construction" were a valid exercise of delegated authority.<sup>76</sup> The administrative rules provided that a project was considered under construction as long as there was continuous physical activity on the project and no period of inactivity longer than six months. The court found that these requirements imposed by administrative rules were an invalid exercise of delegated legislative authority.<sup>77</sup> The statute specifically exempted from the requirements associated with a coastal construction control line any project under construction prior to its establishment. The statute permitted the Department of Natural Resources to make a determination of whether a project was under construction only once—at the time it established the coastal construction control line. The statute did not authorize the Department to continually reexamine the question of whether an exempt project was under construction. Because the administrative rules, especially as interpreted by the Department, authorized such a continual process of review, they were an ultra vires exercise of delegated authority that "enlarge[d] and modifie[d]" the scope of authority delegated to the Department by the legislature.<sup>78</sup> The legislature must act before the Department can impose such a scheme on exempt projects.<sup>79</sup>

73. *Schiffman*, 581 So. 2d at 1379.

74. 581 So. 2d 193 (Fla. 1st Dist. Ct. App. 1991).

75. FLA. ADMIN. CODE r.16B-33.002(56), .004(1) (1991).

76. *Wingfield Dev. Co.*, 581 So. 2d at 197. The court also considered a nonrule policy issue. See *infra* notes 291-97 and accompanying text.

77. *Wingfield Dev. Co.*, 581 So. 2d at 197.

78. *Id.* at 198; see FLA. STAT. § 120.52(8)(c) (1989).

79. Judge Schwartz argued, in his dissent, that the term "under construction," as used in the statute, envisioned an ongoing process of review to determine if the exemption from the coastal construction control line permit requirements was justified. He concluded that the legislature could not have intended for the statute to allow a con-

The decisions in *Puckett Oil Co.*, *Cataract Surgery Center*, *Board of Professional Land Surveyors*, *Browning*, *Schiffman*, and *Wingfield Development Co.* are examples of courts independently evaluating the question of whether administrative agencies have appropriately limited themselves to those powers specifically delegated and reasonably implied from the statutory scheme.<sup>80</sup> The non-deferential approach to judicial review in this area is designed to assure that the ultra vires doctrine does not become as ineffective a check on the exercise of discretion claimed by administrative agencies as the delegation doctrine has on the scope of discretionary authority the legislature can delegate to administrative agencies.<sup>81</sup>

#### D. *Procedural Due Process*<sup>82</sup>

The constitutional guarantee of procedural due process is designed to assure that the government does not arbitrarily deprive a person of a constitutionally protected liberty or property interest. This is accomplished by requiring the government, in many cases, to provide an individual with an opportunity for a hearing to determine the validity of the government's decision.<sup>83</sup>

The initial issue in all cases involving procedural due process claims is whether a constitutionally protected liberty or property interest is at stake which requires some type of hearing. If no such interest is at stake, then procedural due process requirements do not constrain the government's ability to act. The process of identifying a constitutionally protected liberty interest is a relatively easy task, because it usually involves a determination of whether a fundamental right such

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tractor to remain secure in its exemption by "merely begin[ning] construction on the day before the line . . . [was] fixed, cease [construction] the day after, and wait, presumably for decades, until it secure[d] financing to complete the structure." In rejecting this absurd result the Department of Natural Resources merely interpreted the statute in a reasonable manner. The court should defer to such a reasonable interpretation. *Wingfield Dev. Co.*, 581 So. 2d at 199 (Schwartz, J., dissenting); see *infra* 576-83 and accompanying text (discussion of when courts should defer to an interpretation of a statute adopted by an administrative agency).

80. See *infra* notes 126-32 and accompanying text.

81. See Burris III, *supra* note 4, at 590-94.

82. See generally FLORIDA ADMINISTRATIVE PRACTICE § 1.21-1.46 (The Florida Bar 3d ed. 1990)

83. Of course the government may statutorily grant hearings in cases when none would be required by the Florida or United States Constitutions. *E.g.*, FLA. STAT. § 120.54(3), (4) (1989).

as freedom of speech or privacy is at stake in the governmental decision making process.<sup>84</sup> However, determining whether a constitutionally protected property interest exists is more complex, because it turns on whether state laws or procedures recognize a property interest of constitutional magnitude:

Property interests . . . are not created by the Constitution. [T]hey are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law-rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.<sup>85</sup>

On this basis, state law or governmental conduct only creates a constitutionally protected property interest when the *Roth/Sindermann* mutuality of expectation test is satisfied:<sup>86</sup> "To have a property interest in a [governmental] benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must . . . have a legitimate claim of entitlement to it."<sup>87</sup> "A legitimate entitlement is established (1) by the state's unilateral promise of benefit in its laws or administrative rules or (2) by the conduct of the state and the individual which creates 'mutually explicit understandings that support . . . [the] claim of entitlement.'"<sup>88</sup> In two cases during the survey period, Florida courts apparently used these principles in finding there was or was not a constitutionally protected interest at stake. What was remarkable about these cases was not their outcomes, but rather, that the courts did not make explicit reference to these well-established principles in resolving the issues in

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84. *Burris I*, *supra* note 4, at 323 n.167. However, in some circumstances even the determination of whether a constitutional protected liberty interest was at stake can be difficult, because the degree of deprivation may not be sufficient to persuade the court that an invasion of a constitutionally protected liberty interest occurred. *Compare Wisconsin v. Constantineau*, 400 U.S. 433 (1971) *with* *Ingraham v. Wright*, 430 U.S. 651 (1977); *Paul v. Davis*, 424 U.S. 693 (1976).

85. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see Perry v. Sindermann*, 408 U.S. 593, 600-01 (1972) (patterns of conduct between the parties can establish a constitutionally protected property interest); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985).

86. *Roth*, 408 U.S. at 564; *Sindermann*, 408 U.S. at 593.

87. *Roth*, 408 U.S. at 577.

88. *Burris III*, *supra* note 4, at 595 (quoting *Sindermann*, 408 U.S. at 601.). This standard is not always easily satisfied. *See, e.g., Bishop v. Wood*, 426 U.S. 341 (1976).

this area.<sup>89</sup>

In *Spiegel v. University of South Florida*,<sup>90</sup> the court found that the University of South Florida's contract with Dr. Spiegel, providing that he was to be Chair of the Department of Orthopedics and Rehabilitation, was sufficient to create a constitutionally protected property right.<sup>91</sup> The court noted that his removal from that position might well stigmatize him and harm his reputation and ability to obtain employment in other places. The court considered this to be an infringement on his constitutionally protected liberty interests.<sup>92</sup> Therefore, he was entitled to a hearing prior to being deprived of this benefit. The court ordered him reinstated as Chair of the Department, but left the door open for the University to try to remove him after it gave him notice and an opportunity to be heard.<sup>93</sup>

In *Van Poyck v. Dugger*,<sup>94</sup> the court recognized that a prisoner had a constitutionally protected liberty interest<sup>95</sup> "in not being arbitrarily removed from the general prison population,"<sup>96</sup> and placed in a high security cell under twenty-four hour lockdown status.<sup>97</sup> Because Van Poy, in his habeas corpus petition alleged that no administrative hearing was ever held, the court held that the trial court must hold an evidentiary hearing to determine whether the prison officials acted arbitrarily in placing Van Poyck in special confinement or whether it was done for legitimate penological reasons.<sup>98</sup>

89. See *Florida Sugar Cane League v. State*, 580 So. 2d 846, 851 (Fla. 1st Dist. Ct. App. 1991).

90. 555 So. 2d 428 (Fla. 2d Dist. Ct. App. 1989).

91. *Id.* at 429.

92. *Id.*; see *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (constitutionally protected liberty interest at stake in cases of reputational injury). *But see Paul v. Davis*, 424 U.S. 693 (1976) (such harms will not be assumed to exist, they must be alleged, and if disputed, proved).

93. *Spiegel*, 555 So. 2d at 429-30.

94. 582 So. 2d 108 (Fla. 1st Dist. Ct. App. 1991).

95. The court also recognized that the conduct of the prison officials could constitute an unconstitutional form of cruel and unusual punishment. *Id.* at 109.

96. *Id.*

97. Because Van Poyck was sentenced to death for murdering a correctional officer while aiding in a prison escape, the relevant prison population was death row. However, death row prisoners were not normally subject to the special administrative treatment Van Poyck was receiving. *Id.*

98. See *Id.* at 109-10. The right to such a hearing is dependent on state law creating constraints on the discretion of prison officials in making such decisions. If there are none, then there is no need to hold a hearing. See *Meachum v. Fano*, 427 U.S. 215 (1976).

If the court finds there was a constitutionally protected liberty or property interest at stake, it must determine whether the procedural protections, if any, provided by the state were constitutionally sufficient. Perhaps the relatively few cases addressing the threshold issue of whether a constitutionally protected interest was at stake, and the conclusory analysis applied by the courts when ignoring these established doctrinal inquiries, can be explained by the fact that courts and the State of Florida generally are willing to concede the existence of such an interest, and focus primarily on whether the procedural process offered was constitutionally sufficient.<sup>99</sup> The nature of the constitutionally mandated procedural due process protection will vary depending on the context. In *Mathews v. Eldridge*,<sup>100</sup> the Supreme Court formally adopted a balancing approach to this question:

More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>101</sup>

During the survey period, the courts decided only a few cases concerning the constitutional adequacy of the procedure provided by the state. Again, as in other survey periods, "[w]hat is remarkable about these is not the results in each instance, but the fact that the courts ignored the *Mathews v. Eldridge* paradigm for deciding such questions."<sup>102</sup>

Clearly, if no hearing was held, either pre- or post-deprivation, of a constitutionally protected property or liberty interest, then a violation

99. The decline in the number of cases which raised significant procedural due process issues could also be attributed to the limited success such claims have had in the appellate courts at both the state and federal levels. See, e.g., JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 30 & n.80 (1985).

100. 424 U.S. 319 (1976).

101. *Id.* at 334-35.

102. *Burris III*, *supra* note 4, at 597. See, e.g., *Florida Sugar Cane League v. State*, 580 So. 2d 846, 851 (Fla. 1st Dist. Ct. App. 1991); *Conservancy, Inc. v. A. Vernon Allen Builder, Inc.*, 580 So. 2d 772, 774 (Fla. 1st Dist. Ct. App. 1991); *J.B. Coxwell Contracting, Inc. v. Department of Transp.*, 580 So. 2d 621, 624 (Fla. 1st Dist. Ct. App. 1991).

of the constitutional guarantee of procedural due process has occurred.<sup>103</sup> But if an emergency exists, then a post-deprivation hearing may be all that procedural due process requires.<sup>104</sup> In *Garcia v. Department of Professional Regulation*,<sup>105</sup> the court summarily concluded that the provisions of the Administrative Procedure Act, governing the emergency suspension of professional licenses,<sup>106</sup> on their face did not violate the constitutional requirements of procedural due process.<sup>107</sup> While not explicitly stated by the court, this result occurred because in light of the emergency, the APA<sup>108</sup> offered an adequate post-deprivation remedy.

Procedural due process further requires that a party receive adequate notice of the charges so he or she may prepare a defense.<sup>109</sup> In *Willner v. Department of Professional Regulation*,<sup>110</sup> the court noted correctly that an administrative agency may not impose fines or other sanctions for violations which were not charged in an administrative complaint.<sup>111</sup> The court failed to explicitly set forth the reasons why a procedure which did not provide notice was constitutionally and statutorily defective, but it is clear that the APA<sup>112</sup> and the due process clauses of the Florida and United States Constitutions require such notice.<sup>113</sup>

Procedural due process also requires that a party have an opportunity to present his or her defense to an impartial decision maker.<sup>114</sup> In *Ridgewood Properties, Inc. v. Department of Community Affairs*,<sup>115</sup>

103. See *Brevard County v. Hammel*, 575 So. 2d 772 (Fla. 5th Dist. Ct. App. 1991).

104. See e.g., *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908).

105. 581 So. 2d 960 (Fla. 3d Dist. Ct. App. 1991).

106. FLA. STAT. §§ 120.54(9), .60(8) (1989).

107. *Garcia*, 581 So. 2d at 961.

108. FLA. STAT. §§ 120.50-73 (1989).

109. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970).

110. 563 So. 2d 805 (Fla. 1st Dist. Ct. App. 1990).

111. The court also noted that any attempt by an administrative agency to impose an enhanced fine structure for violations which occurred prior to the date that the new fine structure became applicable was a violation of the Ex Post Facto Clause of the United States and Florida Constitutions. *Id.* at 806; see U.S. CONST. art. II, § 10; FLA. CONST. art. I, § 10.

112. FLA. STAT. § 120.57(1)(b)(2) (1989).

113. U.S. CONST. amend. XIV, § 1; FLA. CONST. art. I, § 9.

114. *Goldberg*, 397 U.S. at 271; see *Burris I*, *supra* note 4, at 330-31.

115. 562 So. 2d 322 (Fla. 1990); see *Burris III*, *supra* note 4, at 596-97 (brief discussion of the decision by the First District Court of Appeal in this case).



the Florida Supreme Court considered a certified question from the First District Court of Appeal of whether it is "a violation of a party's due process rights in an administrative hearing for the head of a department to appear as an expert witness when that same department head later enters the final order in the case?"<sup>116</sup> The Department of Community Affairs notified Ridgewood Properties that it must submit a required impact statement for approval before proceeding with a planned office park development on a piece of property in Maitland, Florida. Ridgewood Properties responded that it did not need to file the required impact statement for two reasons.<sup>117</sup> At the administrative hearing, the Secretary of the Department of Community Affairs testified as an expert witness. He was the only witness for the Department of Community Affairs. The hearing officer relied upon his testimony in the recommended order to resolve disputed factual issues. The Secretary adopted as the final order essentially all of the findings of fact and conclusions of law in the hearing officer's recommended order.

The supreme court acknowledged that aggregation of functions in administrative agencies meant that the judicial model for an impartial decision maker in administrative hearings need not be followed. The aggregation of functions was not constitutionally fatal to an administrative agency head performing the role of impartial decision maker in most cases.<sup>118</sup> However, this was anything but a normal case. The court characterized the role played by the Secretary of the Department of Community Affairs as that of "prosecutor, witness, and ultimate judge of the facts and the law. Most significantly, . . . [the] Secretary . . . necessarily passed upon his own evidence."<sup>119</sup> To approve the hearing

116. *Ridgewood Properties, Inc.*, 562 So. 2d at 322.

117. First, "the development rights in the land had vested prior to the passage of the [Development of Regional Impact] Statute" so this new statutory requirement should not govern the development of the land. *Id.* Second, the Department of Community Affairs' policies concerning when a landowner must file a development regional impact statement for approval were unpromulgated rules found in a series of letters to other developers, and were invalid because they had never been adopted as administrative rules, as required by the APA. *Id.* at 322-23 & n.2.

118. Combination of "the fact-seeking and judicial functions in the same office does not automatically violate due process." *Id.* at 323. Nor would such a combination violate the principle of separation of powers. *See, e.g., McDonald v. Department of Banking & Fin.*, 346 So. 2d 569 (Fla. 1st Dist. Ct. App. 1977); *Florida Motor Lines, Inc. v. Railroad Comm'rs*, 129 So. 876 (Fla. 1930).

119. The court noted that the Secretary of the Department of Community Affairs had "signed the notice of violation," "was in charge of the attorneys prosecuting the alleged violation," "was the Department's only witness in its case in chief," "re-

officer's findings of fact and conclusions of law, he had to conclude that his own testimony was competent and substantial.<sup>120</sup> Even with the best of intentions, this can hardly be characterized as an unbiased, critical review."<sup>121</sup> Rather, it was clear the Secretary had a predisposition to reject the contravening evidence and this deprived him of the attributes of an impartial decision maker as required by the procedural due process clauses of the Florida and United States Constitutions. As a general rule, if the head of an administrative agency testified at the hearing about a disputed material issue of fact, then the recommended order must be reviewed by a neutral third party, not the head of the administrative agency nor one of his employees.<sup>122</sup>

### 1. Access to Transcripts of Administrative Hearings

One final aspect of due process touched upon during the survey period concerned the availability of hearing transcripts. The APA provides that an administrative agency must maintain an accurate and complete account of all testimony and other evidence that makes up the record in a formal administrative hearing.<sup>123</sup> In two cases during the survey period, the Florida Supreme Court considered whether an indigent party in an administrative hearing had a statutory or constitutional right to a free transcript of the hearing so that he or she could seek judicial review of the decision by the administrative agency.<sup>124</sup>

*Gretz v. Florida Unemployment Appeals Commission*<sup>125</sup> con-

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viewed the hearing officer's findings," and "issued the final order." *Ridgewood Properties, Inc.*, 562 So. 2d at 323.

120. The Secretary of the Department of Community Affairs testified at the hearing over objections, and his testimony provided the only basis for finding competent, substantial evidence to support the position ultimately adopted in the final order, rejecting the contravening evidence offered by the opposing party. *Id.* at 324.

121. *Id.*; see also *McIntyre v. Tucker*, 490 So. 2d 1012, 1013 (Fla. 1st Dist. Ct. App. 1986).

122. *Ridgewood Properties, Inc.*, 562 So. 2d at 324 & n.4. The APA provides that when a head of an administrative agency has been disqualified from performing this review function, then the governor should appoint an individual not associated with the administrative agency to serve as a substitute decision maker. *Id.* at 324; See FLA. STAT. § 120.71 (1989).

123. FLA. STAT. §§ 120.57(1)(b)(6), (7) (1989); see FLA. STAT. § 120.57(2)(b) (1989) (nature of the record in an informal hearing).

124. Without a record, judicial review of an administrative order is, in most cases, precluded. See FLA. STAT. § 120.68(4) (1989).

125. 572 So. 2d 1384 (Fla. 1991).

cerned whether administrative rules<sup>126</sup> which required a person seeking unemployment compensation to pay a fee for the preparation of a transcript so that he or she could seek judicial review of the administrative agency's order was a valid exercise of the authority delegated to it by the legislature. The court found the rules were invalid because they were contrary to a provision in the enabling statute governing the unemployment compensation system.<sup>127</sup> The court read the statute as prohibiting the Unemployment Appeals Commission from charging fees for any service it provided.<sup>128</sup> This was very broad language designed to assure that claimants had adequate access to the unemployment compensation system.<sup>129</sup> The court reasoned that the duty imposed on administrative agencies by the APA to make transcripts available to a party upon request at no more than the actual cost of reproducing such transcript,<sup>130</sup> and the enabling statute which provided that Unemployment Compensation Appeals Commission may not charge a fee for its services,<sup>131</sup> established the actual cost of a transcript for claimants in an unemployment circumstance as zero.<sup>132</sup>

In *Smith v. Department of Health and Rehabilitative Services*,<sup>133</sup> the court considered the issue of whether a statute or the Florida Constitution required that an indigent party in a non-criminal administrative hearing was entitled to a free transcript of the administrative proceeding so that he or she could seek judicial review of the administrative order.<sup>134</sup> Prior to 1980, the courts interpreted Florida Statute section 57.081 as not granting an indigent party a right to a free transcript in either a judicial, civil, or an administrative proceeding.<sup>135</sup> In 1980, the legislature amended this statutory provision; how-

126. FLA. ADMIN. CODE. 38E-3.003(2), .009(3) (1991).

127. *Gretz*, 572 So. 2d at 1385; see FLA. STAT. § 443.041(2)(a) (1987).

128. Whether the service was mandated by statute or voluntarily undertaken did not matter. Both were covered under the statute. *Gretz*, 572 So. 2d at 1386.

129. *Id.*

130. FLA. STAT. § 120.571(1)(b)(6) (1985) (currently codified as FLA. STAT. § 120.57(1)(b)(7) (1987)); see *Gertz*, 572 So. 2d at 1386.

131. FLA. STAT. § 443.041 (1985).

132. *Gertz*, 572 So. 2d at 1386. "It is illogical to assume that the legislature prohibited charging the claimant for some fees in order to facilitate their ability to obtain judicial review, but intended to allow charging of a fee that would essentially prevent the claimant from pursuing that review." *Id.*

133. 573 So 2d 320 (Fla. 1991).

134. *Id.* at 321-22; FLA. CONST. art. I, § 9 (due process); FLA. CONST. art. I, § 21 (access to courts); FLA. STAT. § 57.081 (1985).

135. *Smith*, 573 So. 2d at 322; *Harrell v. Department of Health & Rehabilita-*

ever, the exact effect of the amendment was unclear.<sup>136</sup> The court found that the purpose of the statute was to assure that any indigent person before an administrative agency received the services of the justice system without charge. The obligation of an administrative agency to maintain a complete record of a proceeding<sup>137</sup> was one of those attributes of the justice system which section 57.081(1) meant to be available without charge.<sup>138</sup> "Thus, . . . [administrative] agencies must supply transcripts, and as indigents, the petitioners are entitled to receive them without charge."<sup>139</sup>

Concerning the due process claim, the court noted in dicta that there was no reason to read the Florida Due Process Clause differently from that in the United States Constitution. The United States Supreme Court in *Ortwein v. Schwab*,<sup>140</sup> found that requiring an indigent person to pay a modest filing fee was rationally related to off-setting the expense of operating a court system, and as such, it was not a violation of due process. The Florida Supreme Court saw no reason to distinguish between the payment of a modest filing fee and payment of the cost of a transcript. Thus, the court concluded that the indigent parties who had received an evidentiary hearing on their claims without cost would not "be constitutionally entitled to be furnished with a free transcript to assist in the prosecution of their appeals."<sup>141</sup> Essentially, this dicta invited the legislature to reconsider its statutory policy, by making it clear that there was no constitutional requirement compelling the current policy.

tive Servs., 361 So. 2d 715 (Fla. 4th Dist. Ct. App. 1978); *Bower v. Connecticut Gen. Life Ins. Co.*, 347 So. 2d 439 (Fla. 3d Dist. Ct. App. 1977).

136. *Smith*, 573 So. 2d at 322.

137. FLA. STAT. § 120.57(1)(b)(7) (1989).

138. The court believed this was a different rationale from *Gretz* which it read as limited to those circumstances where the legislature, by statute, had established the value of the service rendered in providing a transcript was zero. *Smith*, 573 So. 2d at 323.

139. *Id.* But see *id.* at 325 (McDonald, J., concurring in part and dissenting in part). The court also noted that this meant indigent parties seeking judicial review of an administrative hearing order had greater rights than when they were appealing from a trial court judgment in a civil case. The court noted that this disparity was a matter of legislative concern. *Id.*

140. 410 U.S. 656 (1973).

141. *Smith*, 573 So. 2d at 324; see *id.* at 325 (McDonald, J., concurring in part and dissenting in part). The court also noted that filing fees, or the costs incident to seeking judicial review such as preparing a transcript, would not be unreasonable restraints on the access to the courts. *Id.* at 323; see FLA. CONST. art. I, § 21.

Justice Ehrlich agreed with the majority's conclusion concerning the reading of section 57.081, but dissented from the majority's conclusion that there was no constitutional guarantee that an indigent party was entitled to a free transcript of an administrative proceeding so that he or she could seek judicial review of the administrative agency's order.<sup>142</sup> He noted that there was a critical distinction between the federal constitutional requirement of due process and the due process guarantee found in the Florida Constitution. The Florida Supreme Court has consistently held that when the legislature chooses an administrative decision process, it must also include a right to judicial review in order to satisfy the requirements of procedural due process.<sup>143</sup> Because judicial review of an administrative order can occur only if the transcript of the appropriate portions of the administrative hearing are available, the transcript becomes a necessary element of access to the judicial review process. An indigent person would be functionally prohibited from seeking judicial review unless there was a constitutional guarantee to a transcript of the proceedings; the majority erred in not so holding.<sup>144</sup>

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142. *Smith*, 573 So. 2d at 325 (Ehrlich, J., concurring in part and dissenting in part).

143. *Id.* (Ehrlich, J., concurring in part and dissenting in part) (citing *Scholastic Systems, Inc. v. Leloup*, 307 So. 2d 166 (Fla. 1974)).

144. *Id.* (Ehrlich, J., concurring in part and dissenting in part). Justice Ehrlich also believed that the right of reasonable access to courts guaranteed by the Florida Constitution would be denied if an indigent party did not have a transcript of the administrative proceeding made available at no charge. Without the transcript, an indigent party is deprived of any meaningful form of judicial review. When an indigent party wanted to seek judicial review but could not because of the cost of obtaining a transcript of the administrative hearing, then an unreasonable burden was placed on his or her right of access to the court system. Because the judicial review process provided for under the APA is the first opportunity for the individuals participating in an administrative process to have access to the courts, if they are deprived of a free transcript, they are deprived of all access to the courts. Such is not the case when individuals have access to a trial court as an initial matter, and the sole question is whether they should have access to an appellate review process. In such a case, the individual has had access to a court under the Florida Constitution, but in the case of an administrative hearing, such initial access does not occur until the appellate process. *Id.* at 326 (Ehrlich, J., concurring in part and dissenting in part).

## E. *Standing*<sup>145</sup>

### 1. Formal Administrative Hearing

There continues to be a substantial amount of litigation over whether a party has standing to invoke the APA formal hearing process.<sup>146</sup> Perhaps this is explained by the fact that standing constraints permit administrative agencies, and sometimes others, to avoid many difficult substantive issues.<sup>147</sup> Whatever the reason for the continued litigation of these issues, the test for judging when a person is entitled to a formal hearing is well-settled.<sup>148</sup> The two part test set forth in *Agrico Chemical Co. v. Department of Environmental Regulation*<sup>149</sup> for resolving standing issues remains the standard used by courts in determining whether a person has standing to request a formal hearing

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145. See generally Dore I, *supra* note 4; Dubbin & Dubbin, *supra* note 4; Burris III, *supra* note 4, at 601-06; Burris II, *supra* note 4, at 742; Burris I, *supra* note 4, at 334-43. In *City of Destin v. Department of Transportation*, the court held, in part, that the question of standing to invoke a formal hearing under the APA can be waived by an administrative agency failing to object on that basis in a timely fashion. 541 So. 2d 123, 127 (Fla. 4th Dist. Ct. App. 1989).

146. Any question concerning standing may be waived if a party failed to properly preserve the issue for judicial review. See *Florida Assoc. of Counties, Inc. v. Department of Admin.*, 580 So. 2d 641, 646 (Fla. 1st Dist. Ct. App. 1991); *Friends of the Hatchineha, Inc. v. Department of Env'tl. Regulation*, 580 So. 2d 267, 270 (Fla. 1st Dist. Ct. App. 1991) (by implication).

147. Cf. *Amalgamated Transit Union, Local 1267 v. Benevolent Assoc. of Coachmen, Inc.*, 576 So. 2d 379 (Fla. 4th Dist. Ct. App. 1991) (*per curiam*). In *Amalgamated*, the court concluded that the Florida Public Employees Relation Commission improperly permitted the Benevolent Association of Coachmen, Inc. to initiate a complaint against Broward County's Division of Mass Transit concerning the collection of a special assessment from employees' wages. The court reached this decision, because the Association of Coachmen failed to allege, establish, or approve that it was being harmed, or that its members were being harmed by the alleged unlawful special assessments. The court noted that while the record in this case properly established the special assessment was in fact illegal, because the action was brought by a party who lacked standing, the decision of the Florida Public Employees Relation Commission must be reversed. *Id.* at 380.

148. A party is entitled to a formal hearing under the APA if "the substantial interests of a party are determined by an agency . . . whenever the proceeding involves a disputed issue of material fact." FLA. STAT. § 120.57 (1989). The formal hearing requirement does not govern student disciplinary action in the state universities. FLA. STAT. § 120.57(5) (1989).

149. 406 So. 2d 478 (Fla. 2d Dist. Ct. App. 1981), *rev. denied*, 415 So. 2d 1359 (Fla. 1982).

under section 120.57. This test requires that a party,

must show (1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.<sup>150</sup>

After a person has established that he or she standing, then he or she must also allege and prove that there is a disputed issue of material fact to resolve before an administrative agency is required to hold a formal hearing.<sup>151</sup> Two cases which applied this test in determining standing issues during the survey period are worthy of special note.

*Town of Palm Beach v. Department of Natural Resources*<sup>152</sup> concerned the decision by the Department of Natural Resources that no permit was needed for the 2000 Condominium to carry out its plan for trimming and maintenance activities of salt water resistant dune vegetation on property located seaward of the coastal construction control line.<sup>153</sup> The two adjacent property owners<sup>154</sup> and the Sierra Club<sup>155</sup> challenged this decision, and petitioned for a hearing under section 120.57 to resolve the dispute. The Department of Natural Resources denied the petition, holding that these parties "lacked standing to request a formal hearing because they had failed to show a substantial interest in the outcome of the hearing . . . [as they] had failed to show how they were affected by the Department [of Natural Resources'] determination of its jurisdiction."<sup>156</sup>

150. *Id.* at 482.

151. FLA. STAT. § 120.57 (1989). If there is no disputed material factual issue, then the person is entitled only to an informal hearing. FLA. STAT. § 120.57(2) (1989).

152. 577 So. 2d 1383 (Fla. 4th Dist. Ct. App. 1991).

153. *Id.* at 1384-85. Finding a lack of jurisdiction was premised on the determination that the planned activities did not "involve excavation or removal and destruction of native salt resistant vegetation." *Id.* at 1385. The court rejected this reading of the scope of the jurisdiction of the Department of Natural Resources. *Id.* at 1385-86.

154. The Town of Palm Beach and Mr. Darwin both alleged that they owned property which would be adversely effected by the trimming and maintenance activities of salt water resistant dune vegetation by 2000 Condominium. *Id.* at 1385.

155. The Sierra Club alleged that its members used the beaches adjacent to the property, were interested in preserving beaches, and that the trimming and maintenance activities of salt water resistant dune vegetation would adversely effect these interests. *Id.*

156. *Town of Palm Beach*, 577 So. 2d at 1385.

The court held that the Department of Natural Resources erred in concluding that these parties lacked standing to invoke the section 120.57 hearing. The court applied the *Agrico Chemical Co.* two part test. The court found that the first element, whether the necessary degree of injury in fact was alleged, was satisfied because the denial of jurisdiction would allow the planned trimming and maintenance activities to immediately go forward without any further governmental review or permits at either the state or local level,<sup>157</sup> which allegedly would result in an adverse impact on the adjacent property and the beach areas themselves.<sup>158</sup> The court found that the second element, whether the nature of the alleged injury was within the zone of interest protected by the statute, was satisfied, because the statutes and administrative rules were designed to protect the beaches and dunes from harm, which was exactly what the parties alleged was about to happen.<sup>159</sup> The court noted that given the scope of the jurisdiction granted the Department of Natural Resources by the legislature, the determination of whether the Department of Natural Resources properly found it did not have jurisdiction in this case was dependent on disputed factual issues which a section 120.57 hearing could resolve.<sup>160</sup>

While the test in *Agrico Chemical Co.* generally governs standing issues in some circumstances, the statutorily designated status of a person or entity will confer standing even if the requirements of *Agrico Chemical Co.* could not be satisfied. In *Phibro Resources Corp. v. Department of Environmental Regulation*,<sup>161</sup> the court reversed the order

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157. *Id.* at 1387-88.

158. *Id.*

159. *Id.* at 1388. The court distinguished *Town of Palm Beach* from *Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n*, 418 So. 2d 1046 (Fla. 1st Dist. Ct. App. 1982), *rev. denied*, 430 So. 2d 451 (Fla. 1983), where the court held that a party lacked standing to challenge an administrative agency's determination that it lacked jurisdiction, when the injury alleged would arise from completion of the project, not the administrative agency's decision. The court read the decision in *Groves Isle, Ltd.* as limited to circumstances where the actual activity which was alleged would cause injury, would be subject to further state or local review or permit requirements. Only in such cases did the denial of jurisdiction have such an attenuated relationship to the alleged injury so that the party would lack standing. However, such was not the case in *Town of Palm Beach*, because the court found that the denial of jurisdiction would allow the planned trimming and maintenance activities to immediately go forward without any further governmental review or permits on either the state or local level. 577 So. 2d at 1387-88.

160. *Id.* at 1386.

161. 579 So. 2d 118 (Fla. 1st Dist. Ct. App. 1991) (modified on denial of motion



of the Department of Environmental Regulation denying Phibro Resources and Solomon, Inc.<sup>162</sup> a formal administrative hearing concerning consent orders which the Department of Environmental Regulation intended to enter into with Mobil and Conserv.

Three different corporations, Mobil, Phibro Resources, and Conserv, operated a facility at different periods over several years. In 1985, the Department of Environmental Regulation notified them "that pollutants exceeding levels permissible in class II groundwaters had been detected" at the facility.<sup>163</sup> In 1989, the Department notified Phibro Resources that it "intended to enter into consent orders with Conserv and Mobil" concerning liability for the remedial measures needed at the facility.<sup>164</sup> Phibro Resources requested a formal hearing on the adequacy of these consent orders. The Department held that Phibro Resources lacked standing, because it "had failed to show a substantial interest sufficient to warrant the initiation of a section 120.57 proceeding in that it had neither demonstrated injury in fact of sufficient immediacy to warrant a hearing, nor . . . shown that its affected interest was of the type or nature . . . [the statute] was designed to protect."<sup>165</sup>

The Department claimed that any injury allegation was speculative for two reasons. First, Phibro Resources would suffer no injury unless three contingencies occurred: 1) the consent orders, at some unknown time in the future, would fail to resolve the pollution problems; 2) the Department would seek to hold Phibro Resources liable at that point; and 3) the Department would succeed in doing so. Second, any defenses or objections that Phibro Resources could raise to the consent orders could be asserted at a hearing held after the first two contingencies had occurred.<sup>166</sup> The court observed that the Department's position would be correct but for the fact that it did not properly understand the nature of the proceeding at the time of its decision. Phibro Re-

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for rehearing en banc). On rehearing, the court refused to withdraw its opinion, even though the parties had reached a settlement of all the issues and requested a voluntary dismissal while the rehearing petition was pending. *Id.* at 125.

162. Solomon, Inc. was the corporate parent of Phibro. The court held that the request by Solomon, Inc. for a hearing was not untimely filed, and even if it was, that there was no prejudice to any party in permitting it to file a petition for a hearing twenty-one days late. *Id.* at 124; *see infra* notes 313-328 and accompanying text.

163. *Phibro*, 579 So. 2d at 119.

164. *Id.*

165. *Id.* at 120.

166. *Id.* *But see id.* at 125, 126-27 (Barfield, J., dissenting) (finding that this offered more than adequate protection of Phibro's interests).

sources was not seeking access to the administrative process. It was already a party, because it,

was made a party to the proceeding by statute, in that it was served with a written notice of a warning which specified the provision of the statute and rule alleged to have been violated and the facts alleged to constitute a violation. [Both the statute and administrative rules] provide that a person served with a notice of violation . . . shall be entitled to a section 120.57 administrative hearing within twenty days following service of notice; otherwise the person's right to an administrative hearing shall be deemed waived.<sup>167</sup>

Having been designated a party, Phibro Resources did not need to demonstrate that its interests would be "determined in the proceeding (the execution of the two consent orders), so long as the interests of a specific party or parties were there determined."<sup>168</sup> Clearly the consent orders would determine the interests of Mobil and Conserv, and there was no reason for holding that Phibro Resources, a party, lacked standing.<sup>169</sup> Further, because the consent orders assumed there was the possibility of future liability for Phibro Resources, the orders "had the potential of affecting the substantial interests of Phibro [Resources]."<sup>170</sup> The Department of Environmental Regulation thus erred in concluding to the contrary.<sup>171</sup>

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167. *Phibro*, 579 So. 2d at 122. The court specifically rejected the claim by the Department that the notice of violation had no impact on Phibro Resources Corporation's substantial interests. The notice served as a warning and triggered the time frame for requesting an administrative hearing.

168. *Id.*

169. *Id.*

170. *Id.* at 123. The court noted that the claimed interests were not just potential economic injury. It included potential administrative and criminal liability for any wrongs it may have committed. As such, it had a real interest in assuring that the consent orders provided an adequate means for "stem[ming] further migration of contaminated groundwater" from the facility. *Id.*

171. The court suggested, in a portion of the opinion deleted on rehearing, that if the Department of Environmental Regulation wanted to proceed with its consent orders without implicating the interests of Phibro, then it should dismiss the notice of violation against Phibro with prejudice, or provide it with an "unconditional release from any future liability." *Phibro*, 579 So. 2d at 124; *see id.* at 125.

## 2. Standing in Other Contexts

### a. Certificate of Need

The decision in *AMISUB v. Department of Health and Rehabilitative Services*<sup>172</sup> concerned whether a hospital located in another district could challenge the certificate of need decision by the Department of Health and Rehabilitative Services for an adjoining district.<sup>173</sup> The statute provided: "Existing health care facilities may initiate [proceedings challenging the issuance of a certificate of need] upon a showing that an established program will be substantially effected by the issuance of a certificate of need to a competing facility program within the same district."<sup>174</sup> The Department of Health and Rehabilitative Services rejected AMISUB's challenge to the certificate of need issuance in the adjoining district, because AMISUB's health care facility, Northridge Medical Center, was physically located in another district. AMISUB admitted its facility was located in another district, but claimed that it operated a program in both districts because its facility was located near the line dividing the two districts. Because of its location, the Center in fact functionally served patients from both districts, and therefore should have been considered an established program in both districts.

The court rejected this claim for the following reasons. First, the purpose of this statute was to limit the number of health care providers who could challenge certificate of need decisions. The court believed the reading of the statute suggested by AMISUB would be contrary to this statutory purpose, as it would expand, not limit, the circumstances under which a health care facility would have standing to challenge a certificate of need decision.

Second and more importantly, the court noted that an administrative agency's interpretation of a statute which it was primarily responsible for administering was entitled to great weight. It should not be overturned by a court unless the interpretation is "clearly errone-

172. 577 So. 2d 648 (Fla. 1st Dist Ct. App. 1991) (per curiam).

173. The court also rejected the request by the Department of Health and Rehabilitative Services for an award of attorney's fees for pursuing a frivolous appeal of the administrative order. The court found that the appeal was not frivolous, because it was not so devoid of merit on the face of the record that there was little or no prospect of success. *Id.* at 650.

174. FLA. STAT. § 381.709(5)(b) (1989).

ous.”<sup>175</sup> Both the hearing officer and the Department of Health and Rehabilitative Services had interpreted the statute as not authorizing a challenge to a certificate of need just because a facility in an adjacent district may have its patient pool diminished. The court considered this “a permissible interpretation of the statutory language.”<sup>176</sup> As such, the interpretation adopted by the Department of Health and Rehabilitative Services was not clearly erroneous; rather, it was reasonable.

Third, the court found that the definition of “program” used in the statute should be that ordinarily and commonly used, because neither the legislature nor the Department of Health and Rehabilitative Services had given it a special definition. Under the ordinary definition of “program,” AMISUB’s Northridge Medical Center would not qualify because it was not physically performing procedures anywhere within the adjacent district.<sup>177</sup> Therefore, Northridge Medical Center did not have standing to contest the certificate of need decision by the Department of Health and Rehabilitative Services.

*St. Joseph Hospital v. Department of Health and Rehabilitative Services*,<sup>178</sup> concerned the issues of whether the Department of Health and Rehabilitative Services properly denied St. Joseph Hospital’s request for an administrative hearing on a certificate of need application, and whether the order granting such a certificate of need for Fawcett Memorial Hospital for the same district, after St. Joseph Hospital was denied its opportunity to participate in the proceeding, was appropriate. The court agreed with the Department of Health and Rehabilitative Services that St. Joseph had failed to timely apply for a certificate of need, and thus, had waived its right to be a part of the decision process concerning Fawcett Memorial Hospital. St. Joseph Hospital attempted to intervene very late in the process concerning Fawcett Memorial Hospital’s application.<sup>179</sup> The court found that St. Joseph Hospital also

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175. *AMISUB*, 577 So. 2d at 649.

176. *Id.* at 649-50; see *infra* notes 576-83 and accompanying text.

177. *Id.* at 650.

178. 559 So. 2d 595 (Fla. 1st Dist. Ct. App. 1989).

179. *Id.* at 596. St. Joseph Hospital did not petition to intervene until after the certificate of need controversy concerning the 1987 batching cycle had reached a settlement among those parties which had originally participated in the process. *Id.* at 596-97. Having been denied permission to intervene, St. Joseph Hospital then filed a request for a comparative review of its application for certificate of need with that of the Fawcett Memorial Hospital certificate of need application. The Department of Health and Rehabilitative Services denied this request as untimely, because it was not an application which occurred during the same batching cycle. *Id.* at 597; FLA. STAT. §

lacked standing to intervene in the Fawcett Memorial Hospital certificate of need decision process, because it did not have a current program which would compete with the one to be granted to Fawcett Memorial Hospital.<sup>180</sup> Further, the court noted that even if St. Joseph Hospital was entitled to intervene because its substantial interests were effected by the certificate of need decision process, it waived such an opportunity by not attempting to intervene until well after the parties came to an agreement and the case was being remanded to the Department of Health and Rehabilitative Services for implementation of the settlement terms concerning the issuance of certificates of need for the 1987 batching cycle.<sup>181</sup>

### b. Declaratory Statements

In *Florida Optometric Ass'n v. Department of Professional Regulation*,<sup>182</sup> the court considered whether optometrists had standing to intervene in a declaratory statement proceeding conducted before the Board of Opticianry. The petition for a declaratory statement concerned whether an optician was permitted to use a Titmus Vision Tester to check a consumer's visual acuity with and without corrective

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381.709(5)(b) (1987).

The court found that this decision was correct, and that the letter of intent to participate in the certificate of need batching cycle sent by St. Joseph Hospital was insufficient to constitute an application for that batching cycle. *St. Joseph*, 559 So. 2d at 597. The court noted that while the Department of Health and Rehabilitative Services did fail to properly publish the fixed need pool for the 1987 batching cycle, it did make available to all applicants the information concerning the fixed need pool cycle for purposes of determining whether it was appropriate to apply for a certificate of need and the likelihood of success in the comparative review process. Given this information, any applicant could have determined whether it was appropriate for it to apply for the 1987 batching cycle. *Id.* at 597-98. The failure of St. Joseph Hospital to apply during this batching cycle could not be excused because of the failure of the Department of Health and Rehabilitative Services to make these determinations for it. *Id.* at 598.

180. *Id.* St. Joseph Hospital engaged in the treatment of general cardiac problems. This did not create a sufficient competing program which would be substantially affected by the issuance of a certificate of need to Fawcett Memorial Hospital for a cardiac catheterization program. *Id.* In so concluding the court clearly was indicating that the first element in the *Agrico Chemical* test was not satisfied. *See supra* notes 146-60 and accompanying text.

181. *St. Joseph*, 559 So. 2d at 598.

182. 567 So. 2d 928 (Fla. 1st Dist. Ct. App. 1990).

lenses.<sup>183</sup> Optometrists petitioned to intervene in this declaratory statement proceeding, and also sought a formal hearing under APA section 120.57(1). The Board denied the request to intervene, holding that the optometrists did not have standing, because there was no allegation that their substantial interests were going to be affected by any resolution of the declaratory statement request.<sup>184</sup>

The court reversed the Board's decision, holding that in order to have standing to intervene in the declaratory statement proceeding, a person must satisfy the *Agrico Chemical Co.* two-part test.<sup>185</sup> The court found that the optometrists had standing to intervene in the declaratory statement proceeding and to request a formal hearing under section 120.57. The court relied on *Florida Medical Ass'n v. Department of Professional Regulation*<sup>186</sup> because it presented an almost identical battle between professions concerning the scope of their exclusive practice areas, except that in this case it was set in a declaratory statement context. The court agreed with the optometrists that but for the declaratory statement, patients would be required to seek their counsel in order to have the Titmus Vision Tester administered. Thus, the first element of standing was satisfied by demonstrating a sufficient degree of injury in fact. The second element of standing, the zone of interest requirement, was also satisfied by the allegation that the legislature intended for only licensed optometrists to administer such a test, because it was instrumental in the process of prescribing or treating diseases or ailments of the human eye, which opticians were prohibited

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183. *Id.* at 931.

184. *Id.* at 932.

185. The elements of the test are that the person has "suffer[ed] injury in fact which is of sufficient immediacy to entitle him to a [section] 120.57 hearing, and . . . that . . . [the] injury is of a type or nature which the proceeding is designed to protect." *Id.* (quoting *Agrico Chemical Co. v. Department of Env'tl. Regulation*, 406 So. 2d 478, 482 (Fla. 2d Dist. Ct. App. 1981), *rev. denied*, 415 So. 2d 1359 (Fla. 1982)); see *supra* text accompanying notes 146-60.

186. 426 So. 2d 1112 (Fla. 1st Dist. Ct. App. 1983). In *Florida Medical Ass'n*, the first element of the standing test, necessary degree of injury in fact, was satisfied when it was alleged that the proposed rule would potentially deprive a professional category of patients who now would have the option of seeking treatment through another profession. The court also found that the second element of the standing test, the zone of interest requirement, was satisfied because an allegation was made that the legislature had determined that the authority to prescribe drugs was exclusively within the scope of a licensed physician's authority and that it should not be carried out by any other, including optometrists. *Id.*

from carrying out.<sup>187</sup>

### 3. Intervention in the Administrative Decision Process by Third Parties

*Manasota-88, Inc. v. Agrico Chemical Co.*<sup>188</sup> concerned the issue of when a third party could intervene in a case where a default permit was issued by the Department of Environmental Regulation for the mining of phosphates within state wetland areas.<sup>189</sup> Agrico Chemical filed a permit application with the Department of Environmental Regulation requesting permission to mine phosphates within state wetland areas. The relevant statutes provided that such an application must be ruled upon by the Department within ninety days after the application was submitted.<sup>190</sup> If the Department failed to do so, then it must issue a default permit. However, the Department of Environmental Regulation may later impose conditions to assure that the project was properly managed for purposes of mitigating any adverse impact on state wetlands.

Manasota-88, Inc., a third party, attempted to intervene in the administrative process associated with issuance of the default permit. The court held that the Department properly determined that Manasota-88, Inc. could intervene in the permit process even though the permit was

187. *Florida Optometric Ass'n*, 567 So. 2d at 932-33. The court distinguished this case from *Florida Society of Ophthalmology v. Board of Optometry*, 532 So. 2d 1279 (Fla. 1st Dist. Ct. App. 1988), based upon the fact that in that case there was no allegation that an exclusive area of practice at stake. Thus, the zone of interest aspect of the *Agrico Chemical* standing test was not satisfied. *Florida Optometric Ass'n*, 567 So. 2d at 933.

188. 576 So. 2d 781 (Fla. 2d Dist. Ct. App. 1991).

189. The court also addressed several other issues. First, the court noted that the decision of the Department of Environmental Regulation was supported by substantial competent evidence; and there was no factual error committed by the Department of Environmental Regulation in this case. Second, the court noted that Manasota-88, Inc. was not denied any procedural rights when the hearing officer denied its motion for a continuance in order to study the modified mitigation plan submitted by Agrico Chemical Company. The hearing officer granted Manasota-88, Inc. an additional three weeks to study the plan as modified and to submit any additional evidence concerning the feasibility of the modified plan. Manasota-88, Inc. failed to offer any such evidence. *Id.* at 782-83. Third, because Manasota-88, Inc. did not request a stay, the project had gone forward during the appellate process, and even if an issue was presented in terms of denial of procedural rights, it was moot as soon as the wetlands in question in fact no longer existed. *Id.* at 783.

190. FLA. STAT. § 120.60(2) (1989).

issued by default. The court concluded that it was impossible for a third party intervenor to act before the Department gave notice of its intent concerning a permit application. This point was the first opportunity any third party intervenor had to respond to the Department's decision to issue a default permit. As such, it was the only appropriate point in time to file for intervention. It was, in fact, the only point where a third party had an opportunity to intervene in the process.<sup>191</sup> Further, once an intervenor had properly filed a response to the notice of intent to issue a default permit, a hearing must have been held to resolve any disputed factual issues concerning what mitigative steps should be taken.<sup>192</sup>

We do not agree with Agrico [Chemical Company's] position that a default permit issues automatically without further [administrative] agency inquiry. Nothing in the statute prevents [the Department of Environmental Regulation] from holding a hearing to determine reasonable mitigative conditions necessary to protect the interest of the public and the environment, prior to which we need the default permit. The party who finds conditions placed on default permit owners are unreasonable, may resort to the appellate process for relief.<sup>193</sup>

Thus, it is the process of determining the mitigative conditions in which the third party intervenor may participate either informally or in the context of a formal hearing.<sup>194</sup>

#### F. *Exhaustion of Administrative Remedies*

"As a general proposition, where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the court will act."<sup>195</sup> Generally, this is not a jurisdictional re-

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191. An administrative agency must provide an affected person, "within a specified time after some recognizable event in investigatory or other free-form proceeding, [to request] formal or informal proceedings under section 120.57." *Capeletti Bros. v. Department of Transp.*, 362 So. 2d 346 (Fla. 1st Dist. Ct. App.), *cert. denied*, 368 So. 2d 1374 (Fla. 1978); *see* FLORIDA ADMINISTRATIVE PRACTICE § 2.30 (The Florida Bar 3d ed. 1990).

192. *Manasota-88, Inc.*, 576 So. 2d at 783.

193. *Id.*

194. Clearly, the default decision had already been made. The third party may not intervene in that decision process. *Id.* at 784.

195. *Halifax Area Council v. City of Daytona Beach*, 385 So. 2d 184, 186 (Fla.



quirement,<sup>196</sup> but rather, a prudential one,<sup>197</sup>

designed to assure: (1) that courts do not stray from their limited role of judicial review in the administrative process; (2) that agencies have an opportunity to perform the duties delegated to them by the legislature; and (3) that agencies have the initial opportunity to correct any errors that occurred during the administrative process.<sup>198</sup>

During the survey period, the courts decided several cases applying these considerations.

A classic application of the doctrine of exhaustion of administrative remedies is *Department of Revenue v. Brock*.<sup>199</sup> *Brock* concerned a

5th Dist. Ct. App. 1980). If the legislature clearly has left the selection of the judicial process to the parties, then there is no requirement of exhaustion of administrative remedies. See *Friends of the Hatchineha, Inc. v. Department of Env'tl. Regulation*, 580 So. 2d 267, 273 (Fla. 1st Dist. Ct. App. 1991) (noting that when the legislature provided for two independent means of seeking a remedy for erroneous administrative agency action, suit in the appropriate circuit court or administrative hearing, there was no requirement that a party chose one or the other means). *cf.* *Van Poyck v. Dugger*, 582 So. 2d 108 (Fla. 1st Dist. Ct. App. 1991) (determining that when a prisoner exhausted all of his administrative appeals, then the trial court must hold a hearing on his habeas corpus petition in which he alleged prison officials acted arbitrarily in placing him in a high security cell under 24 hour lockdown status).

196. See *Patsy v. Board of Regents*, 457 U.S. 496 (1982).

197. See *Howlett v. Rose*, 571 So. 2d 29 (Fla. 2d Dist. Ct. App. 1990) (noting that exhaustion of state administrative remedies was not a jurisdictional prerequisite to an action under 42 U.S.C. § 1983). *But see* *Park v. Dugger*, 548 So. 2d 1167, 1168 (Fla. 1st Dist. Ct. App. 1989) (holding that exhaustion of administrative remedies was a jurisdictional prerequisite to a circuit court having jurisdiction to issue a writ of mandamus); *Leonard v. Morgan*, 548 So. 2d 803, 804 (Fla. 1st Dist. Ct. App. 1989) (noting that exhaustion of administrative remedies may be required where the legislature has given an administrative agency exclusive jurisdiction to rule on the matter initially).

198. *Burris I*, *supra* note 4, at 344. Because the exhaustion of administrative remedies requirement is prudential, courts may waive it in appropriate cases. One exception to this requirement occurs when the case involves constitutional issues which an agency cannot address in its administrative proceeding. *Mann v. City of Oakland Park*, 581 So. 2d 986, 987 (Fla. 4th Dist. Ct. App. 1991) (*per curiam*) (noting that when a party alleged that an administrative system was unconstitutional on its face, exhaustion of administrative remedies should not be required before a court may appropriately exercise jurisdiction); see also *Public Serv. Comm'n v. Fuller*, 551 So. 2d 1210, 1212-13 (Fla. 1989); FLORIDA ADMINISTRATIVE PRACTICE § 7.3 (The Florida Bar 3d ed. 1990).

199. 576 So. 2d 848 (Fla. 1st Dist. Ct. App. 1991) (*per curiam*).

suit brought by the Florida Hotel and Motel Association and three hotel operators in circuit court to enjoin the Department of Revenue from "collecting gross receipts tax on all local and long distance telephone services separately billed to their tenants."<sup>200</sup> The Department of Revenue interpreted the statute which provided that "charges made by a hotel and motel . . . or local telephone service or toll telephone service, when such charges occur incidentally to the right of occupancy of such hotel or motel"<sup>201</sup> shall be exempt from the gross receipt statute, as not applying to any such charges which are separately billed, because they are not incidental to the right of occupancy.<sup>202</sup> After the circuit court suit was filed, the plaintiffs in this case also filed a challenge to the proposed rule which was to codify this interpretation.<sup>203</sup> The rule challenge was ultimately unsuccessful and was dismissed.<sup>204</sup> Even though the plaintiffs had pursued the administrative remedy of the rule challenge, the circuit court, after the rule challenge had been administratively dismissed, permanently enjoined the Department of Revenue from collecting the gross receipts tax on "telecommunication service from operators of transient rental facilities."<sup>205</sup> After this decision, the plaintiffs dismissed their appeal from the administrative order which dismissed their rule challenge.<sup>206</sup>

This was a fatal mistake, as the court held that the circuit court did not have jurisdiction to enjoin the Department of Revenue's policy. The court noted that the purpose of the prudential requirement of exhaustion of administrative remedies was "to assure that an [administrative] agency responsible for implementing a statutory scheme ha[d] a full opportunity to reach a sensitive, mature, and considerate decision upon a complete record appropriate to the issue."<sup>207</sup> This goal would be accomplished when 1) the administrative agency was permitted to fully develop a factual record upon which it could then exercise its administrative discretion, and 2) the administrative agency, charged by the legislature with primary responsibility for administering a statutory scheme, had a full and fair opportunity to initially resolve the issues.<sup>208</sup>

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200. *Id.* at 849.

201. FLA. STAT. § 203.012(2)(b)(3) (1989).

202. *Brock*, 577 So. 2d at 849.

203. *Id.*

204. *Id.* at 850.

205. *Id.*

206. *Id.*

207. *Brock*, 577 So. 2d at 850.

208. *Id.*

The court noted that exhaustion of administrative remedies was not an absolute requirement. In some cases, such as when there was no factual dispute and it was alleged the administrative agency exceeded its delegated powers by acting in an ultra vires manner, exhaustion of administrative remedies was not required.

However, this exception did not apply in this case, because whether the administrative agency appropriately exercised its delegated discretion depended upon factual determinations made by the administrative agency. It was appropriate in this circumstance to require exhaustion of administrative remedies “[a]lthough statutory construction [wa]s ultimately the province of the judiciary, it should not be undertaken without first giving the [administrative] agency an opportunity to explain its interpretation and to create a record in an administrative form.”<sup>209</sup> In such a case, it was clearly inappropriate for the circuit court to preempt the normal judicial review process associated with the administrative rule challenge process. The plaintiffs should have pursued the judicial remedies associated with the administrative rule challenge rather than continuing to press their suit in the circuit court.<sup>210</sup>

*Marks v. Northwest Florida Water Management District*<sup>211</sup> is also a classic case of how a party who failed to avail himself of the administrative hearing process lost the right to judicial review of an administrative order. Marks sought judicial review of an administrative order which held that he had performed repair work on a dam without the necessary permits. Repairs were needed because the dam was in an unsafe condition which created a risk of catastrophic failure. After receiving notice of the administrative complaint Marks failed to request a hearing under section 120.57(1) of the APA. Having heard nothing from Marks, the Northwest Florida Water Management District entered a final order directing him to either pump out the water behind the dam and cease using the dam for retaining water, or obtain the appropriate permits and repair the dam. Marks claimed that the administrative order was remedial in nature, and that Florida law required a complaint for a remedial order be served upon the owner of the property. Marks also claimed he was not the owner of the property.<sup>212</sup>

The Northwest Florida Water Management District claimed that

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209. *Id.*

210. *Id.*

211. 566 So. 2d 46 (Fla. 1st Dist. Ct. App. 1990).

212. *Id.* at 47; FLA. STAT. § 373.436 (1989).

the administrative order was a corrective one. In the case of corrective orders, the administrative complaint must be served upon the alleged violator.<sup>213</sup> The court refused to take judicial notice of the property records concerning the dam which were offered to prove Marks' assertion that he was not the property owner. If Marks wished to assert this factual defense, then he should have invoked the administrative hearing process. Having failed to invoke this process, he waived his rights to challenge the factual conclusions reached by the Northwest Florida Water Management District.<sup>214</sup> While the court never explicitly characterized the case as concerning exhaustion of administrative remedies, the net effect of its decision was to hold that Marks failed to raise a factual issue with the appropriate administrative agency, and was therefore precluded from raising the same issue in the courts.

If an administrative agency was acting strictly in an advisory capacity, then exhaustion of administrative remedies will not be required, because none of the policy reasons for requiring it are present. In *Ujcic v. City of Apopka*,<sup>215</sup> the court held that before bringing suit under the Whistle-Blower's Act, a police officer was not required to exhaust his administrative remedies before a review board. This result was acceptable because any decision of the review board would be advisory and non-binding on the city or the police officer, and the proceedings before the circuit court are de novo, with no need for an administrative hearing to develop a record for judicial review.<sup>216</sup>

The courts have made it clear that a person need not exhaust his or her administrative remedies under section 120.56 which provides for rule challenges before raising the validity of a rule in the other administrative proceedings. *United Health, Inc. v. Department of Health and Rehabilitative Services*<sup>217</sup> involved a challenge by long term health care providers to the validity of the administrative rule authorizing a rate freeze for the services they provide. The Department of Health and Rehabilitative Services denied the long term health care providers both a formal and informal hearing under the APA,<sup>218</sup> claiming that

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213. *Marks*, 566 So. 2d at 47; FLA. STAT. § 373.119 (1989).

214. *Marks*, 566 So. 2d at 47.

215. 581 So. 2d 218 (Fla. 5th Dist. Ct. App. 1991).

216. *Id.* at 220; *accord Hill v. Monroe County*, 581 So. 2d 225, 226-27 (Fla. 3d Dist. Ct. App. 1991). The court also noted that Ujcic should be permitted to amend his complaint to include the allegation that the exhaustion of administrative remedies was not necessary in this case. *Ujcic*, 581 So. 2d at 220; *see also Hill*, 581 So. 2d at 227.

217. 579 So. 2d 342 (Fla. 1st Dist. Ct. App. 1991) (per curiam).

218. FLA. STAT. § 120.57(1), (2) (1989).

the only method available to challenge a rule is through the APA rule challenge provision in section 120.56.<sup>219</sup>

The court held that the Department of Health and Rehabilitative Services erred in not holding a hearing, because the long term health care providers have substantial interests which were "affected by [the administrative] agency action . . . [, and] seek monetary relief which is not available in a section 120.56 proceeding."<sup>220</sup> The court noted that nothing in the APA required the long term health care providers to exhaust the rule challenge process before proceeding with a request for a section 120.57 hearing.<sup>221</sup> If a rule challenge was the appropriate forum for resolving some of the issues raised in the petition for a section 120.57 hearing, then it may be filed, and the section 120.57 hearing stayed until it was resolved.<sup>222</sup>

In *Lloyd Citrus Trucking v. Department of Agriculture and Consumer Service*,<sup>223</sup> the court interpreted Florida Statute section 601.65 which provides:

If any licensed citrus fruit dealer violates any provision of this chapter, such dealer shall be liable to the person allegedly injured thereby for the full amount of damages sustained in consequence of such violation. Such a liability may be enforced either by proceeding in an administrative action to and before the Department of Agriculture and pursuing such actions with ultimate termination if desired, or by filing of a judicial suit at law in a court of competent jurisdiction.<sup>224</sup>

The court read this statute as providing that a party had a choice of either pursuing an administrative process or direct access to the courts, but not both. "The statutory wording is clear. The legislature described the kind of remedies only. Once Lloyd Citrus pursued its chosen

219. *United Health, Inc.*, 579 So. 2d at 342-43; FLA. STAT. § 120.56 (1989).

220. *United Health, Inc.*, 579 So. 2d at 343.

221. *Id.*; accord *J.B. Coxwell Contracting, Inc. v. Department of Transp.*, 580 So. 2d 621, 623 (Fla. 1st Dist. Ct. App. 1991) (The court noted that a party may challenge the validity of a rule in an administrative agency enforcement proceeding. There was no requirement in such a case that the party must file a separate rule challenge in order to exhaust administrative remedies.).

222. *United Health, Inc.*, 579 So. 2d at 343. The court also noted that any other approach was impractical given the time frames for filing a petition requesting a section 120.57 hearing. *Id.*

223. 572 So. 2d 977 (Fla. 4th Dist. Ct. App. 1990).

224. FLA. STAT. § 601.65 (1979).

course, suit in circuit court to resolution, the Department was without jurisdiction to hear the matter . . . .<sup>225</sup> Lloyd Citrus correctly concluded that the only way it could preserve its opportunity to pursue the administrative hearing process was by dismissing its lawsuit prior to its ultimate resolution.<sup>226</sup> However, where the voluntary dismissal of the lawsuit occurred ten years after it was filed, but before any ultimate resolution of the issues by the circuit court, the administrative remedy was foreclosed, apparently based upon estoppel principles.<sup>227</sup>

In *Board of Regents v. Armesto*,<sup>228</sup> a circuit court granted the request of a Florida State University law student for a permanent injunction enjoining Florida State University from falsely charging the student with violations of the Student Code of Conduct. The injunction was granted by the circuit court because of alleged improper conduct by Florida State University in conducting its investigation of the allegations.<sup>229</sup>

The district court of appeal noted that primary jurisdiction doctrine requires that "circuit courts . . . abstain from exercising their equitable jurisdiction over administrative proceedings where adequate administrative remedies have not been exhausted. An exception exists where threatened agency action is so egregious or devastating that administrative remedies are either too little or too late."<sup>230</sup> The law student alleged that the nature of irreparable injury which she would suffer was that The Florida Board of Bar Examiners "might refuse to admit her to practice even if she were acquitted [of the allegedly false charges] at the University hearing."<sup>231</sup> The court characterized this alleged irreparable injury as mere speculation, and insufficient to "demonstrate that her administrative remedies were inadequate" where she had the right to request that the charges be dismissed and to defend herself in a fair university hearing concerning the matter.<sup>232</sup> "The possible [collateral] consequence[s] . . . [are] not a basis to bypass the administrative process."<sup>233</sup>

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225. *Lloyd Citrus Trucking*, 572 So. 2d at 978.

226. *Id.*

227. *Id.* at 979.

228. 563 So. 2d 1080 (Fla. 1st Dist. Ct. App. 1990).

229. *Id.* at 1080-81.

230. *Id.* at 1081.

231. *Id.*

232. *Id.* The court found that the allegation of the likelihood of false charges being filed was not supported by sufficient evidence. *Id.*

233. *Armesto*, 563 So. 2d at 1081.

The court also rejected the due process challenge to the administrative process provided by Florida State University, because the allegation was not a facial attack on the structure of the administrative hearing process, but one concerning how it was going to be applied to her particular circumstances. It is well established in Florida that such an allegation is insufficient to warrant bypassing the administrative process. In such a case, the exhaustion of administrative remedies is appropriate so that the administrative agency has the first opportunity to resolve the disputed issue.<sup>234</sup>

### G. *Res Judicata and Collateral Estoppel*

Res judicata principles are designed to conserve the resources of administrative agencies, courts, and the parties by precluding needless relitigation of issues.<sup>235</sup> In *Nelson & Co. v. Holtzclaw*,<sup>236</sup> the court noted that administrative orders issued by judges of compensation claims "are subject to the same principles of res judicata as applied to judgments of courts."<sup>237</sup> In discussing prior precedent in the area, the court noted two items of interest. First, res judicata principles were designed to prevent relitigation of issues over which there was likely to be little change over time. Second, res judicata principles did not preclude relitigation of issues where there was a likelihood of change over time.

In *Massie v. University of Florida*,<sup>238</sup> the court noted that the interests of justice on a few occasion might require a court to abandon the traditional rules of res judicata and collateral estoppel. An appellate court has inherent power to correct its own prior erroneous decisions in order to prevent injustice, even when this involves review of an administrative hearing decision which has become final after appropriate appellate review. This discretion must be exercised only in the most unusual circumstances, and is not as a matter of right, merely a matter of grace.<sup>239</sup> When a court finds that such circumstances exist, its "duty in reviewing worker's compensation cases to administer justice under the law outweighs its duty to follow an earlier decision of the court in

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234. *Id.* at 1081-82.

235. *Nelson & Co. v. Holtzclaw*, 566 So. 2d 307, 308-09 (Fla. 1st Dist. Ct. App. 1990).

236. 566 So. 2d 307.

237. *Id.* at 308.

238. 570 So. 2d 963 (Fla. 1st Dist. Ct. App. 1990).

239. *Id.* at 974-75.

the same case when, due to an error in reviewing the evidence, doing so resulted in . . . injustice to a party."<sup>240</sup> The court concluded, after reviewing the record, that the deputy commission was presented with "a legally sufficient petition for modification . . . based on a complete absence of evidence to support [an essential] finding of fact [and] [ ]which absence of evidence [was] now conceded by the deputy commissioner . . . ."<sup>241</sup>

Thus, the court in *Massie* recognized that in extraordinary circumstances, it is possible to overturn a prior appellate ruling affirming an administrative agency's decision. It is limited to the very unusual circumstances of when the earlier decision was based upon erroneous factual premises, and the trier of fact confessed that there were no facts in the record to support his conclusion which was critical to the decision he ultimately reached in the case.<sup>242</sup>

### III. GOVERNMENT IN THE SUNSHINE

The Public Records<sup>243</sup> and Sunshine<sup>244</sup> statutes are designed to assure that the public has access to the decision making processes and records of governmental institutions.<sup>245</sup> As a result of these statutes, the operation of Florida governmental institutions is open to public scrutiny. In response, the courts have rigorously enforced the requirements of these statutes.

During the survey period, one interesting case, *News-Press Publishing Co. v. Lee County*,<sup>246</sup> was decided concerning the Sunshine

240. *Id.* at 975.

241. *Id.* at 977; *see id.* at 977-78 (Ervin, J., concurring).

242. *Cf.* Full Circle Service, Inc. v. Department of Agric., 556 So. 2d 757, 758 (Fla. 2d Dist. Ct. App. 1990) (noting that when a case was remanded after judicial review to the administrative agency, it did not permit parties to re-litigate issues which were properly decided by the court initially).

243. FLA. STAT. §§ 119.01-.14 (1989); *see also* FLA. STAT. § 120.53(3) & n.1 (1991) (text of subsections (2) and (4) as of March 1, 1992); FLA. STAT. §§ 120.532-.533 (1991).

244. FLA. STAT. § 286.011 (1989).

245. *See also* FLA. STAT. §§ 120.53, .55 (1989) (APA provisions requiring public access to orders and rules, public notice of administrative agency meetings, and the subject matter to be discussed).

246. 570 So. 2d 1325 (Fla. 2d Dist. Ct. App. 1990).

One very significant case was decided too late for discussion in this survey article. *Locke v. Hawkes*, 16 Fla. L. Weekly S716 (1991). The decision in *Locke* may significantly limit the power of the legislature to impose the requirements of the Sunshine



Statute. The Sunshine Statute provides that official action taken by state and local agencies must occur only at "public meetings open to the public at all times" unless the Florida Constitution provides otherwise.<sup>247</sup> In *News-Press Publishing Co.*,<sup>248</sup> the issue was whether the mediation process entered pursuant to a circuit court order could be lawfully closed to the public. The statute authorizing court sanctioned mediations specifically provided that any party or person participating in the proceeding may, as a matter of right, prevent the disclosure of any communication made during the proceeding.<sup>249</sup> On this basis, *News-Press Publishing Co.* involved court sanctioned mediation between two governmental entities concerning where a bridge should be located. Because of the nature of these entities, negotiations would otherwise have been covered by the Sunshine Statute and open to the public. However, the court ordered mediation statute presented a situation where the mediation would be closed to the public. The court avoided resolving the broader issue about this conflict between the Sunshine Statute and the court mandated mediation statute by specifically noting that court sanctioned could not result in any final settlement if the parties choose not to send anyone to the mediation conference with the authority to make such a decision. The court held that given "the narrow scope of the mediation proceedings in this case . . . [it did not result in] a substantial delegation effecting the decision-making function of any board, commissioner, agency, or authority sufficient to require that this mediation proceeding be opened to the public."<sup>250</sup> The decision in *News-Press Publishing Co.* clearly indicates that the Sunshine Law would require, when governmental parties do send authorized representatives capable of making binding decisions upon governmental entities to the mediation process, that the mediation be open to the public.<sup>251</sup>

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Statute on other constitutionally created institutions. This decision is not final because the court has granted a motion for reconsideration.

247. FLA. STAT. § 286.011 (1989). The purpose of the law is to insure that shaping of public policy by governmental institutions occurs in the public realm. Courts have generally interpreted the statute very broadly in order to allow full achievement of its purpose.

248. 570 So. 2d 1325.

249. See FLA. STAT. § 44.302(2) (1989).

250. *News-Press Publishing Co.*, 570 So. 2d at 1327.

251. The decision in *Locke*, 16 Fla. L. Weekly S716, indicates that possibly the legislature could not require the courts to open the mediation conference to the public. If the mediation process is open to the public, then it may result may limit the effec-

#### IV. THE ADMINISTRATIVE PROCEDURE ACT

In order for an administrative agency to escape the requirements of the APA, the agency must be excluded from coverage pursuant to the terms of the APA,<sup>252</sup> or expressly excluded from APA coverage by a subsequent statute.<sup>253</sup> Courts are reluctant to find that such an express, subsequent statutory exemption was created, and will not imply one in order to further efficiency or conservation of the limited resources available to an administrative agency. To do so would undermine the legislative commitment to general administrative process and structure for all administrative agencies, imposed through the APA.<sup>254</sup>

As the court noted in *Friends of the Hatchineha, Inc. v. Department of Environmental Regulation*,<sup>255</sup> one of the primary goals of the APA was "to expose policy errors in an [administrative] agency's free-form routine, and to subject agency heads 'to the sobering realization [that] their policies [may] lack convincing wisdom.'"<sup>256</sup> To this end, the legislature used a strong process oriented approach<sup>257</sup> in the APA to govern the exercise of administrative agency power, by guaranteeing that the public and/or effected persons would: 1) receive notice of administrative agency proposed actions; 2) have an opportunity to present contrary points of view and evidence; 3) receive an adequate statement of the facts and policy reasons supporting the administrative agency's final action; 4) have an adequate opportunity for judicial review of administrative agency actions; and 5) receive notice of and access to past administrative agency policy decisions.<sup>258</sup> Further, if an administrative

tiveness of court mandated mediation where governmental entities are involved. See generally ROGER FISHER & WILLIAM URY, GETTING TO YES (1981).

252. See, e.g., FLA. STAT. § 120.50 (1989) (exclusion of courts and legislature); FLA. STAT. § 120.52(1)(c) (1989) (exclusion of judges of compensation claims). The decision in *Locke*, 16 Fla. L. Weekly S716, re-opens the question of whether the legislature may impose the requirements of the APA on constitutionally created governmental institutions. Compare *Locke*, 16 Fla. L. Weekly S716 with *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569, 577-78 (Fla. 1st Dist. Ct. App. 1977).

253. FLA. STAT. § 120.72(1)(a)-(b) (1989).

254. See *Friends of the Hatchineha, Inc. v. Department of Env'tl. Regulation*, 580 So. 2d 267, 273 n.6 (Fla. 1st Dist. Ct. App. 1991).

255. *Id.* at 267.

256. *Id.* at 271 (quoting *McDonald v. Department of Banking & Fin.* 346 So. 2d 569, 583 (Fla. 1st Dist. Ct. App. 1977)).

257. See, e.g., Burris IV, *supra* note 4, at 667-68; Levinson, *supra* note 4, at 750-55, 765; Maher, *supra* note 4, at 770-98.

258. *Friends of the Hatchineha, Inc.*, 580 So. 2d at 271.

agency was exempted from the APA, then, unless the legislature created an alternative administrative process, the courts would have to determine what procedure the administrative agency would have to follow to exercising its delegated authority. This judicial decision process would involve the constant resolution of constitutional issues concerning procedural due process and separation of powers.

### A. *Rules Versus Orders*

While it is relatively clear that the legislature preferred that administrative agencies develop public policy through the rule making process,<sup>259</sup> the courts permitted administrative agencies to develop many controversial and important public policy positions via the adjudicatory process.<sup>260</sup> The net result has been that administrative agencies can create legally binding policy of general applicability by either using their rule making authority or by properly developing policy positions in adjudicatory proceedings.<sup>261</sup> The former process' results are

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259. There are primarily two processes which administrative agencies can use in developing legally binding public policy—rule making and adjudication. In theory, administrative agencies should use the rule making process to establish legally binding public policy of general applicability. The adjudication process to determine the substantial interests of parties under the relevant statutes and administrative rules and only incidentally to develop legally binding public policy . . . . The distinction between these two means for exercising administrative agency authority to develop public policy was diminished in the APA by providing in some cases for additional procedural protection during the rule making process. In cases where these procedural protections are invoked during the rule making process it would closely resemble adjudication. Despite the procedural convergence of rule making and adjudication there still was a general consensus that administrative agencies, at least in theory, should prefer the rule making process over adjudication as the means for developing public policy, because the rule making process was designed to maximize public participation and fairness through its notice, hearing, and publication requirements.

Burris IV, *supra* note 4, at 665-66; see FLA. STAT. § 120.54 (1989). *But see* Dore II, *supra* note 4, at 708-09 (legislature never made its preference for the rule making process sufficiently clear in the statute). Any dispute about whether there was a legislative preference for rule making as compared to nonrule policy making has been resolved in favor of rule making. FLA. STAT. § 120.535(1) (1991) (required rule making; effective March 1, 1992).

260. See McDonald v. Department of Banking & Fin., 346 So. 2d 569 (Fla. 1st Dist. Ct. App. 1977) (leading case supporting concept of nonrule policy making); Burris IV, *supra* note 4, at 673; Dore II, *supra* note 4, at 710-11.

261. See Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So.

promulgated as administrative rules and found in the Florida Administrative Code. The latter's results are characterized by the courts as incipient rules or nonrule policies,<sup>262</sup> because they are developed in the case by case adjudicative process through a series of orders. These results are generally found in the Florida Administrative Law Reporter or administrative agency files.<sup>263</sup>

To date, a substantial amount of litigation concerning whether the nonrule policy was properly documented and supported in the adjudicatory record has occurred.<sup>264</sup> This continual relitigation of the validity of nonrule policies is a waste of the limited resources of the administrative agencies, the courts and private parties, because many, if not most, of the nonrule policies should have been adopted through the more cost efficient rule making process.<sup>265</sup> Several cases during the survey period demonstrated the perils of an administrative agency relying on nonrule policy.

*Rabren v. Department of Professional Regulation*<sup>266</sup> concerned an order issued by the Department of Professional Regulation dismissing the administrative charges against Rabren, a licensed pilot. The court affirmed the dismissal of the charges against Rabren and reversed the finding that certain docking facilities in the Tampa Bay area were ports.<sup>267</sup> Florida statutes required that vessels which were not exempt or which drew less than seven feet of water "shall have a licensed pilot on board when entering or leaving ports of this state,"<sup>268</sup> and that it was improper for a pilot licensed in the State of Florida to delegate his or her responsibilities to any person who he or she knew or should have known was not qualified "by training, experience, or license to perform them."<sup>269</sup> This latter statutory provision clearly prohibited a state li-

2d 1177, 1182 (Fla. 1st Dist. Ct. App. 1981); Burris IV, *supra* note 4, at 677-85.

262. See Burris IV, *supra* note 4, at 670 & n.36.

263. See *id.* at 693-96; see also FLA. STAT. §§ 120.53-.533 (1991); Dore III, *supra* note 4, at 450-54.

264. See, e.g., *Ganson v. Florida Dep't of Admin.*, 554 So. 2d 516, 520 (Fla. 1st Dist. Ct. App. 1989). In *Ganson*, the court noted that if administrative agencies chose to rely upon nonrule policy, then when a hearing was held, a "record foundation for the policy decisions in its orders, by expert testimony, documentary opinion or other evidence appropriate in form to the nature of the issues involved" must be offered. *Id.* The court found that the administrative agency had failed to do so in this case. *Id.*

265. Burris IV, *supra* note 4, at 696-97.

266. 568 So. 2d 1283 (Fla. 1st Dist. Ct. App. 1990) [hereinafter *Rabren II*].

267. *Id.* at 1284.

268. FLA. STAT. § 310.141 (1987).

269. FLA. STAT. § 310.101(1) (1987).

censed pilot from delegating his or her responsibilities to a pilot who holds only a federal license. Any violation of this section may result in a reprimand, fine, suspension, or revocation of license.<sup>270</sup>

Based on this statute, the Board of Pilot Commissioners accused Rabren of assigning pilots, who held only a federal license, to shift two vessels from one port to another in the Tampa Bay area when a state licensed pilot was required. Rabren admitted that these events had occurred.<sup>271</sup> However, he claimed that the shifts involved transfers within the port of Tampa Bay, and, relying upon *Rabren v. Board of Commissioners*,<sup>272</sup> that such actions did not require a state pilot. The hearing officer agreed, holding that while the Tampa Bay area may functionally consist of four ports for purposes of the statute, it was actually considered one port. Thus, any shifting of vessels between the ports located within the Tampa Bay area did not require the presence of a state licensed pilot, because such shifting did not involve a vessel leaving and entering the Tampa Bay port area.<sup>273</sup>

The Board of Pilot Commissioners reversed the decision of the hearing officer, finding that as a matter of law the hearing officer had erred. The Board concluded that the statute had been misinterpreted by the hearing officer, because the shifting of a vessel between ports in the Tampa Bay area was an act that involved leaving one Florida port and entering another, which required a state licensed pilot.<sup>274</sup> In announcing this policy, the Board functionally adopted a nonrule policy interpreting the statute.

The court noted that the Board of Pilot Commissioners had the

270. *Rabren II*, 568 So. 2d at 1285. The Board of Pilot Commissioners was delegated the authority by the Florida legislature to enforce Florida Statutes Chapter 310. FLA. STAT. § 310.185(1) (1987).

271. *Rabren II*, 568 So. 2d at 1286.

272. 497 So. 2d 1245 (Fla. 1st Dist. Ct. App. 1986), *rev. denied*, 508 So. 2d 13 (Fla. 1987) [hereinafter *Rabren I*]. The court held that the Board of Pilot Commissioners had exceeded its delegated authority in promulgating a rule which required a state pilot on board when a vessel was shifted from one docking facility to another while in port, because the Florida House of Representatives had rejected a similar provision as part of Chapter 310. However, in that case, the court noted that the Tampa Bay area included four ports, and that the rule might well have been a proper exercise of delegated authority when a vessel is shifted from a docking facility in one port to another facility in another Tampa Bay area port. *Id.* at 1249; *see Rabren II*, 568 So. 2d at 1285-86.

273. *Rabren II*, 568 So. 2d at 1287.

274. *Id.* The Board of Pilot Commissioners completely accepted the hearing officer's factual conclusions set forth in the recommended order.

authority to promulgate nonrule policy through adjudicatory orders. Whether to adopt certain public policy positions through the rule making or adjudicatory process was within the scope of discretion delegated to the Board of Pilot Commissioners by the legislature. However, when an administrative agency chooses to rely upon nonrule policy adopted in an adjudicatory context, the adjudicatory record must provide adequate support for that policy, both in law and fact. In this case, because the parties chose not to make the factual records available to the court on appeal, there was no such factual basis for the nonrule policy before the court. Further, the court noted that the order failed to "offer an explanation or justification for the policy."<sup>275</sup> The Board of Pilot Commissioners' finding that these facilities in the Tampa Bay area were each ports under the statute was a bare assertion unsupported by any factual predicate.<sup>276</sup>

Similarly, in *Health Care and Retirement Corp. of America v. Department of Health and Rehabilitative Services*,<sup>277</sup> the court noted:

[W]hen an [administrative] agency seeks to validate its action based upon a policy that is not recorded in rules or discoverable precedents, that policy must be established by expert testimony, documentary opinions, or other evidence appropriate to the nature of the issues involved and the agency must expose and elucidate its reasons for its discretionary action.<sup>278</sup>

In this case, the court found that the nonrule policy was merely stated as a bare assertion during the course of the administrative hearing.<sup>279</sup>

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275. *Id.* at 1289.

276. "If the [Board of Pilot Commissioners] wishes to avoid rulemaking and opt for policy development through adjudication, then it must accept the procedural safeguards that apply in formal hearings . . ." *Id.* at 1290.

277. 559 So. 2d 665 (Fla. 1st Dist. Ct. App. 1990).

278. *Id.* at 667-68 (citing *St. Francis Hosp., Inc. v. Department of Health & Rehabilitative Servs.*, 553 So. 2d 1351, 1354 (Fla. 1st Dist. Ct. App. 1989)).

279. *See also* *Bajrangi v. Department of Business Regulation*, 561 So. 2d 410, 415-16 (Fla. 5th Dist. Ct. App. 1990). In *Bajrangi*, the court noted that the testimony concerning the usual penalties, which apparently were based upon informal guidelines that did not appear in any statute or administrative rule and were not adequately documented as nonrule policy, cannot constitute a basis for rejecting a hearing officer's decision. *Id.* The error committed by the administrative agency was that it failed to provide actual testimony which would prove the factual predicate necessary for the adoption of such a nonrule policy. The witness just testified in a conclusory fashion that this was the usual penalty. *Id.*

The nonrule policy was not discoverable in any administrative agency precedent. The Department of Health and Rehabilitative Services also failed to adequately document the nonrule policy during the course of the administrative hearing by providing expert testimony, documents and other evidence to support its nonrule policy. Without adequate documentation to support the nonrule policy, the decision of the Department of Health and Rehabilitative Services was not supported by competent substantial evidence. Further, it may well be that it was inconsistent with prior administrative agency practices, a deviation from which has not been adequately explained on the record.<sup>280</sup>

In *Schiffman v. Department of Professional Regulation*,<sup>281</sup> the court concluded that the decision of the Board of Pharmacy imposing a permanent revocation of license was an invalid nonrule policy, because it lacked adequate evidentiary support in the administrative hearing record.<sup>282</sup> The Board of Pharmacy was authorized by the legislature to adopt administrative rules concerning revocation of a license.<sup>283</sup> The Board of Pharmacy did not adopt administrative rules and relied upon nonrule policy developed in the adjudicatory hearing process. While the Board of Pharmacy was free to choose to develop its policies concerning sanctions in this manner, it may not do so without establishing the following requirements in each order: 1) an explanation of the nonrule policy; 2) adequate factual support in the record for the nonrule policy; and 3) an explanation of how the nonrule policy was within the scope of the administrative agency's delegated authority.<sup>284</sup> In *Schiffman*, the Board of Pharmacy failed to provide any policy reasons justifying the nonrule policy which it applied.<sup>285</sup> Further, the order of the Board of Pharmacy was unclear, because one part of the order could be read as finding that Schiffman would never be eligible for reinstatement, while another part of order could be read as indicating that he may be eligible for reinstatement if he offered some, albeit undefined, evidence of rehabilitation. Such an internally inconsistent order was not an adequate explanation of the nonrule policy.<sup>286</sup>

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280. *Health Care & Retirement Corp. of Am.*, 559 So. 2d at 668. The court remanded the case for further action in light of its opinion. See FLA. STAT. § 120.68(12) (1989).

281. 581 So. 2d 1375 (Fla. 1st Dist. Ct. App. 1991).

282. *Id.* at 1376.

283. See FLA. STAT. § 465.016(4) (1989).

284. See *Schiffman*, 581 So. 2d at 1377; *Burris IV*, *supra* note 4, at 676-77.

285. *Schiffman*, 581 So. 2d at 1377.

286. *Id.* at 1378.

In *Beverly Enterprises-Florida v. Department of Health and Rehabilitative Services*,<sup>287</sup> the court held, in part, that the Department of Health and Rehabilitative Services acted improperly in altering its nonrule policy without adequately supporting it in the administrative hearing record.<sup>288</sup> The court found that when an administrative agency takes a position adverse to the party's understanding of the administrative agency's prior position in a matter, then the agency has effectively denied the party's request for action. When a party requested a formal administrative hearing in response to this decision, then the hearing must be de novo in nature to the extent that it addressed the formulation of the new administrative agency nonrule policy and was not a review of any action taken earlier based upon pre-existing administrative agency nonrule policy.<sup>289</sup> The court found that the Department of Health and Rehabilitative Services had abandoned its prior interpretation of the statute during the course of this proceeding without offering sufficient support in the evidentiary record or a reasonable explanation for its shift in policy.<sup>290</sup>

However, one case suggested that in some circumstances the courts might compel an administrative agency to adopt its policy positions through the rule making process. In *Department of Natural Resources v. Wingfield Development Company*,<sup>291</sup> the court considered whether a letter from the Department of Natural Resources requiring a

287. 573 So. 2d 19 (Fla. 1st Dist. Ct. App. 1990).

288. *Id.* at 23.

289. *Id.*

290. *Id.* The court stated:

When an [administrative] agency seeks to validate agency action based upon a policy that is not recorded in rules or discoverable precedents, that policy must be established by expert testimony, documentary opinions, or other evidence appropriate to the nature of the issues involved and the agency must expose and elucidate its reasons for its discretionary action. The agency may apply incipient or developing policy in a section 120.57 administrative hearing, provided the agency explicates, supports and defends such policy with competent, substantial evidence on the record in such proceeding. [Whenever an administrative agency's] policy does not simply reiterate a legislative mandate and is not readily apparent from a literal reading of the statutes involved . . . [it is] required to show the reasonableness and factual accuracy of its policy [in the administrative hearing record].

*Id.* at 22-23 (quoting in part *St. Francis Hospital, Inc.*, 553 So. 2d at 1354 (citation omitted)).

291. 581 So. 2d 193 (Fla. 1st Dist. Ct. App. 1991).



developer to make periodic reports on construction progress, not cease making significant construction progress on any part of the project for a period of six or more months and complete the resort project within two years or lose its exemption from the modified coastal construction control line permit requirements for those parts of the resort project located seaward of the modified line was a valid exercise of administrative discretion.<sup>292</sup> These constraints on exempt status from the permit requirements imposed by the adoption of a coastal construction control line did not appear in the statutes or the administrative rules. The court agreed with the hearing officer that the Department of Natural Resources letter containing these limitations was an "illicit rule not adopted in the manner required by law."<sup>293</sup>

The court further noted that "any agency statement is a rule [under the APA<sup>294</sup>] if it purports in and of itself to create certain rights and adversely affect others, or if it serves by its own effect to create rights, or to require compliance, or otherwise to have the direct and consistent effect of law."<sup>295</sup> The court read the Department of Natural Resources letter as easily qualifying as a rule under the APA, because it "implements, interprets or prescribes law or policy, describes procedure or practice requirements of the [administrative] agency, and imposes requirements or information not specifically required by statute or by existing rule."<sup>296</sup> As such, the letter was an invalid exercise of delegated authority, because it was not adopted through the rule making process mandated by the APA.<sup>297</sup> This opinion is of special note because the language indicates that these requirements could only be imposed through the rule making process. Thus, it implicitly rejects the possibility that these requirements could be imposed through the nonrule policy route.

During the last legislative session the hesitancy of the courts to require administrative agencies to engage in rule making rather than

292. *Id.* at 194-95 (extensively quoting the specific language of the letter). The Department of Natural Resources imposed these limitations to assure that exemption from the coastal construction control line permit requirements "was obtained in good faith and that the builder intends to go forward with the construction in a timely manner." *Id.* at 195.

293. *Id.* at 196.

294. FLA. STAT. § 120.52(16) (1989).

295. *Wingfield Dev. Co.*, 581 So. 2d at 196.

296. *Id.*

297. *Id.*; see FLA. STAT. § 120.54 (1989); see also *supra* notes 74-79 and accompanying text.

rely upon nonrule policy was addressed. The legislature amended the APA to require administrative agencies in most circumstances to adopt policy positions<sup>298</sup> through the rule making process.<sup>299</sup> An administrative agency can escape the rule making preference only if 1) the policy at issue is not a matter within the scope of the definition of a rule,<sup>300</sup> or 2) it is not feasible or practicable to currently adopt the policy through the rule making process.<sup>301</sup> The burden is on an administrative agency to prove that it should be exempt from the rule making preference.<sup>302</sup> If a hearing officer determines that an administrative agency should have adopted the nonrule policy or statement as a rule, then the administrative agency "shall immediately discontinue *all* reliance upon the statement or any substantially similar statement as a basis for agency action."<sup>303</sup> If an administrative agency nevertheless continues to rely upon the nonrule policy or statement in agency action, then the person whose substantial interests were affected by the agency action may recover attorney's fees and costs,<sup>304</sup> unless an administrative agency is engaged in a good faith attempt to adopt the nonrule policy or statement as a rule.<sup>305</sup>

These amendments to the APA should impact on the administrative process in four ways. First, the threat of attorney's fees and costs awards should create a substantial incentive for administrative agencies to promulgate their policy positions through the rule making process.

298. See FLA. STAT. § 120.52(16) (1991). See generally Dore III, *supra* note 4, at 450-54.

299. FLA. STAT. § 120.535(1) (1991). See generally Dore III, *supra* note 4, at 450-54.

300. See FLA. STAT. § 120.52(16) (1991). See generally Dore III, *supra* note 4, at 450-54.

301. FLA. STAT. §§ 120.535(1)(a), (b) (1991). See generally Dore III, *supra* note 4, at 450-54.

302. If the party meets its initial burden of showing that it is substantially affected by the nonrule policy or statement which meets the definition of a rule, but has not been adopted as a rule, then an administrative agency has the burden of offering persuasive proof that the nonrule policy or statement is not within the scope of the definition of rule and/or that it is not feasible or practicable to adopt it as a rule at this time. FLA. STAT. § 120.535(2)(b) (1991); see FLA. STAT. § 120.535(2)(a) (1991). See generally Dore III, *supra* note 4, at 450-54.

303. FLA. STAT. § 120.535(4) (1991). See generally Dore III, *supra* note 4, at 450-54.

304. FLA. STAT. § 120.535(6) (1991). See generally Dore III, *supra* note 4, at 450-54.

305. FLA. STAT. §§ 120.535(5), (6) (1991). See generally Dore III, *supra* note 4, at 450-54.

Second, the courts should no longer tolerate the use of nonrule policies by administrative agencies, except in very rare circumstances, because administrative agencies will no longer be able to merely assert it is not feasible or practical to adopt a policy as a rule; they will have to prove it.<sup>306</sup> Third, there should be a dramatic increase in the use of the rule making process<sup>307</sup> and challenges to proposed and promulgated rules.<sup>308</sup> Fourth, once administrative agencies have promulgated most of their nonrule policies and statements as rules, the legislature should be able to better exercise its oversight function and assure that administrative agencies are exercising their delegated authority in a manner consistent with the legislative purpose and intent.<sup>309</sup>

### B. *Adjudicatory Structure and Procedure*

The courts decided several cases during the survey period which generally concerned the structure of the adjudicatory process and the procedures used.

In *Southeast Grove Management Inc. v. McKiness*,<sup>310</sup> the court reversed and remanded a nonfinal administrative order, in part, because the hearing officer improperly allocated the burden of persuasion and failed to appreciate that the hearing concerned an administrative order which had already been rendered, not the original complaints.<sup>311</sup> In such a case, the party requesting the hearing has the "burden of showing by competent, substantial evidence that . . . [the] findings [in the administrative order] were incorrect."<sup>312</sup>

306. See *Burris IV*, *supra* note 4, at 683-85. See generally *Dore III*, *supra* note 4, at 450-54.

307. HOUSE COMM. ON GOVERNMENTAL OPERATIONS, H.R. REP. in H.R. BILL NO. 1879 (Fla. May 22, 1991). See generally *Dore III*, *supra* note 4, at 450-54.

308. FLA. STAT. § 120.54(4) (1991) (administrative challenges to proposed rules); FLA. STAT. § 120.56(1) (administrative challenges to adopted rules). See generally *Dore III*, *supra* note 4, at 450-54.

309. See *Burris IV*, *supra* note 4, at 667-73. See generally *Dore III*, *supra* note 4, at 450-54.

310. 578 So. 2d 883 (Fla. 1st Dist. Ct. App. 1991).

311. *Id.* at 886-87. The court found that the notice given concerning the complaints and right to request an administrative hearing was sufficient even though it never mentioned whether a hearing request was made—the right to a hearing on the complaint was waived. *Id.* at 887 n.6. The other issues concerned estoppel claims. See *id.* at 885-86.

312. *Id.* at 887 (also noting that the factual findings in the order carried a rebuttable presumption of correctness).

The courts in two cases addressed the question of when administrative agencies and private parties could successfully use procedural errors as a basis for seeking default orders. In *Coon Clothing Co. v. Eggers*,<sup>313</sup> the court noted that public policy considerations required that, whenever possible, the merits of a case should be the basis for its resolution, rather than procedural default mechanisms. When notice of an administrative hearing arrives only three working days prior to the hearing, there was evidence that the party was absent from the place where the notice was served, and there was no evidence of any prejudice to the administrative agency arising from the delay in the response by the party, then a default order should not be entered, and the case should be reopened with a hearing.<sup>314</sup>

*Department of Environmental Regulation v. Puckett Oil Co.*<sup>315</sup> is consistent with the *Eggers* case. *Puckett Oil Co.* concerned under what circumstances it was appropriate for a hearing officer to enter a summary final order.<sup>316</sup> In this case, the hearing officer entered a "summary final order awarding \$15,000 in attorney's fees and costs to Puckett," because the Department of Environmental Regulation failed to respond in a timely fashion to the petition filed by Puckett Oil, waiving its right to a hearing on the petition and admitting that there was no material issue of fact involved in resolving the petition.<sup>317</sup> The court held that the hearing officer erred in doing so. The court found that the use of the word "shall" in the administrative rule establishing the time for filing a response to a petition was not designed to create a circumstance where every failure to respond in a timely fashion should be treated as depriving the hearing officer of jurisdiction to entertain a request for permission to file a late response to the petition. Rather, the mandatory language was used for the purpose of only generally providing for "the orderly conduct of business."<sup>318</sup> In such cases the use of the word "shall" was not intended as mandatory, but directory. Because the word "shall" was used in this way, the trier of fact retained jurisdiction to determine whether to exercise his or her "discretion to

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313. 560 So. 2d 1357 (Fla. 3rd Dist. Ct. App. 1990).

314. *Id.* at 1357-58.

315. 577 So. 2d 988 (Fla. 1st Dist. Ct. App. 1991).

316. The court avoided deciding under what circumstances a party should be permitted to escape any adverse consequences for failing to timely respond to a petition.

317. *Id.* at 990-91.

318. *Id.* at 991.

extend the time for the filing of a responsive pleading.”<sup>319</sup> The hearing officer cannot refuse to exercise its discretionary authority to grant an administrative agency permission to file an untimely response as a means of sanctioning the administrative agency for failing to strictly adhere to the rules.

Of course, there are circumstances where it is appropriate for a hearing officer to conclude that the administrative agency’s failure to file a response was a waiver of its right to a hearing.<sup>320</sup>

But, in order for waiver to be applied based on the passage of time, we consider it essential for a showing to be made that the party against whom waiver is asserted has received notice sufficient to commence the running of the time period within which the response is required. Thus, if it is clearly established that a party has received notice informing him or her of the requirement of taking certain action within a specified period of time, and such party delays for a protracted length of time in taking the required action,

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319. *Id.* The court noted that any contrary reading of the rule would require it to hold that the rule was an ultra vires exercise of delegated authority. *Id.* at 991-92. The court stated:

[N]o statutory authority, either expressly or reasonably implied therefrom, empowered DOAH to set a jurisdictional time limitation on the right of an agency to respond to a petition for fees and costs. To the contrary, we consider that the division’s power to permit a late-filed response is reasonably implied from the very statutes that rule 22I-6.035 referenced as authorizing its adoption: Section 120.57, Florida Statutes (1989), specifically subsection (1)(b)4, authorizing parties “to respond, to present evidence and argument on all issues,” and sections 57.111(4)(c) and (d), allowing a state agency against which a small business party has prevailed to oppose an application for attorney’s fees and costs by affidavit, and requiring the hearing officer to conduct an evidentiary hearing on the application. Clearly the two statutes, which the rule was designed to implement, imply that the agency shall be given a fair opportunity to defend against an application for fees and costs. We find nothing in the statutes reasonably suggesting that if an agency fails to comply with the time limitations required for its response, a summary final order, regardless of any mitigating circumstances, must thereafter be entered.

*Id.* at 992; see *supra* notes 38-81 and accompanying text.

320. In circumstances in which no response whatsoever has been filed, the division obviously has the right, in its supervision of orderly administrative proceedings, to conclude that a party has waived his or her right to respond, as more fully discussed *infra*, and to thereafter enter a summary final order, pursuant to Florida Administrative Code Rule 22I-6.030.

*Puckett Oil*, 577 So. 2d at 992.

we consider that the party may be deemed to have waived his or her right to so act.<sup>321</sup>

However, because waiver of a right to a hearing should not be lightly implied, it should be imposed only where a party clearly has waived its right to a hearing, or any delay in the filing of a timely response results in prejudice to another party's interests.<sup>322</sup>

The hostility of the courts toward the use of procedural default mechanisms for resolving cases also can be seen in the one case during the survey period that concerned the legal sufficiency of notice given by an administrative agency. In *Baker v. Office of the Treasurer*,<sup>323</sup> a fire-fighter, Baker, appealed the final order which revoked his fire-fighter certification, claiming that he was not given appropriate notice of an opportunity to seek a hearing challenging the allegations in the complaint. The State Fire Marshal sent Baker notice of the complaint by certified mail. The notice was returned to the Marshal's office, noting a forwarding address. The Marshal again mailed the complaint to the forwarding address, but it was returned. The Marshal then employed a private investigator who looked for Baker at the first address and also checked an address listed in the telephone book, none of which led him to Baker. The Marshal, after taking these steps, published notice of the complaint against Baker in the Orlando Sentinel on four consecutive Wednesdays. Baker never did respond to these notices, and a final order revoking his certification was issued by default.

Baker claimed that the State Fire Marshal's office failed to make a diligent search before resorting to notice by publication. The APA provided that an administrative agency, prior to revoking any license based upon an administrative complaint, shall serve the person with notice of the complaint either by personal service or certified mail. If both personal service and certified mail service are unsuccessful, then the agency may publish notice in an appropriate newspaper.<sup>324</sup>

The resolution of whether the State Fire Marshal's office properly resorted to the use of notice through publication turned on whether the private investigator made a diligent search for Baker.<sup>325</sup> The court found that the private investigator's affidavit did not demonstrate what

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321. *Id.* at 993 (citation omitted).

322. *Id.* at 993-94.

323. 575 So. 2d 727 (Fla. 1st Dist. Ct. App. 1991).

324. FLA. STAT. § 120.60(7) (1989).

325. *Baker*, 575 So. 2d at 728.

steps he had taken in attempting to locate Baker. Rather, the affidavit evidenced a mere conclusory statement that the investigator had visited one address in an attempt to locate Baker, and that his present address remained unknown. Based upon the affidavit, the court could not know what steps the private investigator took in attempting to locate Baker's other addresses.<sup>326</sup>

The court held that "the requirements of the statute authorizing service by publication were not met in this case in that there was an absence of diligent inquiry and a conscious effort to locate appellant reasonably employing knowledge known by or readily available to the appellee."<sup>327</sup> Because there was no proof that notice by publication was necessary in this case, Baker was denied his opportunity to request a hearing and contest the allegations contained in the complaint.<sup>328</sup>

Two cases during the survey period concerned the question of when the jurisdiction of the administrative agency or hearing officer was terminated. *New v. Department of Banking and Finance*<sup>329</sup> concerned an agreement reached between New and the Department of Health and Rehabilitative Services just prior to the commencement of a section 120.57 formal hearing. The agreement provided for repayment of an overpayment of certain amounts via an electronic funds transfer. The hearing officer closed the file and discontinued the hearing at that point. However, the Department of Health and Rehabilitative Services was unable to persuade the Comptroller that it had lawfully appropriated funds for the purpose of making its portion of the repayment, and therefore, the settlement agreement was not implemented.

The court noted that a settlement agreement did not deprive a hearing officer of jurisdiction when the hearing concerning the case was merely discontinued as a result. The hearing officer loses jurisdiction over the matter only after the case is dismissed. When, for reasons unforeseen by the parties at the time, the settlement agreement was not implemented, then the case must be re-opened, and the formal administrative hearing process should be resumed for the purpose of entering

326. *Id.* at 729. The court noted that there were several obvious steps which should have been taken including seeking his address from his employer, the City of Orlando Fire Department. *Id.*

327. *Id.*

328. *Id.* at 729-30. The court ordered that the case be remanded and a hearing date set in compliance with the requirements of the APA.

329. 554 So. 2d 1203 (Fla. 1st Dist. Ct. App. 1989).

an order adopting the terms of the settlement agreement.<sup>330</sup> The Comptroller erred in unilaterally entering a final order requiring repayment by New.<sup>331</sup>

In *Kalbach v. Department of Health and Rehabilitative Services*,<sup>332</sup> the Department of Health and Rehabilitative Services and Kalbach “had agreed that the arrearage owed for [child support] as of March 22, 1988, was \$1,020.40.”<sup>333</sup> This was adopted as a finding of fact in the final order by the Department. In a subsequent letter, the Department asserted that the correct arrearage amount for child support “was actually \$2,084.97 as June 15, 1988.”<sup>334</sup> After a second hearing, the hearing officer determined that the Department was bound by its earlier finding that the arrearage in child support was \$1,020.40, even though this figure was in conflict with the circuit court’s order concerning child support obligations. The Department rejected this finding in its final administrative order, and held that any error in the determination of arrearages in child support, whether the error is an over- or under-statement, should be corrected at the point in time when the error is discovered.

The court rejected this position, finding that after an administrative order became final and the time for judicial review had passed, the Department of Health of Rehabilitative Services was precluded from modifying the order. “While administrative agencies do have inherent power to reconsider final orders that are still under their control . . . [, where the] order . . . passed out of . . . [their] control . . . [it] be-

330. *Id.* at 1207. This may appear nonsensical. However, it is necessary so that the parties can seek enforcement of the settlement agreement in court.

331. The court noted that the Comptroller incorrectly concluded there were no appropriated funds available to repay the amount of the overpayment. *Id.*

The court also granted New’s motion for attorney’s fees and costs because, the agency’s actions which precipitated this appeal was gross abuse of [the] agency’s discretion. The Comptroller who was a mere party to a valid section 120.57 proceeding took charge of the proceedings and without jurisdiction or authority entered a void order adversely affecting the substantive rights of New. It was necessary that she appeal the order in order to protect her rights.

*Id.* The Division of Administrative Hearing was directed to hold a hearing on the matter of the appropriate amount of attorney’s fees and costs if the parties were unable to agree on the amount. *Id.* at 1208.

332. 563 So. 2d 809 (Fla. 2d Dist. Ct. App. 1990).

333. *Id.* at 810.

334. *Id.*



came final and was no longer subject to modification."<sup>335</sup> The only occasion when the agency might successfully argue for an exception to this general rule occurs where it is able to demonstrate that modification of the order is necessary due to a "change in circumstances or any demonstrated public need or interest."<sup>336</sup> No such showing was offered in this case.

It is clear that the APA requires an administrative agency to maintain an accurate transcript of any section 120.57(1) hearing.<sup>337</sup> In *Citrus Central v. Gardner*,<sup>338</sup> the court noted that when circumstances required a hearing de novo to be held, because the record of the original hearing was not available, then "the presentation of new and additional evidence, by which the matter might be determined as if it had not been previously addressed" was admissible.<sup>339</sup>

Further, in *E.H. v. Department of Health and Rehabilitative Service*,<sup>340</sup> a hearing was held by the Department of Health and Rehabilitative Services pursuant to section 120.57(1), but because the court reporter who kept the transcript of the record had left the jurisdiction, and all efforts by the parties to contact the court reporter had failed, no record was available for the appeal.<sup>341</sup> The remedy in such a case was for both parties, along with the hearing officer, to submit their recollections of what transpired at the hearing, and this would constitute the record on appeal.<sup>342</sup> An administrative agency was not considered exonerated from this duty by mere allegations that it made a good faith attempt to preserve the record. While in this case the failure of the agency to maintain the transcript of the proceeding did not result in its being unable to meet its burden of showing that there was substantial and competent evidence to support its decision, in some future case it may well do so.<sup>343</sup>

Generally, under the APA, ex parte communication is prohibited.<sup>344</sup> But in *Citizens of Florida v. Wilson*,<sup>345</sup> the court noted that

335. *Id.*

336. *Id.* at 811; *cf. supra* notes 235-42 and accompanying text.

337. FLA. STAT. § 120.57(1)(b)(7) (1989); *see supra* notes 123-44 and accompanying text.

338. 569 So. 2d 936 (Fla. 1st Dist. Ct. App. 1990).

339. *Id.* at 937.

340. 571 So. 2d 50 (Fla. 1st Dist. Ct. App. 1990).

341. *Id.* at 50.

342. *Id.* at 51; *see* FLA. R. CIV. P. 9.200(b)(4).

343. *E.H.*, 571 So. 2d at 51.

344. FLA. STAT. § 120.66 (1989).

this prohibition was not designed to forbid contact between Public Service Commission members and their staff during the course of a rate hearing. The Court found that section 120.66 was limited to circumstances where a hearing officer was involved, or after an administrative agency had received a recommended order. Neither of these circumstances were present in this case. The court also noted that the communication occurred during the course of a public hearing and, therefore, lacked the characteristic of an *ex parte* communication which generally is contact made outside of the public hearing context.<sup>346</sup>

### C. *Licensing*<sup>347</sup>

In *Patmilt Corp. v. Department of Business Regulation*,<sup>348</sup> the court held that where the Department of Business Regulation had orally agreed to accept a lesser penalty than revocation of a license, and where the licensee relied upon that oral agreement, the Department of Business Regulation cannot enter a default order revoking the license because of the Department's perception that the licensee was late in submitting a completed copy of the written agreement based upon the prior oral agreement. The process used by the Department was not fair and constituted a material error, because it failed to give the licensee specific notice of the possible consequences of not timely submitting an executed copy of the written agreement.<sup>349</sup> The court indicated that the Department may adopt such an approach if it provides adequate notice to a licensee so that the licensee knows it must submit the agreement in a timely fashion, or, in a timely fashion, request an administrative hearing, or otherwise risk having waived the right to a hearing.<sup>350</sup>

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345. 569 So. 2d 1268 (Fla. 1990).

346. *Id.* at 1270.

347. Several other cases concerning licensing are discussed elsewhere in this article. *See, e.g., supra* notes 70-73, 103-113, 266-76 and accompanying text.

348. 581 So. 2d 997 (Fla. 1st Dist. Ct. App. 1991).

349. *Id.* at 998-99. The court also noted that the written agreement provided by the Department of Business Regulation stated that if the agreement was not accepted by the director, then it would constitute notice of a request for an administrative hearing on the matter.

350. *But see supra* notes 313-28 and accompanying text.

#### D. Contract Bidding

Only one decision during the survey period directly concerned the contract bidding process. *Mercedes Lighting and Electrical Supply Co. v. Department of General Services*<sup>351</sup> concerned an appeal from a final order issued by a hearing officer awarding attorney's fees to the Department of General Services and Marpan Supply because Mercedes Lighting had filed a "frivolous bid protest."<sup>352</sup> Mercedes Lighting's low bid was rejected, because it did not include a list of in-state service representatives, as required by the invitation to bid issued by the Department of General Services. Mercedes Lighting contended that it filed a bid with in-state service representatives named,<sup>353</sup> or, in the alternative, that the omission of an in-state service representative from the bid was a minor irregularity which could be waived.<sup>354</sup>

The hearing officer rejected both contentions finding that naming of manufacture's sales employees could not reasonably be understood as having designated an in-state service representative, and holding that the minor bid irregularity claim was waived, as it was not asserted in a timely fashion.<sup>355</sup> The hearing officer characterized the protest as frivolous, because it had no basis in law or fact. The hearing officer specifically found that Mercedes Lighting had simply forgotten to include the in-state service representative information in its bid, and that the bid protest was filed merely to provide an opportunity for it to correct this oversight. The hearing officer considered this an inappropriate use of the bid protest process<sup>356</sup> and awarded attorney's fees and costs to the parties to the bid protest.<sup>357</sup>

The court, when interpreting under what circumstances attorney's fees and costs could be awarded under section 120.57(1)(b)5, drew

351. 560 So. 2d 272 (Fla. 1st Dist. Ct. App. 1990).

352. *Id.* at 273.

353. Mercedes Lighting maintained that the names were found among the plant manufacturer's sales employees listed in their bid. *Id.* at 274.

354. *Id.*

355. The hearing officer found that Mercedes Lighting would gain an advantage if it was allowed to re-open its bid to correct the deficiency, because it could choose to withdraw its bid by failing to correct the deficiency—an opportunity not offered to other bidders on the contract.

356. *Id.* at 275. The hearing officer did not find that the bid protest was instituted for the purpose of creating unnecessary delay or to establish an advantage.

357. *Mercedes Lighting*, 560 So. 2d at 276. "The hearing officer entered a final order granting the Department \$24,312.00 in fees plus costs, and Marpan \$20,281.00 plus costs." *Id.*

upon the policy arguments underlying Rule 11 of the Federal Rules of Civil Procedure.<sup>358</sup> The APA provision concerning awards of attorney's fees and costs provided that an award should occur only when the action was filed for an improper purpose, such as a frivolous bid protest. The APA provision did not require that the party or attorney signing the papers, which were the basis for the administrative action believe that "the paper is well-grounded in fact, and is . . . warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law."<sup>359</sup>

The court reasoned that if the legislature intended to have these factors considered in the decision process concerning awards of attorney's fees, it would have listed them explicitly in section 120.57(1)(b)5.<sup>360</sup> The court found that the hearing officer erred in concluding that the bid protest was frivolous, because there was no clear binding precedent which established a position contrary to that asserted by Mercedes Lighting during the bid protest process.<sup>361</sup> A critical element in this decision process was that the administrative agency always had an opportunity to change its mind as a result of the hearing in the case before it. The fact that the hearing officer ultimately chose to reject the position advocated by Mercedes Lighting was not sufficient justification for holding that the bid protest was frivolous, especially where there was a reasonably clear legal justification for bringing the protest.<sup>362</sup> In dicta, the court noted that there were other remedies availa-

358. *Id.* at 276-77.

359. *Id.* at 277; FLA. STAT. § 120.57(1)(b)5 (1989)

The signature of a party, a party's attorney, or a party's qualified representative constitutes a certificate that he has read the pleading, motion, or other paper and that, to the best of his knowledge, information, and belief formed after reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay or for frivolous purpose or needless increase in the cost of litigation.

360. *Mercedes Lighting*, 560 So. 2d at 277. The court noted that it is appropriate for the legislature to make clear its intent if it wished to have the two-prongs of Rule 11 apply in this statutory circumstance. The court's imposition of this requirement in this instance would violate the tenets of the separation of powers doctrine. *Id.* at 277-78.

361. *Id.* at 278. The Department of General Services did not move to dismiss the bid protest petition "on the grounds that it was baseless or filed for an improper purpose." *Id.* at 274.

362. The court noted that a decision by a hearing officer should not normally be given the effect of *stare decisis*, as in the case of judicial decisions, because such decisions turn on the specific facts of each case and are easily distinguishable. It would be

ble to a hearing officer besides an awarding of attorney's fees and costs. A hearing officer also had authority to order a pleading struck if it was filed for an improper purpose, or to order it withdrawn or amended.<sup>363</sup>

### E. *Emergency Rules and Orders*

In *Bank of Credit and Commerce International (Overseas) Ltd. v. Lewis*,<sup>364</sup> the now infamous Bank of Credit and Commerce International<sup>365</sup> (BCCI) appealed the final administrative order by the Comptroller denying BCCI's petition for renewal of a license to operate an office in Miami, Florida.<sup>366</sup> Despite a very checkered past operation,<sup>367</sup> the Comptroller granted BCCI a renewal of its Miami office license for the year ending on March 4, 1990. In that renewal order, the Comptroller stated that "BCCI has satisfactorily demonstrated that the statutory requirements for renewal of its license have been met."<sup>368</sup>

After this renewal was granted, BCCI and the Comptroller entered into another agreement further detailing monitoring and compliance requirements. In early January 1990, BCCI entered a guilty plea to money laundering charges and agreed to pay a civil forfeiture of approximately \$15,000,000. Although the plea agreement was subject to a gag order, the Comptroller was given permission to review the terms of the plea agreement and the details of BCCI's compliance with its terms. In February 1990, BCCI timely filed another application for renewal of its license for the Miami office. Notice of the renewal was published in the Florida Administrative Weekly on March 2, 1990.

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contrary to the purpose of the bid protest proceedings, as these were designed to provide "a person, whose substantial interest ha[d] been determined by agency action, an opportunity to attack the agency's position by appropriate means, subject to judicial review under § 120.68, Florida Statutes." *Id.* at 278. *But see* *Burris IV, supra* note 4, at 693-97.

363. *Id.* at 279.

364. 570 So. 2d 383 (Fla. 1st Dist. Ct. App. 1990).

365. BCCI has been labeled the sleaziest bank in the world by both *Time* and *Newsweek*. *See* 138 *TIME* July 29, 1991, at 42-47.

366. *BCCI*, 570 So. 2d at 384.

367. BCCI was indicted in October of 1988, had been subject to an emergency order calling for it to cease all unsafe and unsound banking practices and activities, and had entered into a subsequent agreement with the Comptroller in which BCCI promised to operate using safe and sound banking practices, to cease violation of any laws, to maintain adequate monetary reserves, and to make periodic reports concerning compliance with these requirements. *Id.*

368. *BCCI*, 570 So. 2d at 384.

“On March 5, 1990, three days after publication, Lewis issued a final order denying the renewal of BCCI’s Miami agency license.”<sup>369</sup> The order concluded that “(a) the [\$15,000,000] civil forfeiture affect[ed] the financial condition of BCCI so as to constitute an unsafe and unsound banking practice; (b) the activities described in the indictment constitute[d] criminal violations of law; and (c) renewal of the Miami agency license [was] not in the public interest.”<sup>370</sup> The Comptroller notified BCCI that it could challenge the order through an administrative hearing process or by seeking appellate review within thirty days.

Under the APA, summary orders should be issued only in an emergency situation. In all other situations, the APA requires that a party which will be adversely effected should be given notice and an opportunity to be heard before any final order or action is taken.<sup>371</sup> The court rejected any claim that the legislature had totally abrogated a pre-deprivation hearing right of applicants for a banking license. The court found that the APA guaranteed an applicant, as well as any other person, the opportunity to request a hearing within twenty-one days of publication of the notice of the license renewal request.<sup>372</sup> The court concluded that “[t]his statute, by its own terms, gives an applicant, as well as other parties, [twenty-one] days to request a hearing. We find nothing in the statute which authorizes the [D]epartment [of Banking and Financing] to issue a final order prior to giving the applicant a reasonable opportunity to request a hearing.”<sup>373</sup> If an administrative agency chooses to rely upon the presence of an emergency to justify summary action, then it must explain how the circumstances present an “immediate danger to the public health, safety or welfare.”<sup>374</sup> In this case, the Department of Banking and Financing failed to properly demonstrate, on the face of the order, that such an emergency existed as required by a section 120.59(3).<sup>375</sup>

In *Allied Education Corp. v. Department of Education*,<sup>376</sup> the court noted that a cease and desist order entered against a post-secondary vocational school and ordering that it cease operations, presented an appropriate circumstance for interlocutory judicial review, “because

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369. *Id.* at 385.

370. *Id.*

371. *Id.*

372. FLA. STAT. § 120.60(5)(a)2 (1989).

373. *BCCI*, 570 So. 2d at 385.

374. FLA. STAT. § 120.59(3) (1989); *see* FLA. STAT. 120.60(8) (1989).

375. *BCCI*, 570 So. 2d at 386.

376. 573 So. 2d 959 (Fla. 1st Dist. Ct. App. 1991).

review of final agency action would not provide an adequate remedy."<sup>377</sup> The court entered an order quashing the cease and desist order without prejudice, because the Department of Education did not allege and was unable to substantiate "any threat or danger to the public health, safety, or welfare."<sup>378</sup> The court rejected the attempt by the Department of Education to remedy these defects by alleging and offering evidence on these issues during the hearing conducted by the Division of Administrative Hearings as untimely, because these allegations and findings should have been set forth in the emergency order itself.<sup>379</sup>

In dicta, the court noted that Florida Statute section 246.2265, which delegated to the Department of Education the authority to suspend the license of educational institutions in an emergency,<sup>380</sup> did not require the Department of Education to comply with any of the procedural safeguards which normally are applicable when an emergency suspension, restriction, or limitation of a license is imposed.<sup>381</sup> Without these procedural safeguards, the "emergency action taken by an agency prior to providing an opportunity for the effected person(s) to be heard would run afoul of well-established constitutional guarantees of procedural due process."<sup>382</sup> In order to assure that section 246.2265 was not unconstitutional, the court found that the procedure provided for in the APA for emergency suspension of a license was required in any action under the section. The court found that the action of the Department of Education did not comply with this procedure, because its cease and desist order "did not set forth specific facts and reasons for finding an immediate danger to the public health, safety or welfare, nor did it state why the action taken was only that necessary to protect the public interest, nor did it give reasons for concluding that the procedures utilized were fair under the circumstances."<sup>383</sup>

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377. *Id.* at 960. The court noted that Allied Education sought interlocutory review through a notice of appeal process. This was not considered the proper method for invoking the appellate court's jurisdiction based on an interlocutory circumstance. Allied Educational should have filed a petition for review of a non-final agency action pursuant to FLA. R. APP. P. 9.100(c). The court treated the notice of appeal filed by Allied Educational as such a notice for purposes of this case. *Id.* at 960 n.1.

378. *Id.*

379. *Id.* at 961.

380. FLA. STAT. § 246.2265 (1989).

381. *See* FLA. STAT. §§ 120.54(9) (1989); FLA. STAT. § 120.60(8) (1989).

382. *Allied Educ. Corp.*, 573 So. 2d at 961.

383. *Id.* at 961. The court also noted that Allied Education was not offered an

Similar principles constrain the power of administrative agencies to issue emergency rules.<sup>384</sup> The decision in *Little v. Coler*<sup>385</sup> concerned a challenge to emergency rules promulgated by the Department of Health and Rehabilitative Services.<sup>386</sup> Under the APA, in order for an emergency rule promulgated by an administrative agency to be valid, the agency must publish "the facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances."<sup>387</sup> In this case, the Department of Health and Rehabilitative Services, in its published notice concerning these emergency rules, stated that the reduction in appropriations for the aid to families with dependent children program required an immediate implementation of cost reduction plans, or the program would have insufficient funds to continue operation until the end of the fiscal year. The Department of Health and Rehabilitative Services asserted in its notice that the process being adopted was fair, because it was impossible to promulgate a permanent rule in time to implement the savings required by the reduced appropriation.<sup>388</sup>

The court held that reduction in appropriation for the program qualified as an emergency circumstance under the APA.<sup>389</sup> The court found that the possibility of a transfer of funds from state trust funds by the Governor, if an excess of those funds existed, was not a sufficient basis for holding that no emergency existed as result of the reduced appropriation.<sup>390</sup> The emergency rules were justified as long as they were needed to assure compliance with the appropriate statutes gov-

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evidentiary hearing concerning the matters alleged in the emergency cease and desist order. *Id.*

384. See FLA. STAT. § 120.54(9) (1989).

385. 557 So. 2d 157 (Fla. 1st Dist. Ct. App. 1990).

386. The court noted that initially the case was properly before it, because when a petitioner asserts that emergency rules will have a real and substantial impact on him or her, then rules may be challenged in a direct appeal to the court. *Id.* at 158; see FLA. STAT. §§ 120.54(9), .68 (1989).

387. *Little*, 557 So. 2d at 158.

388. *Id.* The reductions implemented by the rules chiefly concerned methods by which the amount of benefits paid out would be reduced through delays in the first benefit payments to new applicants. *Id.* at 159.

389. *Id.* at 160.

390. *Id.* at 159. The court specifically found that the transfer of such funds was far too contingent to be relied upon in avoiding the possible shortfall in the funding of the program as it was currently constituted. *Id.*



erning the program.<sup>391</sup> The failure of the Department of Health and Rehabilitative Services to notify, as suggested by Florida Administrative Code Rule 28-3.037, major wire services and other effected persons of the purpose of the emergency rule was not a basis for invalidating the emergency rules which were ultimately promulgated. The language of rule 28-3.037 is not mandatory, so providing these types of notice is a matter left to administrative discretion. Discretionary decisions of this nature should be overturned by the courts only when an abuse of discretion has occurred. The court found no evidence in this case to support the claim that the Department of Health and Rehabilitative Services abused its discretion.<sup>392</sup>

#### F. *What Counts As Evidence In An Administrative Proceeding?*

Part of what makes the hearing processes under the APA unique is that the traditional complex rules of evidence do not constrain what evidence may be admitted at a hearing. "Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida."<sup>393</sup> Under this statutory scheme, hearing officers have "considerable discretion in determining what evidence should be admitted at an administrative hearing."<sup>394</sup> However, there are limits to this discretion both as to the admission and exclusion of evidence.

For example, in *Conservancy, Inc. v. A. Vernon Allen Builder, Inc.*,<sup>395</sup> the court held that it was reversible error for the hearing officer to exclude evidence of secondary impact in determining cumulative impact of a dredge and fill permit. The court found that this was relevant non-repetitive evidence on a critical issue.<sup>396</sup> However, in *Faucher v.*

391. *Little*, 557 So. 2d at 160.

392. *Id.*

393. FLA. STAT. § 120.58(1)(a) (1989). *But see* Martin Marietta Corp. v. Roop, 566 So. 2d 40, 42 (Fla. 1st Dist. Ct. App. 1990) (noting that administrative proceedings under Chapter 120 are exempted from the rules of evidence, but that the workers' compensation system of adjudication is governed not by the APA, but by the Florida Rules of Evidence).

394. *Burris II*, *supra* note 4, at 755; *see also* *Burris III*, *supra* note 4, at 623.

395. 580 So. 2d 771 (Fla. 1st Dist. Ct. App. 1991).

396. *Id.* at 779.

*R.C.F. Developers*,<sup>397</sup> the court noted that when medical records and documents are not legible, then such medical documents and records “cannot be regarded as competent and substantial proof of anything, and will be disregarded in the evaluation of the evidence in the record on appeal.”<sup>398</sup> The court was clearly indicating that such information should never have been admitted as evidence.

### 1. Hearsay

Hearsay evidence is generally admissible in an administrative proceeding, but the use of hearsay evidence to support an administrative agency decision is significantly restricted under the APA.<sup>399</sup> Standing alone, hearsay evidence cannot constitute competent substantial evidence, but it can “be used for the purpose of supplementing or explaining other evidence.”<sup>400</sup> In *Doran v. Department of Health and Rehabilitative Services*,<sup>401</sup> the court held that “[t]he documents presented before the hearing officer were hearsay and did not come within any recognized exception which would have made them admissible in a civil action.”<sup>402</sup> Because the documents offered in this case were uncorroborated hearsay evidence, the APA provides that such evidence cannot by itself constitute competent and substantial evidence in a case.<sup>403</sup> Because there was no other evidence offered in this case to prove the critical disputed factual issues, the order of the Office of Public Assistance Appeals Hearings was reversed.<sup>404</sup> However, if the hearsay evidence offered had been admissible in a civil action, then it may have by itself

397. 569 So. 2d 794 (Fla. 1st Dist. Ct. App. 1990).

398. *Id.* at 798 n.2.

399. *Cf. Nowicki v. St. Petersburg Kennel Club*, 558 So. 2d 181 (Fla. 1st Dist. Ct. App. 1990). In *Nowicki*, the court noted once again that judges of compensation claim are required to follow the rules of evidence more closely than hearing officers in a normal APA adjudicatory proceeding. In such a case, documents which are hearsay must be excluded from evidence unless they are qualified for admission under one of the hearsay exceptions. *Id.* at 183.

400. FLA. STAT. § 120.58(1)(a) (1989). “The use of hearsay evidence in this limited manner, supplementing or explaining other evidence, is often erroneously cited by boards or commissions in reversing the decisions of referees [or] hearing officers . . . .” Burris III, *supra* note 4, at 624.

401. 558 So. 2d 87 (Fla. 1st Dist. Ct. App. 1990).

402. *Id.* at 88.

403. *See* FLA. STAT. § 120.58(1)(a) (1989).

404. *Doran*, 558 So. 2d at 88.

constituted competent substantial evidence.<sup>405</sup>

### G. *An Agency Must Follow Its Own Rules*

Administrative agencies may not take action which is inconsistent with their own rules.<sup>406</sup> Generally, if an administrative agency does so, then the reviewing court must remand the case to the agency for proceedings consistent with the agency rules.<sup>407</sup>

The court used this basic principle in resolving the issue presented in *Florida Optometric Ass'n v. Department of Professional Regulation*.<sup>408</sup> In *Florida Optometric Ass'n*, the court considered whether the Board properly determined that the petition for intervention was filed untimely. The structure of the APA and the Florida Administrative Code clearly envisions that a person who may be affected by declaratory statements must be offered a clear point of entry into the formal proceeding, allowing that person to contest the possible resolution of the matter to be addressed.

The court noted that this required a notice which was "sufficient to give persons with standing to initiate [section] 120.57 proceedings a *clear point of entry* to either initiate [section] 120.57 proceedings or intervene in already existing proceedings directed to the same agency decision."<sup>409</sup> Because no statute or rule superseded the notice timing requirements found in Administrative Code Rule 28-5.111,

the Board was required to comply with the requirements of Rule 28-5.111 in giving notice of the declaratory statement proceedings. The published notice of the declaratory statement petition obviously failed to comply with Rule 28-5.111, in that it neither specified the time limit for requesting a hearing, nor referenced the relevant procedural rules. Further, even if the published notice of the petition for declaratory statement had complied with rule 28-5.111, the optometrists' petition would have been timely, because it was filed just eleven days following the April 21, 1989 publication [of

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405. See FLA. STAT. § 120.58(1)(a) (1989); Burriss III, *supra* note 4, at 625.

406. See *Phibro Resources Corp. v. Department of Env'tl. Regulation*, 579 So. 2d 118, 123 (Fla. 1st Dist. Ct. App. 1991). The court was troubled by the failure of the Department of Environmental Regulation to follow its own rules concerning consent orders. *Id.*

407. See FLA. STAT. § 120.68(12)(b) (1989).

408. 567 So. 2d 928 (Fla. 1st Dist. Ct. App. 1990).

409. *Id.* at 935.

the notice concerning the declaratory statement proceeding].<sup>410</sup>

The court also noted that normally, petitions for declaratory statement do not concern anyone other than the particular petitioner, because they are limited to the petitioner's circumstance only. In such a case, there is no right to a section 120.57 hearing. But if a petition for a declaratory statement is not so narrowly drawn, it will affect "the substantial interest of other parties," or have the potential to affect the substantial interest of other parties so that an opportunity for a section 120.57 hearing must be offered in order to provide them with a clear point of entry into the declaratory statement proceeding.<sup>411</sup>

However, when the deviation from the requirements of the administrative rules has been slight or minor, then the courts have been unwilling to reverse an administrative agency decision. Cases along this line apparently rely on a harmless error rationale to justify the decision not to reverse.<sup>412</sup> In *State v. Donaldson*,<sup>413</sup> the court noted that the

410. *Id.* Further, the court noted that there was no indication here that the filing of the petition for intervention was occurring after a waiver of the right to a clear point of entry had occurred. The court also stated that the optometrists could not have been held to have waived their right to a clear point of entry, because they never received adequate notice under Rule 28-5.111 that a section 120.57 hearing was going to be held concerning the declaratory statement petition. *Id.*

411. *Id.* at 936. The court declined to address the issue of whether the declaratory statement sought in this case would be invalid due to the attempt to promulgate a rule via a non-rulemaking process. In doing so, the court noted that,

although the line between the two is not always clear, it should be remembered that declaratory statements are not to be used as a vehicle for the adoption of broad agency policies. Nor should they be used to provide interpretations of statutes, rules or orders which are applicable to an entire class of persons. Declaratory statements should only be granted where the petition has clearly set for specific facts and circumstances which show that the question presented relates only to the petitioner and his particular sets of circumstances. Thus, petitions which provide only a cursory factual recitation or which use broad undefined terms . . . should be carefully scrutinized. Similarly, petitions by associations rather than individuals, should be inherently suspect. When an agency is called upon to issue a declaratory statement in response to a question which is not limited to specific facts and a specific petitioner, and which would require response of such a general and consistent nature as to meet the definition of a rule, the agency should either decline to issue the statement or comply with the provisions of section 120.54 governing rulemaking.

*Id.* at 937.

412. *Cf. Krischer v. School Bd.*, 555 So. 2d 436 (Fla. 3d Dist. Ct. App. 1990). In *Krischer*, the court held that a technical violation of the notice requirements provided

legislature did not intend for minor deviations from the requirements set forth in the administrative rules concerning storage and maintenance schedules for a breathalyzer machine, which do not impact on its reliability,<sup>414</sup> to prohibit the use of the test results in court.<sup>415</sup>

#### H. Rule Making Process

Generally, courts will rigorously enforce the procedural requirements of the rule making process. In *Martin County Liquors v. Department of Business Regulation*,<sup>416</sup> the Division of Alcoholic Beverages and Tobacco challenged the decision of the hearing officer who "found the Department's requirements that applicants for quota liquor licenses provide documentation supporting financial arrangements and demonstrate 'right of occupancy' are an invalid exercise of delegated legislative authority."<sup>417</sup> The hearing officer found that the attempt to

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for in the Florida statutes did not require reversal of an otherwise appropriate order terminating a teacher's employment absent a showing that the teacher was prejudiced by the failure to comply with the notice requirements. There was more than adequate documentation that the teacher had received numerous notices concerning her inadequate performance, and that she was offered many opportunities to attempt correction of this unsatisfactory performance. Any technical violation of the notice requirement was considered harmless error. *Id.* at 437; see also *School Bd. v. Weaver*, 556 So. 2d 443 (Fla. 1st Dist. Ct. App. 1990). In *Weaver*, the court noted that when an administrative agency failed to timely act upon a recommended order, such failure was not grounds generally for reversal of the final order. A violation of the time frame for rendering a final order as provided for in the APA did not require reversal "if the fairness of the proceedings or the correctness of the action taken is found to have been impaired by virtue of the statute's violation." *Id.* at 446. The court found in this case that there was no evidence showing that the delay "impaired the fairness of the proceeding nor the correctness of the action." *Id.*

413. 579 So. 2d 728 (Fla. 1991).

414. The court agreed that when no evidence was offered by the prosecution that the breathalyzer machine was reliable, then the results of the breathalyzer test must not be admitted. *Id.* at 729.

415. *Id.*

416. 574 So. 2d 170 (Fla. 1st Dist. Ct. App. 1991). The rule challenge was filed under section 120.56. FLA. STAT. § 120.56 (1989). This case also involved a section 120.57 formal hearing in which the rule was applied concerning quota liquor licenses to deny the application of Martin County Liquors, Inc. *Id.* at 172.

417. *Id.* at 172. Martin County Liquors, Inc. was denied its liquor license because it had failed to file with its application a right of occupancy certification for the location where it planned to operate its business. Martin County Liquors filed a rule challenge concerning the Department of Beverage Regulations rule 700L and 710L, alleging that "they were not filed with the Office of Secretary of State, as well as the

impose the requirements of rule 700L was an invalid exercise of delegated authority, because it was not filed with the Secretary of State, as required by the APA.<sup>418</sup> The hearing officer also concluded that section 302 of the manual was an attempt to promulgate a rule without complying with the rulemaking process, and was an invalid exercise of delegated legislative authority.<sup>419</sup> The court agreed that the failure to file rule 700L with the Secretary of State's office rendered it an invalid exercise of delegated legislative authority. The court found that this was a material failure to follow the applicable process concerning rule making.<sup>420</sup>

In *Department of Health and Rehabilitative Services v. Florida Medical Center*,<sup>421</sup> the court addressed the issue of what remedy was available when a proposed rule, which was substantively amended, was renoticed by the administrative agency rather than beginning the rule making process anew. While the APA provides that an administrative agency may adopt rules "only after the public has been notified of the content of proposed rules and reasonable opportunity for public comment has been given,"<sup>422</sup> it also provides that an administrative agency in several circumstances need not begin the rule making process again

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validity of [section] 302 of the Division's, a policy and procedure since it constituted a rule and was not properly promulgated as such." *Id.* at 173.

418. FLA. STAT. § 120.54(11), (13)(a) (1989).

419. *Martin County Liquors, Inc.*, 574 So. 2d at 173.

420. *Id.* The court noted in dicta that there was no statutory requirement concerning the items listed in rule 700L, but that if the agency had properly promulgated such requirements through its rule making authority, they could be legally imposed on all applicants. *Id.* The court also found that the manual provision of section 302 was an attempt to impose the requirements of a rule on license applicants without complying with the rule making process:

Applicants for quota liquor licenses are initially approved or disapproved based on the requirements established in the DABT's policy section 302. No other standard definition of the complete application exists, and it is to be applied uniformly and generally to the public at large. It clearly does not fall within the exceptions under section 120.52(16)(a). Thus, we find that DABT's assertion that section 302 was irrelevant to their denial of Martin County Liquors' application because their field office accepted the incomplete application to be without merit. DABT's policy section 302 meets the definition of rule pursuant to section 120.52(16), and because it was not promulgated as such, it constitutes an invalid exercise of delegative legislative authority.

*Id.* at 174.

421. 578 So. 2d 351 (Fla. 1st Dist. Ct. App. 1991).

422. *Id.* at 354.

because it amended a proposed rule.<sup>423</sup> Rather, all that is required in those circumstances is that the amended proposed rule be renoticed. The court noted that administrative agencies may,

make changes during the course of the rulemaking process without the necessity of beginning the process anew, so long as the changes (1) are supported by the record of public hearings held on the rule, (2) are merely technical and do not affect the substance of the rule, (3) are in response to written material contained in the record and submitted to the agency within [twenty-one] days following the first publication of notice of the proposed rule, or (4) are in response to a proposed objection by the Administrative Procedures Committee.<sup>424</sup>

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423. FLA. STAT. § 120.54(13)(b) (1989); see *J.B. Coxwell Contracting, Inc. v. Department of Transp.*, 580 So. 2d 621 (Fla. 1st Dist. Ct. App. 1991). In *Coxwell*, the court noted that under the APA, an administrative agency need not re-notice its proposed rule before promulgating, it even if it was amended, so long as the rule amendment was adopted as "a result of testimony presented at a public hearing prior to the rule's adoption." *Id.* at 623-24. The court rejected the rule challenge and held that this was exactly what happened in this case. *Id.*

424. *Florida Medical Ctr.*, 578 So. 2d at 353. FLA. STAT. § 120.54(13)(b) (1989) provides:

After the notice required in subsection (1) and prior to adoption, the agency may withdraw the rule in whole or in part or may make such changes in the rule as are supported by the record of public hearings held on the rule, technical changes which do not affect the substance of the rule, changes in response to written material relating to the rule received by the agency within 21 days after the notice and made a part of the record of the proceeding, or changes in response to a proposed objection by the committee. After adoption and before the effective date, a rule may be modified or withdrawn only in response to an objection by the committee or may be modified to extend the effective date by not more than 60 days when the committee has notified the agency that an objection to the rule is being considered. The agency shall give notice of its decision to withdraw or modify a rule in the first available issue of the publication in which the original notice of rulemaking was published and shall notify the Department of State if the rule is required to be filed with the Department of State. After a rule has become effective, it may be repealed or amended only through regular rulemaking procedures.

See also FLA. STAT. § 120.54(11)(a) (1989) which provides:

After the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, the adopting agency shall file any changes in the proposed rule and the reasons therefor with the committee or advise the committee that there are no changes. In addition, when any change is made in a proposed rule, other than a technical change, the

However, it is equally clear that the APA provides: “[S]ubstantially affected persons [must have] a reasonable opportunity to challenge proposed rules prior to their adoption.”<sup>425</sup>

When an administrative agency materially amends or modifies the proposed rule after the time for challenging the rule has run<sup>426</sup> and the opportunity for public comment has passed,<sup>427</sup> then interested persons are effectively deprived of any meaningful point of access to the rule making process. The court held such a result is contrary to the fundamental structure of the APA rule making process, because it would permit an administrative agency to circumvent all meaningful public input into the rule making process, as well as foreclosure any challenge to the validity of the proposed rule prior to its promulgation.<sup>428</sup> Clearly,

adopting agency shall provide a detailed statement of such change by certified mail or actual delivery to any person who requests it in writing at the public hearing. The agency shall file the change with the committee, and provide the statement of change to persons requesting it, at least 7 days prior to filing the rule for adoption.

425. *Florida Medical Ctr.*, 578 So. 2d at 354 (emphasis omitted).

426. The APA provides:

(4)(a) Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority.

(b) The request seeking a determination under this subsection shall be in writing and must be filed with the division within 21 days after the date of publication of the notice. It must state with particularity the provisions of the rule or economic impact statement alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging the proposed rule would be substantially affected by it.

FLA. STAT. § 120.54(4)(a)-(b) (Supp. 1990).

427. Under the APA,

[i]f the intended action concerns any rule other than one relating exclusively to organization, procedure, or practice, the agency shall, on the request of any affected person received within 21 days after the date of publication of the notice, give affected persons an opportunity to present evidence and argument on all issues under consideration appropriate to inform it of their contentions . . . . The agency may schedule a public hearing on the rule and, if requested by any affected person, shall schedule a public hearing on the rule.

FLA. STAT. § 120.54(3)(a) (Supp. 1990). Thus, any affected person has an absolute right to a public hearing on a proposed rule, if a timely request was made.

428. [A]n agency need only publish notice of an innocuous proposed rule, wait 21 days so that the time for demanding a public hearing under 120.54(3) or petitioning for a determination of invalidity under 120.54(4)



in this case the amendment of the proposed rule was substantial, because it fundamentally changed the criteria for awarding certificates of need.<sup>429</sup> Therefore, the rule making process must begin anew and the parties must be offered an adequate point of entry.<sup>430</sup>

In *Florida Medical Center*, the court also noted that any time an administrative agency publishes notice of a change in a proposed rule, a substantially affected person has a new twenty-one day period within which to file notice of a rule challenge under section 120.54(4) claiming that the administrative agency violated the limitation imposed by section 120.54(13)(b) on the amendment or modification of a proposed rule.<sup>431</sup> Any successful challenge to the amended proposed rule under this process will require the administrative agency to withdraw the amended proposed rule, or begin the rule making process anew.<sup>432</sup> The court specifically found that this reading of the time frame for filing a section 120.54(4) challenge to a proposed rule was required, because the post-promulgation rule challenge provisions are not as complete or adequate a set of safeguards as the pre-promulgation rule challenge provision under section 120.54(4).<sup>433</sup>

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has passed, and then simply change the rule however it wishes. The fact that such changes might be in excess of the limitations of Section 120.54(13)(b), and might bear no resemblance to the original proposed rule, would not matter, at least so far as the public right to be heard *prior* to rule adoption. In our view, such a holding would not comport with the legislative intent. Rather, it would effectively defeat the legislative purposes undergirding Section 120.54.

*Florida Medical Ctr.*, 578 So. 2d at 354 (emphasis in original).

429. The original proposed rule provided that certificates of need should be issued in a manner to assure that "unnecessary duplication of services" did not occur in the area of adult cardiac catheterization programs. *Id.* at 353. The amended proposed rule dropped this focus and substituted a concern for "foster[ing] competition among [adult cardiac catheterization] providers." *Id.*

430. *Id.* at 354-55.

431. *Id.* at 355.

432. *Florida Medical Ctr.*, 578 So. 2d at 355. The court found that competent, substantial evidence existed that the proposed rule amendment in this case was designed to give effect to private negotiations between the administrative agency and a substantially affected person who had filed a section 120.54(4) challenge to the original proposed rule. These negotiations and the subsequent amendment of the proposed rule were not within the permitted scope of amendments authorized under section 120.54(13)(b). *Id.*

433. *Id.* at 355. Judge Miner dissented because once the rule became effective, as it had in this case, section 120.56 should have been used to bring a rule challenge, not section 120.54(4). *Id.* (Miner, J., dissenting). If the limitations found in section

In an unusual case concerning a challenge to an administrative rule, the court addressed the question of when the Division of Administrative Hearings could legitimately reject a rule challenge as a pretext for circumventing the prohibition against prisoners filing section 120.57 petitions challenging the administration of rules by prison officials.<sup>434</sup> In *Ramadanovic v. Department of Corrections*,<sup>435</sup> a prisoner challenged a rule adopted by the Bureau of Prisons. His rule challenge was dismissed by the Director of the Department of Administrative Hearings, because it did not comply with the requirements of section 120.56 for a rule challenge. The court found that when Ramadanovic made specific allegations in his petition about how the rule was being applied to his particular circumstance, it was not cause to hold that the petition was an attempt to file a section 120.57(1) petition in the guise of a section 120.56 rule challenge. The court noted that any rule challenge petition under section 120.56 must "state with particularity facts sufficient to show the person seeking relief is substantially effected by the rule."<sup>436</sup> Thus, the fact that Ramadanovic's petition contained allegations about how the rule applied to him was not sufficient evidence to show that he had filed a section 120.57(1) claim in the form of a section 120.56 rule challenge.<sup>437</sup>

### 1. Economic Impact Statement

In *Cataract Surgery Center v. Health Care Cost Containment Board*,<sup>438</sup> the court, in what it admitted was the most flagrant dicta,<sup>439</sup>

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120.54(13)(b) on amending a proposed rule were violated, then a basis for declaring the rule invalid in a section 120.56 rule challenge existed. *Id.* at 356.

434. Prisoners are prohibited under the APA from participating in any administrative proceeding other than rule challenges. FLA. STAT. § 120.52(12)(d) (1989).

435. 575 So. 2d 1333 (Fla. 1st Dist. Ct. App. 1991).

436. FLA. STAT. § 120.56(2) (1989) quoted in *Ramadanovic*, 575 So. 2d at 1335.

437. *Ramadanovic*, 575 So. 2d at 1334-35. The court remanded the case to the Department of Administrative Hearings "for entry of an order stating with specificity grounds warranting dismissal of Ramadanovic's petition, or for further proceedings on petition, pursuant to section 120.56(2)." *Id.* at 1335.

438. 581 So. 2d 1359 (Fla. 1st Dist. Ct. App. 1991).

439. The court held that the proposed rules were invalid ultra vires acts. *See supra* notes 44-55 and accompanying text. The discourse on the adequacy of the economic impact statement was wholly unnecessary. The issue should have been dismissed as one which the court need not reach, as it did concerning at least one other issue raised by the parties. *Cataract Surgery Ctr.*, 581 So. 2d at 1360 n.1. Not only did the court not need to decide the issue in order to resolve the case, it also acknowledged that

noted that the inadequate economic impact statement was a possible independent basis for declaring the proposed rules invalid. The court found that the economic impact statement prepared by the Health Care Cost Containment Board was grossly insufficient and violated the APA rule making requirements concerning such statements. The court correctly noted both the purpose of an economic impact statement and the limited circumstances under which any defect in an economic impact statement justified holding a rule or proposed rule invalid:

The purpose of an economic impact statement is "to promote agency introspection in administrative rulemaking; to ensure a comprehensive and accurate analysis of economic factors, which factors will work together with social factors and legislative goals underlying agency action; to direct agency attention to key considerations and thereby facilitate informed decision making."

. . . .  
Preparation of an economic impact statement is a procedural requirement, and any defect in its preparation will not defeat an otherwise valid rule as long as evidence proves that an agency fully considered the economic impact of its action or if it is established that the agency's proposed action will have no economic impact . . . [or the] deficiencies in the economic impact statement [did not] impair the fairness of the rulemaking proceedings.<sup>440</sup>

The hearing officer in this case determined, after an extensive consideration of the evidence, that the weight of the evidence demonstrated that any deficiencies in the economic impact statement were harmless error. The court rejected this conclusion, because the Health Care Cost Containment Board had "ignored its statutory duty" when it failed to evaluate whether there would be substantial ongoing costs in complying with the proposed rules.<sup>441</sup> The court found that "these costs were reasonably ascertainable[,] . . . the board took no action to discover that information . . . [and] had the board been fully aware of these costs, that knowledge may have had an impact on the board's decision as to what data to require and what method to utilize in col-

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probably no one had standing to raise the issue. As the court noted, "it is unnecessary for us to rule on this issue or the standing of the appellants in regard to the small and minority business issue." *Id.* at 1365.

440. *Id.* at 1363-64 (quoting *Department of Health & Rehabilitative Servs. v. Wright*, 439 So. 2d 937, 940 (Fla. 1st Dist. Ct. App. 1983)).

441. *Id.* at 1364.

lecting that data.”<sup>442</sup>

The court also criticized the Health Care Cost Containment Board for failing to follow the required procedures to assess whether the proposed rules would have an impact on small and minority businesses. By failing to determine whether such an impact existed, the Health Care Cost Containment Board effectively circumvented the APA rule making requirement that when such an impact exists notice must be sent to the Small and Minority Business Advocate, the Minority Business Enterprise Assistance Office, and the Division of Economic Development of the Department of Commerce,<sup>443</sup> and further, that each of these entities must be given an opportunity, prior to final agency action on the proposed rule, “to present evidence and argument and to offer alternatives regarding the impact of the rule on small business.”<sup>444</sup> The court believed that these procedural requirements were not designed as a futile process offering little or no hope for the amendment of the proposed rule, because the administrative agency must adopt the proposed alternatives or file with the Administrative Procedures Committee a written statement explaining why it did not adopt the alternatives.<sup>445</sup> By failing to properly assess any impact on small and minority businesses, the Health Care Cost Containment Board “precluded these parties from providing input essential to protecting small businesses” as mandated by the statute.<sup>446</sup>

This aspect of the decision in *Cataract Surgery Center* is a classic example of a court offering its opinion on an issue which was totally irrelevant to the resolution of the case. It was particularly offensive in this case, as the discussion of the small and minority businesses requirements was totally gratuitous, because the parties before the court in all probability lacked standing to raise the issue. Finally, the court did not offer a persuasive explanation of why it should reject the factual findings of the hearing officer on the economic impact statement issues. While the court concluded that the Health Care Cost Contain-

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442. *Id.*

443. FLA. STAT. § 120.54(3)(b) (1989).

444. FLA. STAT. § 120.54(3)(b)1 (1989); see *Cataract Surgery Ctr.*, 581 So. 2d at 1364. The author knows of no case, nor did my informal survey of individuals who practice in the area disclose any cases, where any of these entities has offered any comment as a result of receiving notice.

445. See *Health Care Cost Containment Bd.*, 581 So. 2d at 1365 (“It cannot be assumed that the Board would have rejected the input from these representatives.”); FLA. STAT. § 120.54(3)(b)2-3 (1989).

446. *Cataract Surgery Ctr.*, 581 So. 2d at 1364-65.

ment Board had failed to make any reasonable attempt to develop a legitimate economic impact statement, the hearing officer found sufficient evidence to reach a contrary result. The court, in rejecting the findings of the hearing officer on these factual issues, was engaged in substitution of judgment.

The APA provides that judicial review of factual issues is very limited:<sup>447</sup>

If the agency's action depends on any fact found by the agency in a proceeding meeting the requirements of [section] 120.57, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside agency action or remand the case to the agency if it finds that the agency action depends on any finding of fact that is not supported by competent substantial evidence in the record.<sup>448</sup>

In this case, the court ignored the limited scope of judicial review, or attempted to avoid it by characterizing the factual issues as a question of law—whether the Health Care Cost Containment Board had filed an economic impact statement. The former was as gross a violation of the requirements of the APA as the court accused the Health Care Cost Containment Board of committing, while the latter was a subterfuge given the fact that the Health Care Cost Containment Board had prepared an economic impact statement.

## V. JUDICIAL REVIEW

### A. *Preservation of the Right to Review*

The APA<sup>449</sup> and the Florida Constitution<sup>450</sup> guarantee the right to judicial review of administrative decisions. However, this right is not absolute,<sup>451</sup> and there are several ways in which a party may lose or

447. See *infra* notes 552-75 and accompanying text; Burris III, *supra* note 4, at 633-36.

448. FLA. STAT. § 120.68(10) (1989).

449. FLA. STAT. § 120.68 (1989); see FLA. STAT. § 120.69 (1989).

450. See FLA. CONST. art. I, §§ 9, 18, 21; FLA. CONST. art. V, § 4(b)(1).

451. Any party seeking judicial review must satisfy standing requirements. Failure to do so is generally, but not always, fatal to obtaining judicial review. See *Cattract Surgery Ctr.*, 581 So. 2d at 1365 (discussing issue concerning the adequacy of the economic impact statement without first determining whether any party had stand-

waive, either intentionally or unintentionally,<sup>462</sup> its right to judicial review,<sup>463</sup> or fail to qualify for judicial review.

If a party failed to timely request or fulfill the statutory prerequisites for judicial review, then the right to judicial review may be lost.<sup>464</sup> However, in *Stewart v. Department of Corrections*,<sup>465</sup> the court noted that even though a party had failed to timely file a notice of appeal concerning an administrative order, it should not preclude the judicial review process from going forward. The court found that such time limitations, especially where, as here, there was only a one day violation, may be avoided by the application of the doctrine of equitable tolling. In such a case, the burden was on the party seeking the benefit of the equitable tolling doctrine to show either "excusable ignorance of the limitations" or a lack of prejudice to the administrative agency arising from the untimely filing of the notice of appeal. The court found that there was no evidence here that the administrative agency had been prejudiced, and permitted the late filing of the notice of appeal to preserve the rights to judicial review.<sup>466</sup>

Besides a timely filing of a petition for judicial review, other factors must also be satisfied before judicial review can occur. In *Rabren v. Department of Professional Regulation*,<sup>467</sup> the court noted that in order for judicial review to be available, the following must be shown:

ing to raise the issue); *City of Destin v. Department of Transp.*, 541 So. 2d 123, 127 (Fla. 4th Dist. Ct. App. 1989) (holding, in part, that the Department of Transportation waived its right to question whether the City of Destin had standing to invoke a formal hearing under the APA by not raising the issue before or during the formal hearing.)

452. See *Prestressed Decking Corp. v. Medrano*, 556 So. 2d 406, 409 (Fla. 1st Dist. Ct. App. 1989) (When a party fails to properly raise an issue as part of the administrative hearing process, the hearing officer is precluded from considering that issue in its recommended order.)

453. Without a stay of enforcement of the administrative agency decision, judicial review may result in a correction of a wrong that may not have an adequate remedy. See FLA. STAT. §§ 120.68(3), .69(5) (1989); *Stables v. Rivers*, 559 So. 2d 440 (Fla. 1st Dist. Ct. App. 1990) (noting that filing a motion for protective order did not constitute an automatic stay for any scheduled depositions).

454. *Markham v. Moriarty*, 575 So. 2d 1307 (Fla. 4th Dist. Ct. App.), cert. denied, *Abundant Life Ctr. v. Markham*, 112 S. Ct. 440 (1991) (per curiam); see also *Machin v. Lumber Transp., Inc.*, 556 So. 2d 446, 447 (Fla. 1st Dist. Ct. App. 1990) (noting that while there may be circumstances under which the requirements for timely filing notice of appeal may be tolled, a judge of compensation claims cannot grant a time extension when he no longer has jurisdiction over the matter).

455. 561 So. 2d 15 (Fla. 4th Dist. Ct. App. 1990).

456. *Id.* at 16; cf. *supra* notes 313-28 and accompanying text.

457. 568 So. 2d 1283 (Fla. 1st Dist. Ct. App. 1990).

“(1) the action is final; (2) the agency is subject to the provisions of the APA; (3) he was a party to the action which he seeks to appeal, and (4) he was adversely affected by the decision.”<sup>458</sup>

During the survey period, several decisions considered the question of what constitutes final administrative agency action. In *Friends of the Hatchineha, Inc. v. Department of Environmental Regulation*,<sup>459</sup> the court noted that before a person is entitled to a formal administrative hearing “there must be final agency action affecting the petitioner’s substantial interests, coupled with a disputed issue of material fact.”<sup>460</sup> A variety of decisions can satisfy this requirement of final agency action. In *Friends of the Hatchineha, Inc.*, the court held that a letter granting an agricultural exemption constitutes final agency action when it was used to justify the dismissal of a complaint filed by the Department of Environmental Regulation concerning the building of an access road or driveway through wetlands.<sup>461</sup> The court found that the Department of Environmental Regulation “exercised its discretion by determining that no permits were required. The exercise of such discretion constituted final agency action.”<sup>462</sup>

*Palm Springs General Hospital v. Health Care Cost Containment Board*<sup>463</sup> concerned an agreement between the Health Care Cost Containment Board and Palm Springs General Hospital on how medicaid reimbursement pays should be calculated. This agreement was the basis for termination of the administration hearing concerning the dispute. However, after the matter was removed from the hearing officer’s docket, the Health Care Cost Containment Board notified Palm Springs General Hospital by letter that it would not honor the written agreement settling the dispute. Palm Springs General Hospital, Inc. sought judicial review of the decision contained in the letter notifying it that the Health Care Cost Containment Board would not honor the written agreement concerning this matter.<sup>464</sup> The court held that although the letter was a form of informal administrative agency action, it was final for purposes of judicial review. The court reversed and re-

458. *Id.* at 1288.

459. 580 So. 2d 267 (Fla. 1st Dist. Ct. App. 1991).

460. *Id.* at 269.

461. *Id.* at 271. The court properly noted that a long line of cases had established that a decision by an administrative agency that it lacked jurisdiction was a form of final agency action. *Id.* at 271-72; *see supra* notes 152-60 and accompanying text.

462. *Id.* at 272.

463. 560 So. 2d 1348 (Fla. 3d Dist. Ct. App. 1990).

464. *Id.* at 1348-49.

manded the matter to the Health Care Cost Containment Board for implementation of the settlement agreement.<sup>465</sup>

Under some circumstances, even interlocutory orders may be considered final administrative agency action. In *Holland v. Courtesy Corp.*,<sup>466</sup> the court noted that where a matter was decided which effectively precluded consideration of any other issues in the case, even though the order may resemble a nonfinal decision, it shall be treated as final for purposes of seeking judicial review. “[I]n the classic sense, . . . [an interlocutory] order . . . is a final order . . . [when] it disposed of all matters then pending before the . . . [judge of compensation claims or administrative hearing officer].”<sup>467</sup>

### B. *Scope of Hearing Officer’s Authority Over Factual Issues, Penalties and Questions of Law*

The dichotomy between factual and legal issues directly effects how courts approach the judicial review process, especially when an administrative agency’s final order overturned the recommended order of a hearing officer.<sup>468</sup> The APA provides that the discretion of an administrative agency to reject the factual findings and penalty recommendation of a hearing officer in a recommended order is very limited.

The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing

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465. *Id.* at 1349-50. The court also awarded attorney’s fees to Palm Springs General Hospital, finding it was a gross abuse of discretion for the administrative agency to renounce the settlement agreement. It remanded the case to the Division of Administrative Hearings for determination of the appropriate amount of attorney’s fees. *Id.* at 1350 n.2.

466. 563 So. 2d 787 (Fla. 1st Dist. Ct. App. 1990).

467. *Id.* at 789-90.

468. FLA. STAT. § 120.57(1)(b)10 (1989); *see* FLA. STAT. § 120.68(7) (1989).



to the record in justifying the action.<sup>469</sup>

A number of cases addressing these issues during the survey period demonstrated how administrative agencies continue to struggle with the limited scope of their discretion in these areas.

In *Clay County Sheriff's Office v. Loos*,<sup>470</sup> the court held that the Unemployment Appeals Commission erred in finding that a memo provided a basis for overturning the factual conclusions reached by the appeals referee. The memo, from the sheriff to all personnel, indicated that any employee who did not receive permission to enroll in a training course would have been required to pay for the training course; rather than the Department. The appeals referee denied unemployment benefits to Loos who was terminated from his position as a deputy sheriff, because he attended a radar training course in direct disobedience of a superior officer's denial of his request to attend such a course, as set forth in the memo.<sup>471</sup>

The Unemployment Appeals Commission found that the memo created confusion on the part of employees concerning whether they would suffer any other disciplinary action besides having to pay for the training course themselves.<sup>472</sup> The court found that there was competent substantial evidence to support the appeals referee's finding that direct disobedience of the order of a superior officer not to attend this training program showed an intentional and substantial disregard by the employee of his duty and obligation to the employer, as defined by a superior officer's command.<sup>473</sup> The memo was considered by the appeals referee and the Unemployment Appeals Commission was merely substituting its factual judgment for that of the appeals referee—a practice forbidden by the APA.<sup>474</sup>

469. FLA. STAT. § 120.57(1)(b)10 (1989); see FLA. STAT. § 120.57(1)(b)10 & n.1 (1991) (further restrictions on the discretion of an administrative agency to reject the findings of a hearing officer).

470. 570 So. 2d 394 (Fla. 1st Dist. Ct. App. 1990).

471. The appeals referee found that Loos had engaged in misconduct by enrolling in the course in the face of instructions to the contrary, and that successful completion of the course would have increased the employee's salary by \$20 per month. *Id.* at 395. Misconduct is defined by statute as "carelessness or negligence of such a degree . . . as to . . . show an intentional and substantial disregard . . . of the employee's duties and obligations to an employer." FLA. STAT. § 443.036(26) (1989).

472. *Loos*, 570 So. 2d at 395.

473. *Id.* at 395-96.

474. The court also concluded that the Unemployment Appeals Commission erred in concluding that as a matter of law, the definition of misconduct did not cover

*Kan v. P.G. Cook Assocs.*<sup>475</sup> was another example of an administrative agency overstepping its authority by reweighing or reevaluating the evidence heard by the hearing officer or appeals referee. In this case, the Unemployment Appeals Commission reversed a decision of the appeals referee which had granted Kan unemployment compensation benefits. The appeals referee found that Kan was promised additional training, if necessary, to enable him to meet his employer's expectations concerning the number of bicycles he should assemble per hour. The employer had failed to provide the additional training, and as a result, Kan's earnings were substantially diminished. In such a circumstance, the appeals referee found that a reasonable "average able-bodied qualified worker" would give up his employment as a result.<sup>476</sup> The Unemployment Appeals Commission found that Kan understood that the initial eighty hours of instruction would permit him to assemble the requisite number of bicycles per hour, and that his employer had never guaranteed him a minimum wage. Because of these factors, which the Unemployment Appeals Commission believed were overlooked by the appeals referee, it reversed and held that Kan was not entitled to unemployment compensation.

The court reversed the decision of the Unemployment Appeals Commission. The court noted that the Commission may reverse the decision of an appeals referee concerning factual findings only if it could demonstrate that such factual findings were not supported by competent substantial evidence.<sup>477</sup> The court found no indication in the record that any information had been improperly ignored or overlooked by the appeals referee, and the decision of the appeals referee was supported by competent substantial evidence. As a result, the court found that the Commission had improperly reweighed the evidence in overturning the appeals referee's order.<sup>478</sup>

In *Freeze v. Department of Business Regulation*,<sup>479</sup> a final order by the Department of Business Regulation, revoking an alcoholic beverage license, was reviewed by the court. The court noted that the Department of Business Regulation had "no authority to reject the find-

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the circumstance that the hearing officer found present in this case. *See id.*

475. 566 So. 2d 932 (Fla. 3d Dist. Ct. App. 1990).

476. *Id.* at 933 (quoting *Uniweld Prod., Inc. v. Industrial Relations Comm'n.*, 277 So. 2d 827, 829 (Fla. 4th Dist. Ct. App. 1973)).

477. *Id.* at 933.

478. *Id.* at 934.

479. 556 So. 2d 1204 (Fla. 5th Dist. Ct. App. 1990).

ings of fact of the hearing officer which were supported by competent, substantial evidence. Factual issues susceptible of ordinary methods of proof that [were] not infused with policy considerations . . . [were] the prerogative of the hearing officer as finder of fact."<sup>480</sup> An administrative agency errs when it rejects "the hearing officer's findings of fact and . . . substitut[es] its own where there was conflicting evidence, or sufficient evidence to support the hearing officer's findings. An agency may not reject the hearing officer's findings unless there is *no* competent, substantial evidence from which the finding could reasonably be inferred."<sup>481</sup>

The court reviewed the evidence concerning whether smoking pot<sup>482</sup> on the porch of the establishment occurred, and affirmed the hearing officer's findings of fact on this issue, stating that the Department of Business Regulation had properly relied on it in its final order. As to the other factual findings, the court merely asserted that the Department of Professional Regulation improperly rejected the hearing officer's findings, because it did so based upon credibility of the testimony offered. In doing so, the Department exceeded its review authority and improperly substituted its judgment for that of the hearing officer.<sup>483</sup> While these errors required the court to remand the case, the court clearly indicated that the same penalty may be imposed for the "pot smoking" incident.<sup>484</sup>

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480. *Id.* at 1205 (citations omitted).

481. *Id.* (emphasis in original).

482. Also known as marijuana.

483. *Freeze*, 556 So. 2d at 1206.

484. *Id.* Judge Gershon, in his dissent, argued that there was insufficient evidence to prove that the owners of the establishment had notice of illegal drug transactions, or that consumption of illegal drugs was occurring on the premises, because there was no evidence that either of the owners were present at the time these transactions occurred, or that their employees were aware of these illegal transactions. *Id.* Further, the Department of Business Regulation erred in disagreeing with the hearing officer's findings that the owners were incapable of determining whether marijuana was being used on the premises, and that the owners had taken adequate steps to diligently police the possibility of such use. "Clearly, the Department rejected the hearing officer's findings and substituted its own findings based upon its re-evaluation of the evidence. Just as clearly, the Department had no authority to reject the hearing officer's finding of fact because the findings are supported by competent, substantial evidence." *Id.* at 1207. Judge Gershon concluded by stating that the Department of Business Regulation erred in substituting its judgment on these factual issues, and that the case should be remanded with instructions to reinstate the alcoholic beverage license of these individuals. *Id.*

In *Greseth v. Department of Health and Rehabilitative Services*,<sup>485</sup> an employee of the Department of Health and Rehabilitative Services was suspended for "willful violation of rules, regulations, or policies of the Department."<sup>486</sup> The hearing officer found that Greseth was the only investigator in her unit which was supposed to have three investigators, and that she was overworked in terms of her case assignments.

In the case of L.Y.'s report, Greseth relied on the initial report from the hospital, after it had been confirmed by L.Y.'s grandmother that the baby would not be released for at least two weeks. Therefore, from the information available to Greseth, the baby was not in immediate danger. Greseth intended to contact the hospital to verify the information on January 9, but became ill and was out of work for a week.<sup>487</sup>

The Department of Health and Rehabilitative Services policies required their investigators to contact the mother of the child within twenty-four hours of the abuse report, or to initiate an out-of-town inquiry if the parties involved in the abuse report were not in the vicinity. Greseth was also required by Department policy "to contact the hospital and clarify the abuse report during her initial investigation."<sup>488</sup> "The hearing officer concluded that Greseth did not wilfully violate policies because she was assigned, with the Department's knowledge, to more cases than she could physically handle."<sup>489</sup> The hearing officer

485. 573 So. 2d 1004 (Fla. 4th Dist. Ct. App. 1991).

486. *Id.* at 1005. Greseth was assigned a neglect child report for investigation. The concern was that the child was being medically neglected by its parents. The child's grandmother contacted Greseth and informed her that when the child was released from the hospital, both the mother and baby would live at the grandmother's residence. The grandmother further reported that the child would not be released from the hospital for some time. Greseth reported these facts to her supervisor and asked for advice on how to proceed. The supervisor did not respond to her inquiry, and soon thereafter, Greseth became ill and was absent from her job for a period of nine days. During this time, the supervisor failed to review her files or in any way take steps to provide for further investigation of her files during her absence. Upon returning to work, Greseth soon learned that baby L.Y. had been released from the hospital the day before she had become extremely ill. The baby subsequently died, and the death was considered "unrelated to any action or inaction on Greseth's part, or for that matter, as a result from any neglect on the part of the mother." *Id.* at 1005-06.

487. *Id.* at 1006.

488. *Id.*

489. *Id.*

further found that Greseth had acted appropriately, based upon the information she had available, in determining that the case of L.Y. was low priority because of the fact that the child was hospitalized, and that she did not act negligently in reaching such a decision.

The Department of Health and Rehabilitative Services accepted the hearing officer's findings of fact, but concluded that Greseth had actually acted either negligently or willfully in violating these policies by not making "a few phone calls which it claimed would have satisfied [the] regulations."<sup>490</sup> The Department remanded the case to the hearing officer for consideration of mitigating circumstances. The hearing officer again noted that there was insufficient evidence that Greseth had acted either willfully or negligently in violating the Department's policy, given her case load, the need to prioritize the cases, and the lack of her supervisor's assistance, and recommended that Greseth receive the lightest suspension possible.

Greseth argued that the Public Employees Relation Commission acted improperly in agreeing with the Department of Health and Rehabilitative Services that her conduct constituted negligent or willful violation of Department policy. "An administrative agency may not reject the hearing officer's findings unless there is no competent, substantial evidence from which the finding could reasonably be inferred."<sup>491</sup> The court noted that decisions concerning whether negligent or willful misconduct had occurred are findings of fact traditionally within the scope of a hearing officer's discretion, absent a showing that there was a lack of competent and substantial evidence to support them. The administrative agency may not simply reweigh the evidence and reach contrary conclusions where the record does provide competent and substantial evidence to support the hearing officer's findings on these two issues.<sup>492</sup>

The court held that the administrative agency could not avoid this limitation on the scope of its authority to overturn the hearing officer's recommended order by merely labeling its contrary findings of fact as conclusions of law. "Substituted factfinding, thinly disguised as a conclusion of law, is wholly improper."<sup>493</sup> There was no indication that the Public Employees Relation Commission was making a decision "in an

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490. *Greseth*, 573 So. 2d at 1006.

491. *Id.*

492. *Id.* (citing *Heifetz v. Department of Business Regulation*, 475 So. 2d 1277, 1281-82 (Fla. 1st Dist. Ct. App. 1985)).

493. *Id.* at 1006-07.

area of special expertise, and therefore [the court] need not defer to . . . its special knowledge."<sup>494</sup> The record amply supported the hearing officer's finding that Greseth did not engage in negligent or willful conduct given the case load that she was assigned, lack of support from her supervisor, and her unexpected illness. The court reversed and remanded the case to the Public Employee Relation Commission so that it could enter an order "vacating her suspension and granting her lost wages, attorney's fees, and expenses as a result of the proceeding below."<sup>495</sup>

*Smith v. Department of Health and Rehabilitative Services*<sup>496</sup> concerned the appeal of a final order issued by the Public Employees Relation Commission which accepted the decision by the Department of Health and Rehabilitative Services to suspend the employee for twenty days, even though the hearing officer had found that no penalty should be imposed in the case. The hearing officer had issued a recommended order finding that the Department of Health and Rehabilitative Services had failed to prove that Smith was negligent in carrying out her duties.<sup>497</sup> The Public Employees Relations Commission accepted the hearing officer's findings of fact, but disagreed with the hearing officer's inference that such facts demonstrated non-negligence on Smith's part. The court found that while it may have been a close case, the inferences reached by the hearing officer were reasonable. Where reasonable people may differ over the issue of what inferences should be drawn, then the Public Employees Relation Commission must affirm the decision of the hearing officer. In such cases, the findings of the hearing officer are considered supported by competent and substantial evidence.<sup>498</sup>

While on most occasions the restrictions on administrative discretion found in section 120.57(1)(b)10 are violated by administrative agencies improperly overturning factual findings made by hearing officers, in a few cases, administrative agencies erred in refusing to overturn the factual findings of a hearing officer when it was appropriate to do so.<sup>499</sup> *Department of Professional Regulation v. Wise*<sup>500</sup> concerned

494. *Greseth*, 573 So. 2d at 1007.

495. *Id.*

496. 555 So. 2d 1254 (Fla. 3d Dist. Ct. App. 1989).

497. *Id.* The Department of Health and Rehabilitative Services found that Smith had failed to make arrangements for children so that they would not have to spend the night in the screening area of the Dade County Juvenile Detention Center.

498. *Id.* at 1256.

499. *Cf. Health Care & Retirement Corp. of Am. v. Department of Health &*

the appeal of a final order by the Board of Medicine which dismissed disciplinary complaints against Dr. Wise. The Board specifically relied on factual findings made by the hearing officer. The complaint against Dr. Wise alleged that he had influenced several female patients to have sexual relations with him. Dr. Wise maintained that these events had never occurred.

At the hearing, five former patients testified on how Dr. Wise had influenced them to have sexual relations with him. Over the objection of the Department of Professional Regulation, the hearing officer permitted Dr. Wise to offer evidence concerning the entire sexual history of each witness. The hearing officer ultimately concluded in his recommended order that "the testimony of the former patients was not clearly convincing,"<sup>501</sup> and recommended that no disciplinary action be taken against Dr. Wise. The hearing officer offered no explanation as to why the testimony of the former patients did not constitute clear and convincing evidence.

After an initial review of the hearing officer's recommended order, the Board of Medicine remanded the case to the Division of Administrative Hearings for reconsideration in light of whether the sexual history of the patients should have been admitted. On remand, the same hearing officer concluded that the evidence of sexual history was relevant as to credibility, and explained why, in light of this information, he found that the former patients did not present credible clear and convincing evidence of misconduct by Dr. Wise. The Board of Medicine again reviewed the officer's recommended order, and concluded that the findings of fact were, in part, based upon what it considered to be inadmissible evidence. However, in light of the Division of Administrative Hearings' position, it concluded that it had no choice but to accept the hearing officer's recommended order, and dismissed the complaint.

In *Wise*, the court held that admission of the sexual history evidence was reversible error.<sup>502</sup> The court found that the testimony con-

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Rehabilitative Servs., 559 So. 2d 665, 667 (Fla. 1st Dist. Ct. App. 1990) (noting that a record may not provide competent, substantial evidence to support a hearing officer's factual findings when he misread the application being reviewed).

500. 575 So 2d 713 (Fla. 1st Dist. Ct. App. 1991).

501. *Id.* at 714.

502. The Department of Professional Regulation also argued that the determination of admissibility of evidence was a question of law which, under the APA, was left to the administrative agency. The Board of Medicine was correct in its initial review of the hearing officer's decision, and in remanding the case to the Department of Admin-

cerning the sexual history of the patients was irrelevant and did not bear on their credibility.<sup>503</sup> The court noted that "evidence of a witness' relationship with a person other than the accused, standing alone, ha[d] no probative value in the credibility determination."<sup>504</sup> The only time that sexual history would be relevant in determining the credibility of a witness was when the defendant claimed that it explained the witness' motive for testifying falsely against him. Because the sexual histories in this case did not concern sexual relationships with Dr. Wise, they were not relevant to any claim that the witnesses were motivated to testify falsely against him. The sexual relationships related in these histories were completely unrelated to those which occurred with

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Administrative Hearings for the exclusion of what it viewed as irrelevant testimony, because the Board of Medicine was acting within the scope of its delegated authority and not interfering with the factual finding process by the hearing officer. When the case was remanded to the Division of Administrative Hearings, the Division erred in refusing to comply with the direction from the Board of Medicine concerning the admissibility of the irrelevant sexual history evidence. *Id.* at 716-17. The court refused to address this issue because it was moot given its resolution of the admissibility issue. The court noted it would have been a different case if the Department had petitioned the court for a writ of mandamus when the Division of Administrative Hearings refused to comply with its request on remand. *Id.* at 717.

However, the position of the Department of Professional Regulation on this issue was not sound for three reasons. First, the hearing officers are generally the triers of fact, and if anybody in the APA administrative process has expertise on admissibility questions, it would be the hearing officers who deal with these issues on a day-to-day basis, not the administrative agencies performing their review function prior to issuing final orders. *See* FLA. STAT. § 120.65(4) (1989) (requiring hearing officers to be experienced members of the Florida Bar); FLA. STAT. § 120.58 (1989) (hearing shall be conducted by the presiding officer, in most cases a hearing officer). Second, if administrative agencies do have the authority to overrule the decisions of hearing officers on admissibility questions, then their role as the initial finders of fact would be substantially undermined, and potentially, the APA preference for using initial fact finders who are independent of the administrative agencies would be functionally destroyed. *See* FLA. STAT. § 120.57(1)(a) (1989). Third, it would become another device for administrative agencies to use in attempting to avoid the limited scope of their discretion to reject the factual findings of hearing officers. FLA. STAT. § 120.57(1)(b)(10) (1989).

503. The court rejected the Department of Professional Regulation's position that the rape shield statute prohibited admission of evidence concerning the patient's sexual history. FLA. STAT. § 794.022 (1989). The court noted that the rape shield statute was designed to reach only prosecutions under the criminal statutes. FLA. STAT. § 794.011 (1989). Because this was not a criminal prosecution for sexual battery, the rape shield statute was not applicable to this administrative hearing which concerned whether Wise should be disciplined by the Board of Medicine. *Wise*, 575 So. 2d at 715.

504. *Wise*, 575 So. 2d at 715.



Dr. Wise.<sup>505</sup> It was therefore error for the hearing office to admit this irrelevant evidence in such a case,<sup>506</sup> and the court ordered the case remanded to the Board of Medicine.<sup>507</sup>

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505. *Id.* The court noted that the Department of Professional Regulation agreed by stipulation to the admission of medical records which did contain information concerning the sexual histories of the witnesses for purposes of proving that they were Dr. Wise's patients. This did not in any way waive the Department of Professional Regulation's objection to the use of these medical histories in trying to impeach the credibility of the patients. The court also noted that the medical records did not contain much of the information which was brought out at the hearing, and therefore the records could not be said to have been the source of most or even the majority of the objectionable testimony. *Id.*

506. The court went on to note that just because irrelevant testimony had been permitted in the hearing, reversal of the Board of Medicine's decision is not necessarily justified. "Where unfairness has not otherwise infected the fact-finding process, findings which are founded solely upon evidence which is competent and substantial will not be disturbed on appeal." *Id.*; FLA. STAT. § 120.68(8) (1989). It was clear in this case that the irrelevant testimony concerning the witnesses' sexual history played a critical role in the hearing officer's determination of their credibility. This precluded the court from being able to determine whether there was competent, substantial evidence supporting the hearing officer's findings independent of the irrelevant testimony. "Under these circumstances, we cannot say with any certainty that the improper admission of irrelevant evidence did not impair the fairness or correctness of the fact-finding process. We, therefore, determine that remand for clarification of the recommended findings is required." *Wise*, 575 So. 2d at 716. The court also noted that the Board of Medicine, given the status of the record with the irrelevant testimony playing what was apparently a key role, was also precluded from finding whether the hearing officer's determinations were supported by competent, substantial evidence. *Id.*

507. The court remanded, with directions that the Board further remand the case to the hearing officer. The hearing officer shall review the record from the hearing previously held before him and enter a new recommended order, either on the record before him, taking into account only the legally relevant evidence previously admitted, or he may, at his option, consider additional evidence in deciding the issue. We direct that the new recommended order shall set forth a concise and explicit statement of the underlying facts of record supporting the findings of fact.

*Id.* at 717. The court also found that the Department of Professional Regulation was correct in arguing that the factual finding by the hearing officer that "the testimony of L.H. was no more persuasive in this case than it was before the psychiatric society, was not supported by competent substantial evidence." *Id.*

Judge Ervin, in his concurring opinion, noted that the court should have resolved the question of whether the Board of Medicine had the power, on the initial remand, to direct the Division of Administrative Hearings that it not consider certain evidence which it had concluded was irrelevant. *Id.* at 717-18. Normally, an administrative agency may:

Perhaps the most controversial APA restriction on administrative agency authority to overturn a hearing officer's conclusions concerns recommended penalties.<sup>508</sup> The restriction "generally denies . . . [an administrative] agency authority to vary the penalty once it accepts the hearing officer's factual conclusions as supported by substantial competent evidence."<sup>509</sup>

In *Bradley v. Criminal Justice Standards and Training Commission*,<sup>510</sup> after an administrative hearing, the hearing officer recommended that Bradley, a certified correctional officer, receive a six month suspension of his certificate. The Criminal Justice Standards and Training Commission rejected this recommended penalty, and revoked Bradley's correctional officer certificate. The Commission offered

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adopt the recommended order as its final order, or the agency, in its final order may reject or modify the recommended conclusions of law, but only if it determines from the record and states with particularity that the findings were either not based on competent, substantial evidence, or that the proceeding in which the findings were based did not comply with the essential requirements of law.

*Wise*, 575 So. 2d at 718. Judge Ervin indicated that absent a showing of prejudice on the part of the hearing officer, it was not appropriate for administrative agency to remand a case for a new hearing or reevaluation of the record by another hearing officer.

However, Judge Ervin noted that nothing in this scheme precluded the Board of Medicine from remanding to the hearing officer for clarification of the recommended order, if it determined that it was unable to, based upon the original recommended order, determine whether there were erroneous conclusions of law or whether the record adequately supported the findings of fact by the hearing officer. Judge Ervin noted that there was no specific statutory authorization for this clarification remand, but he believed that it was a reasonable inference to be drawn from section 120.57(1)(B)10 and section 120.59(2) of the APA. *Id.* This was so because without the remand, the Board would have been unable to determine "whether the recommended order would have been entered without such evidence, could hardly be expected to comply with its statutory obligation either to adopt, reject, or modify the submitted findings of fact, or to recite its final order explicit and concise statements of underlying facts of record in support of its findings." *Id.* at 718-19. He noted "that [administrative] agencies have the same authority as appellate courts to remand for clarification in circumstances where it is uncertain whether a finder of fact would have reached the same result if the evidence which the finder of fact incorrectly admitted had not been received." *Id.* at 719. The Board of Medicine was correct in remanding the case for clarification.

508. "The [administrative] agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefore in the order, by citing to the record in justifying the action." FLA. STAT. § 120.57(1)(b)(10) (1989).

509. *Burriss III*, *supra* note 4, at 629.

510. 577 So. 2d 638 (Fla. 1st Dist. Ct. App. 1991) (motion for certification).

no new grounds or policy reasons for why it rejected the hearing officer's recommended penalty. In fact, the Commission's decision was based solely on the factors specifically considered by the hearing officer.

The court found that this was a classic case of the administrative agency imposing a higher penalty by substituting its judgment for that of the hearing officer. The only basis for the substitution of judgment offered by the Commission was that it simply disagreed with the hearing officer's assessment of the seriousness of the offense committed by corrections officer Bradley. Under the APA "[a]n [administrative] agency should not reject the recommended penalty without properly rejecting, amending, or substituting at least one recommended finding of fact or conclusion of law."<sup>511</sup> The Commission thus violated this dictate by enhancing the penalty in this case.<sup>512</sup>

*Bajrangi v. Department of Business Regulation*<sup>513</sup> also concerned the validity of a punishment imposed in a final administrative order. Bajrangi was charged by the Department of Business Regulation with having sold an alcoholic beverage to an underage individual without first requesting identification. The Department issued a notice of violation, and requested that Bajrangi "show cause why his license should not be suspended or revoked."<sup>514</sup> After a formal administrative hearing, "[t]he hearing officer . . . found as fact that[,] '[t]he usual penalty for a licensee selling to an underage person is [a] \$1,000 civil penalty accompanied by a [twenty] day license suspension.'"<sup>515</sup> However, in the section of the hearing officer's recommended order concerning conclusions of law, he found that there were no rules promulgated concerning appropriate penalties for a first offense violation. Lacking such rules or guidelines from the administrative agency, the hearing officer concluded that a twenty day suspension and \$1,000 fine were inappropriate for a first offense, and not supported by any evidence or argument. The hearing officer instead recommended a penalty consisting of a three day

511. *Id.* at 639.

512. The court acknowledged that this decision was in conflict with *Allen v. School Board* where the Third District Court of Appeal approved of an administrative agency imposing a penalty beyond that imposed by the hearing officer, even though the agency had fully adopted the hearing officer's findings of fact and conclusions of law. 571 So. 2d 568 (Fla. 3d Dist. Ct. App. 1990). The court certified the question to the Florida Supreme Court, noting that its decision and that of the Fifth District Court of Appeal conflicted with the decision in *Allen. Bradley*, 577 So. 2d at 639.

513. 561 So. 2d 410 (Fla. 5th Dist. Ct. App. 1990).

514. *Id.* at 411.

515. *Id.* at 412.

license suspension and a \$1,000 fine.<sup>516</sup>

The final order entered by the Division of Alcoholic Beverages and Tobacco adopted the decision of the hearing officer, except that it found a three day license suspension inappropriate, and it imposed the twenty day suspension originally suggested. The Division characterized the hearing officer's conclusion concerning the appropriate number of days for license suspension as a conclusion of law. The Division found in fact that there were penalty guidelines in existence, and pointed to the Ramey's testimony asserting that the appropriate penalty for a first time offense was a twenty day suspension and \$1,000 fine.<sup>517</sup>

Since 1984, the APA has provided that an administrative agency "may no longer reduce or increase a recommended penalty without a review of the complete record *and* without stating with particularity its reasons in the order, by citing to the record 'in justifying the action.'" <sup>518</sup> Thus, the court read the decision by the supreme court in *Department of Professional Regulation v. Bernal*<sup>519</sup> as merely reaffirming that the APA required an administrative agency to state on the record valid reasons for disregarding the recommended penalty contained in the hearing officer's recommended order. The decision in *Bernal* did not indicate when an administrative agency's "rationale for increasing a penalty [was] 'legally insufficient' or 'valid' and there is some disagreement concerning the circumstances in which an appellate court should invalidate agency orders that alter penalties recommended by hearing officers."<sup>520</sup> In this case, it appeared that the Division of Alcoholic Beverages and Tobacco and the hearing officer "simply disagree[d] about the appropriate penalty for the . . . single act of sale of a beer to a minor."<sup>521</sup> Such disagreement did not fall within the area where an administrative agency's expertise can be used to justify imposing an enhanced penalty. Any other scheme would threaten the independence of the hearing officer, which the APA envisioned.<sup>522</sup>

516. *Id.*

517. *Id.* at 411-12.

518. *Bajrangi*, 561 So. 2d at 413 (emphasis in original).

519. 531 So. 2d 967 (Fla. 1988).

520. *Bajrangi*, 561 So. 2d at 414; *Department of Professional Regulation v. Bernal*, 531 So. 2d 967 (Fla. 1988).

521. 561 So. 2d at 415.

522. The APA makes clear that:

[T]he virtue of neutrality is greater than the virtue of expertise. Given that the hearing officer and the agency should always be working from the same record, the circumstances under which the agency would be justified

Both *Bradley* and *Bajrangi* demonstrated continued approval of a two track approach to an administrative agency overturning recommended penalties. To overturn the recommendations, the administrative agency can state the particular reasons for rejecting it and cite to support in the record for its position, or the agency can claim it is a policy matter within the agency's expertise. The former is an approach which parallels that adopted for rejecting factual findings by a hearing officer. An administrative agency can review the complete record and state with particularity its reasons for deviating from the hearing officer's recommended penalty. However, if the agency merely disagrees with the assessment of the seriousness of the offense by the hearing officer in a particular case, then it is not an adequate justification for rejecting the hearing officer's recommended penalties.

The latter approach closely resembles a non-rule policy in that it permits a general claim of expertise to establish a policy which justifies imposing a penalty not recommended by the hearing officer. The danger posed by this approach is three fold:

First, it opens the door for [administrative] agencies to rejecting recommended penalties as long as they used the magic words 'general policy disagreement' to characterize why they rejected the recommended penalty of the hearing officer. This may be permitted even though the nature of the penalty to be imposed in a case is generally a fact specific determination. Second, it invites a general abuse of the law/fact dichotomy by approving of the characterization of what in most cases is a factual issue as a legal or policy matter.<sup>523</sup>

Third, it permits an administrative agency to avoid providing adequate explanation and documentation of a nonrule policy governing the nature of penalties to be imposed for certain administrative offenses.<sup>524</sup>

While an administrative agency's discretion to reject a hearing officer's findings of fact is limited, no such constraint is imposed on its discretion regarding findings concerning questions of law. In *Ritenour*

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in substituting its judgment concerning the appropriate penalty for that of the hearing officer should not arise except where one or more of the hearing officer's recommended findings of fact and conclusions of law are properly rejected, substituted or amended by the [administrative] agency.

*Id.*

523. *Burris III*, *supra* note 4, at 632-33.

524. *See supra* notes 258-309 and accompanying text.

*v. Unemployment Appeals Commission*,<sup>525</sup> a referee, after hearing extensive testimony, concluded that the employee had not voluntarily left her employment, but rather, had been forced out for good cause due to the irrational if not abusive treatment.<sup>526</sup> The Unemployment Appeals Commission reversed the appeals referee, holding that given the facts of the case, the good cause legal standard had not been met.<sup>527</sup>

The court stated that the appeals referee was the trier of fact in unemployment compensation cases. It was thus the duty of the appeals referee to weigh and reject conflicting evidence. On this basis, questions of whether a person left his or her employment voluntarily clearly were questions of fact, including whether a person left for good cause. However, before questions of fact can be properly addressed, the appeals referee must correctly understand the legal standard of good cause. This focuses on the question of whether the circumstances "would impel the average, able-bodied, qualified worker to give up his employment."<sup>528</sup> Thus, the court stated:

While the appeals referee found that a good cause to terminate existed because of the employer's irrational or abusive conduct, there was no finding (except perhaps by inference) that this irrational, abusive conduct would cause the average, able-bodied, qualified worker to quit his or her employment.<sup>529</sup>

It was this very question of what the average person would do in response to the conduct of the employer which caused the Unemployment Appeals Commission to reverse the findings of the appeals referee. This was considered a legal error by the appeals referee. Under the APA, it is clearly permissible for an administrative agency to overturn an erroneous legal interpretation adopted by an appeals referee or hearing officer.<sup>530</sup> "The commission in this case, basing its decision on the appeals referee's facts, concluded that the appeals referee's conclusion of law was erroneous. The legislature had given the Commission that authority."<sup>531</sup>

525. 570 So. 2d 1106 (Fla. 5th Dist. Ct. App. 1990).

526. *Id.* at 1107.

527. *Id.*

528. *Id.*

529. *Id.*

530. FLA. STAT. § 120.57(1)(b)(10) (1989).

531. *Ritenour*, 570 So. 2d at 1108.

*Harloff v. City of Sarasota*<sup>532</sup> concerned an appeal of a final order of the Southwest Florida Water Management District which granted Harloff a consumptive use permit for water allowances which were substantially less than the amounts he had requested.<sup>533</sup> The District accepted the factual findings of the hearing officer,<sup>534</sup> but rejected the hearing officer's legal conclusions and adopted those which had been advocated by its staff.<sup>535</sup>

The issue before the hearing officer was whether the District had properly determined the extent to which Harloff should have been permitted to withdraw water in order to safeguard the interest of the City of Sarasota which had a pre-existing water use permit.<sup>536</sup> Chapter 373 of the Florida Statutes required that an applicant for a water use permit demonstrate the following: 1) that the use must be a reasonable and beneficial one; 2) that granting the application will not interfere with any pre-existing permitted water use; and 3) that granting the permit would be consistent with the public interest.<sup>537</sup> Everyone in-

532. 575 So. 2d 1324 (Fla. 2d Dist. Ct. App. 1991).

533. *Id.* at 1328.

534. The hearing officer found that the City of Sarasota had maintained a wellfield since 1966 adjacent to Harloff's farm land. Until January 1991, the wellfield was permitted by the Southwest Florida Water Management District to withdraw between six and seven million gallons per day. *Id.* at 1325-26. Since 1966, the water table at the wellfield site had been substantially lowered. By 1989, the water table dropped to such an extent that the wellfield could not pump the maximum number of gallons per day authorized by District. This threatened the continued viability of the wellfield until steps were taken to adequately preserve the water table level in the future.

Harloff used a semi-closed ditch irrigation system in order to water his 8,500 acres of farm land. A drip irrigation system, which would have been more expensive to operate, would have resulted in substantial water savings, but the officer made no finding as to whether it was economically feasible for Harloff to adopt this system. Harloff requested that District grant him a permit authorizing him to withdraw 26 million gallons per day as a seasonal average and 32 million gallons per day as a seasonal daily maximum with 15 million gallons per day as an annual average. The District granted him 15.6 million gallons per day as a seasonal average, 21 million gallons per day as a daily maximum, and 11.1 million gallons per day as an annual average. The District's staff had specifically found that the Harloff's withdrawal of water would effect the continuing viability of the wellfield for the City of Sarasota. *Id.* at 1326.

535. The staff recommendations were specifically rejected by the hearing officer.

536. *Harloff*, 575 So. 2d at 1326.

537. See FLA. STAT. § 373.019(4) (1989) (A "reasonable-beneficial use" means the use of water in such quantity as is necessary for economic and efficient utilization for a purpose and in a manner which is both reasonable and consistent with the public interest."); FLA. STAT. § 373.223 (1989).

volved agreed that Harloff's agricultural enterprise was a reasonable and beneficial use. However, the City of Sarasota contested whether the request was consistent with the City's existing permit for water use.<sup>538</sup> The City also alleged that any threat to the City's existing water use posed by Harloff's request would be inconsistent with the public interest.<sup>539</sup>

The hearing officer concluded that if Harloff's request for water consumption was granted, substantial damage to the functional ability of the City's wellfield would result. Despite this factual finding, "the hearing officer recommended that Mr. Harloff receive a consumptive use permit for the entire allowance of water that he had requested."<sup>540</sup> The District rejected this legal conclusion based upon the findings of fact, and ruled that Harloff had failed to establish that his requested consumptive use would not interfere with any existing permitted water use, and that the requested use was not inconsistent with the public interest.

The court "affirm[ed] the decision because the District's board was free to substitute its own legal conclusions for those of the hearing officer, so long as competent substantial evidence supported the substituted legal conclusions."<sup>541</sup> The final order of the District essentially required that Harloff substantially curtail his agricultural activities, or alter those activities, in order to provide adequate protection to the wellfield permitted for water supply to the City of Sarasota.<sup>542</sup> The court found that the District failed to point to or explain what legal error was committed by the hearing officer.

Nonetheless, the court concluded "[o]n full review of the record, however, we are convinced that the District correctly found errors of law in the hearing officer's proposal and that the District's final order [was] supported by competent, substantial evidence."<sup>543</sup> The court reasoned that while an administrative agency may be required to adequately explain its reasons with particularity concerning any rejection of a proposed penalty, there was no such requirement when an agency rejected a conclusion of law that did not involve the imposition of any

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538. *Harloff*, 575 So. 2d at 1326-27.

539. *Id.* at 1327.

540. *Id.*

541. *Id.* at 1325.

542. *Id.*

543. *Harloff*, 575 So. 2d at 1327.



penalty.<sup>544</sup> The court noted that the District had been granted broad powers by the legislature to implement the water management plan for that area. An essential element in the exercise of those powers was that they be carried out in a logical and consistent fashion.

If the legal interpretation of these policies were left to various hearing officers, the concepts would inevitably receive different meanings before different hearing officers. Because agency boards are charged with the responsibility of enforcing the statutes which govern their area of regulation, courts give great weight to their interpretation of those statutes.<sup>545</sup>

Thus, determinations of what constitutes a reasonable and beneficial use, an interference with existing permanent water use, or what is in the public interest are matters which involve important policy questions. It would be impossible to maintain consistent policies if individual hearing officers were allowed to exercise their discretion in interpreting the legal concepts and their meaning.<sup>546</sup> The court noted that such decisions involved both questions of law and fact. However, the court determined that “[a]n agency’s decision on such a mixed question is entitled to ‘increased weight when it is infused by policy considerations for which the agency has special responsibility.’”<sup>547</sup> The court concluded that the District, in reaching its decision, concerning the scope of permitted water use that Harloff was entitled to, engaged in an interpretation of the statute, not a substitution of its judgment concerning factual matters.<sup>548</sup>

The court went on to note that the hearing officer made two errors in interpreting the scope of the law:

First, the hearing officer’s recommended order appears to place the burden of proof on the City or the District staff to establish that Mr. Harloff’s requested permit would interfere with the water supply at the . . . wellfield. The statute, however, clearly places the burden on Mr. Harloff to prove that his request would *not* interfere.<sup>549</sup>

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544. *Id.*; FLA. STAT. § 120.57(1)(b)10 (1989).

545. *Harloff*, 575 So. 2d at 1327.

546. *Id.*

547. *Id.* at 1328 (quoting *Santaniello v. Department of Professional Regulation*, 432 So. 2d 84, 85 (Fla. 2d Dist. Ct. App. 1983)).

548. *Id.*

549. *Id.*

In light of this allocation of the burden of proof, Harloff failed to demonstrate that his requested permit use would not substantially interfere with the continued viability of the wellfield and the City of Sarasota's preexisting use permit.<sup>550</sup> While the court did not explicitly find, it clearly indicated that Harloff had failed to carry his burden of persuasion on this point.

Second, the hearing officer erred in concluding that the City of Sarasota should take steps to improve the ability of a wellfield to retrieve water from the lowered water table. This may well have been an issue if the City of Sarasota's permit for use of the wellfield was before the District, but it was not an issue when considering Harloff's request for a water use permit. The statute made it clear that the City's prior permit for water use was entitled to non-interference in its current condition, and that the hearing officer erred in imposing any additional burden on the City to modify the wellfield in order to permit Mr. Harloff to use water at the level he requested.<sup>551</sup>

### C. *Deferential Judicial Review of Factual Issues*

The competent and substantial evidence standard of judicial review for factual determinations made by administrative agencies<sup>552</sup> is designed to restrain reviewing courts from reweighing the evidence and substituting their judgment for that of the administrative agency on factual issues.<sup>553</sup> “[C]ourts will not review conflicting evidence, or

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550. *Harloff*, 575 So. 2d at 1328.

551. *Id.*

552. The competent and substantial evidence standard of judicial review does not apply in every case. It is limited to those records developed in hearings which meet the requirements of section 120.57. FLA. STAT. § 120.68(10) (1989). If the record of the administrative hearing is destroyed, then generally the appropriate remedy is to vacate the order and remand to the agency for a de novo hearing. *Gay v. Department of State*, 550 So. 2d 137, 138 (Fla. 1st Dist. Ct. App. 1989) (per curiam).

553. *See, e.g., Department of General Serv. v. English*, 534 So. 2d 726, 728 (Fla. 1st Dist. Ct. App. 1988) (courts are prohibited from making credibility judgments or substituting their own judgment for that of the administrative agency, hearing officer, or referee). The prohibition against reweighing of the evidence also applies when there has been no administrative agency hearing. In such a case, the reviewing court may order an administrative agency to conduct a “factfinding proceeding under this act” in order to resolve disputed factual issues necessary to determining whether an administrative agency's action in the case was valid. FLA. STAT. § 120.68(6) (1989). After an administrative agency has made the necessary factual findings, the reviewing court is restricted to setting aside, modifying, or ordering agency action when “the facts compel

make any determination with respect to the weight of the evidence, as these are usually matters for administrative agency determination."<sup>554</sup> This is a very deferential standard of judicial review which generally requires courts to construe the record in the light most favorable to the administrative agency decision.<sup>555</sup> Also, the courts will not permit parties, during the judicial review process, to supply facts not found in the administrative record.<sup>556</sup> In *Hillsborough County School Board v. Williams*,<sup>557</sup> the court noted that a disputed factual issue which was not resolved at the hearing may not be "supplied at the appellate level."<sup>558</sup> In such a case, the reviewing court must remand the case to the administrative agency for a determination of the disputed factual issue.<sup>559</sup>

The burden is on the party attacking the agency's factual determinations to demonstrate that these determinations are not supported by competent substantial evidence in the record.<sup>560</sup> This burden cannot be

a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility." FLA. STAT. § 120.68(11) (1989). Because this standard of judicial review appears to foreclose any judicial overturning of the factual determinations made by an administrative agency, it is even more of a deferential standard of review than that imposed on the court under the competent and substantial evidence standard. While this approach is both time consuming and in some cases wastes the limited resources of administrative agencies and the courts, it does insure that an administrative agency has made the initial factual determinations and that the reviewing court is not free to reject the administrative agency's factual determinations or independently evaluate the record to reach its own factual conclusions.

554. *Rolling Oaks Utils. v. Public Serv. Comm'n*, 533 So. 2d 770, 772 (Fla. 1st Dist. Ct. App. 1988) (clarified on rehearing).

555. *See Faucher v. R.C.F. Developers*, 569 So. 2d 794, 797 (Fla. 1st Dist. Ct. App. 1990) (noting that in reviewing a record under the competent and substantial evidence standard of review, the evidence should be interpreted and construed in light of the whole record for the purpose of "find[ing] as much consistency as possible in the testimony of the various witnesses, and determine what irreconcilable conflicts remain in the evidence").

556. *Cf. Palm Beach Community College v. Department of Admin.*, 579 So. 2d 300, 302-03 (Fla. 4th Dist. Ct. App. 1991) (per curiam) (where parties to an administrative proceeding have agreed to a stipulated set of facts, then it was reversible error for the administrative agency to base the decision on new findings of facts).

557. 565 So. 2d 852 (Fla. 1st Dist. Ct. App. 1990).

558. *Id.* at 854.

559. *See Schultz v. Mr. Donut of Am.*, 564 So. 2d 236, 238 (Fla. 1st Dist. Ct. App. 1990).

560. Administrative "[a]gency determinations may be set aside if the . . . court finds that the agency's conclusions are derived from findings of fact not supported by competent record evidence." *Health Care and Retirement Corp. of Am. v. Department*

met if the administrative record is not before the court, or if the administrative agency never resolved the disputed factual issue. In *City of Sarasota v. AFSCME Council 1979*,<sup>561</sup> the court noted that a party seeking judicial review of a decision by an administrative agency had the burden of providing the court with an appropriate record so that the judicial review process could go forward. When a party is seeking judicial review of an administrative order relating to an automatic stay, “[a]t a minimum . . . this court [should receive] . . . a copy of the final order, any pleadings regarding the stay and the lower tribunal’s order on the stay.”<sup>562</sup> Without a record for review, the court must affirm the administrative agency’s decision to deny the automatic stay, because it had no basis for determining that the decision was an abuse of discretion.<sup>563</sup>

Similarly, in *Rabren II*,<sup>564</sup> the court noted that it was the duty of the Department of Professional Regulation, as the party seeking judicial review in this case on the issue of the appropriateness of the recommended penalty, to provide a transcript of the proceedings. Because it failed to do so both before the Board of Pilot Commissioners and also on appeal before the court, there was no basis for overturning the recommended penalty, because an administrative agency is prohibited from “deviating from the recommended penalty without reviewing the ‘complete record . . . .’”<sup>565</sup> The failure to provide a transcript in such a circumstance cannot be characterized as harmless error, because there may well have been evidence in the record indicating whether these docking facilities should or should not have been characterized as independent ports within the Tampa Bay port area.<sup>566</sup>

The net result is that in most cases, the reviewing courts write opinions demonstrating how agency factual determinations were adequately supported by the record.<sup>567</sup> For example, in *Manasota-88, Inc. v. Agrico Chemical Co.*,<sup>568</sup> the court noted that the decision of the De-

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of Health and Rehabilitative Serv., 559 So. 2d 665, 667 (Fla. 1st Dist. Ct. App. 1990); *Rolling Oaks Utils.*, 533 So. 2d at 772.

561. 563 So. 2d 830 (Fla. 1st Dist. Ct. App. 1990) (per curiam).

562. *Id.* at 830.

563. *Id.* at 830-31.

564. 568 So. 2d 1283 (Fla. 1st Dist. Ct. App. 1990).

565. *Id.* at 1289-90; see FLA. STAT. § 120.57(1)(b)10 (1989).

566. *Rabren II*, 568 So. 2d at 1290.

567. See *Martin County Liquors v. Department of Business Regulation*, 574 So. 2d 170, 175 (Fla. 1st Dist. Ct. App. 1991).

568. 576 So. 2d 781 (Fla. 2d Dist. Ct. App. 1991).

partment of Environmental Regulation was supported by substantial competent evidence, and that it would not reweigh such evidence. Accordingly, no factual error was committed by the Department in this case.<sup>569</sup>

Also, *Citizens of Florida v. Wilson*,<sup>570</sup> after extensively reviewing the testimony of the only witness before the Public Service Commission, the supreme court concluded that the record provided competent and substantial evidence in support of the Commission's decision concerning the facts, and that its order was not arbitrary as a matter of law. In doing so, the court reaffirmed that the competent and substantial evidence standard of review should be applied in reviewing the records of hearings before the Public Service Commission. This standard of judicial review prohibited the court from reevaluating or reweighing the evidence heard by the Commission. This prohibition was considered to extend to any inferences that should have been drawn from the testimony that the Commission heard during the course of the proceedings.<sup>571</sup>

These cases, and others, do not imply that convincing a court to reject an administrative agency's findings of fact is an impossible task.<sup>572</sup> However, they do require a record that clearly demonstrates that the factual findings of the administrative agency were not supported by competent substantial evidence, which is a relatively rare circumstance.<sup>573</sup>

*Burd v. Division of Retirement*<sup>574</sup> is a classic example of the type of record which will convince an appellate court to reject an administrative agency's findings of fact. In *Burd*, the court noted that it was appropriate for it to reverse and remand an administrative order when the fact finder overlooked unrefuted testimony on the central factual issue in the case. In such cases, there was no inappropriate substitution of judgment by the court on a factual issue, but rather an appropriate reversal, because the factual finding of the administrative agency was

569. *Id.* at 782-83.

570. 569 So. 2d 1268 (Fla. 1990).

571. *Id.* at 1270.

572. One of the best arguments is that the administrative agency improperly rejected the factual findings of the hearing officer. *See supra* notes 468-551 and accompanying text.

573. Far too often the courts are presented with arguments by counsel which essentially are requests for the courts to reweigh the evidence or reevaluate the credibility of witnesses.

574. 581 So. 2d 973 (Fla. 1st Dist. Ct. App. 1991).

not supported by competent substantial evidence.<sup>575</sup>

#### D. *Deferential Judicial Review of Questions of Law*

The power of an administrative agency to interpret a statute or rule could be viewed as an invasion of the core judicial function of interpreting the law.<sup>576</sup> However logical this extreme position may be, it has never enjoyed much support.<sup>577</sup> The principle is well settled "that administrative agencies are necessarily called upon to interpret statutes."<sup>578</sup> Courts have gone even further; not only can an administrative agency interpret statutes, "agency determinations with regard to a statute's interpretation will receive great deference [from reviewing courts] in the absence of clear error or conflict with legislative intent."<sup>579</sup>

The . . . general rule is that agencies are to be accorded wide dis-

575. *See id.* at 974; *cf.* *Faucher v. R.C.F. Developers*, 569 So. 2d 794 (Fla. 1st Dist. Ct. App. 1990) In *Faucher*, the court noted that in order for the judge of compensation claims to reject the medical opinions offered by doctors who testified during the course of the hearing, an adequate demonstration on the record must be made that such opinions were based upon false or incomplete medical history given by the claimant to these doctors. In order to demonstrate this, the record must reflect that questions were addressed to the doctors "specifically inquiring about the effect of the false or admitted information on the doctor's previously expressed opinion." 569 So. 2d at 801. *But see id.* at 804 (Nimmons, J., dissenting).

576. Perhaps the most famous statement along these lines is found in *Marbury v. Madison*; "It is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803).

577. Rather, the position has been that the courts must always retain the power to determine whether the administrative agency acted within the scope of its delegated authority. *See supra* notes 38-81 and accompanying text; *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.").

578. *Laborers' Int'l Union of N. Am., Local 478 v. Burroughs*, 541 So. 2d 1160, 1162 (Fla. 1989).

579. *E.g.*, *Martin County Liquors v. Department of Business Regulation*, 574 So. 2d 170, 175 (Fla. 1st Dist. Ct. App. 1991); *Florida Sugar Cane League v. State*, 580 So. 2d 846, 851 (Fla. 1st Dist. Ct. App. 1991) ("We are disinclined to disturb their conclusions based on the established principle that [administrative] agency policy determinations should be accorded deference by a reviewing court."); *accord Chevron, U.S.A., Inc.*, 467 U.S. at 843 n.11 ("The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.").

cretion in the exercise of their lawful rule making authority, clearly conferred or fairly implied and consistent with the agencies' general statutory duties. An agency's construction of the statute it administers is entitled to great weight and is not to be overturned unless *clearly erroneous*. [Moreover,] [t]he agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of *possible* interpretations.<sup>580</sup>

This approach generally results in the courts affirming agency interpretations of statutes.<sup>581</sup> Similarly, a court will defer to an administrative agency's interpretation of its rules "unless the interpretation is clearly erroneous."<sup>582</sup> The classic circumstance that will satisfy this standard of judicial review occurs when a court finds that an administrative agency's interpretation was "contrary to the plain and unequivocal language" of the statute or rule.<sup>583</sup>

#### E. *Nondeferential Judicial Review of Questions of Law*

Courts most often abandon the deferential approach of judicial review when it involves an administrative agency's interpretation of the law.<sup>584</sup> During the survey period, the courts consistently held that two circumstances justified abandoning the usual deference given to administrative agency resolution of questions of law.<sup>585</sup> First, if the adminis-

580. *Department of Professional Regulation v. Durrani*, 455 So. 2d 515, 517 (Fla. 1st Dist. Ct. App. 1984) (citations omitted) (emphasis added).

581. *See Burris III*, *supra* note 4, at 636-38. The degree of deference courts should extend to an administrative agency's interpretation of a statute has been much debated in both the federal and state courts. In *Chevron, U.S.A., Inc.*, 467 U.S. at 842-45, the Supreme Court explained its current position on this question.

582. *Eager v. Florida Key Aqueduct Auth.*, 580 So. 2d 771, 772 (Fla. 3d Dist. Ct. App. 1991) (*per curiam*); *see also Meridian, Inc. v. Department of Health & Rehabilitative Servs.*, 548 So. 2d 1169, 1170 (Fla. 1st Dist. Ct. App. 1989) (stating that the court must affirm an administrative agency's interpretation of agency rules unless "arbitrary, capricious, or not in compliance with the . . . [relevant statutory provisions]).

583. *See id.*; *see also Town of Palm Beach v. Department of Natural Resources*, 577 So. 2d 1383, 1386 (Fla. 4th Dist. Ct. App. 1991).

584. The courts in some cases have abandoned the deferential approach of judicial review of factual issues. *See Burris III*, *supra* note 4, at 635-36; *Burris II*, *supra* note 4, at 776-78.

585. There are few examples of other circumstances when the courts will not defer to an agency interpretation of the law. *See Cataract Surgery Ctr. v. Health Care*

trative agency's interpretation of a statute or administrative rule was contrary to express language or purpose, then the court will not hesitate to overturn the interpretation.<sup>586</sup> Second, if the interpretation adopted by the administrative agency would result in the court's declaration that the statute was an impermissible delegation of authority or that the administrative rule was an ultra vires act, then, if it is reasonable to do so, the court will reject the administrative agency's interpretation and impose one which avoids these problems.<sup>587</sup>

In *Elmariah v. Department of Professional Regulation*,<sup>588</sup> the court considered the issue of whether the hearing officer correctly concluded that the false and deceptive statements made by Dr. Elmariah in his application for staff privileges at various hospitals were not sufficiently related to the practice of medicine to justify disciplinary action by the Board of Medicine. The Board was delegated the authority to discipline doctors for "making deceptive, untrue, or fraudulent representations in the practice of medicine . . . ."<sup>589</sup> The Board rejected the hearing officer's conclusion and found that staff privileges "directly related to the practice of medicine or to the attempt to practice medicine."<sup>590</sup>

The court noted that:

Although it is generally held that an agency has wide discretion in interpreting a statute which it administers, this discretion is somewhat more limited where the statute being interpreted authorizes sanctions or penalties against a person's professional license. Statutes providing for the revocation or suspension of a license to practice are deemed penal in nature and must be strictly construed,

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Cost Containment Bd., 581 So. 2d 1359, 1364-65 (Fla. 1st Dist. Ct. App. 1991); *St. Johns N. Util. Corp. v. Public Serv. Comm'n*, 549 So. 2d 1066, 1069-70 (Fla. 1st Dist. Ct. App. 1989) (noting that an "agency bears the burden of providing a reasonable explanation for inconsistent results based upon similar facts;" if the explanation is reasonable, then the court must affirm the agency's interpretation); *Ford Motor Credit Co. v. Department of Revenue*, 537 So. 2d 1011 (Fla. 1st Dist. Ct. App. 1988) (stating that a court in reviewing constitutional challenge to an agency decision will give no deference to the agency's resolution of such constitutional claims).

586. See, e.g., *Town of Palm Beach v. Department of Natural Resources*, 577 So. 2d 1383, 1386 (Fla. 4th Dist. Ct. App. 1991).

587. See *Department of Env'tl. Regulation v. Puckett Oil Co.*, 577 So. 2d 988 (Fla. 1st Dist. Ct. App. 1991).

588. 574 So. 2d 164 (Fla. 1st Dist. Ct. App. 1990).

589. FLA. STAT. § 458.331(k) (1983).

590. *Elmariah*, 574 So. 2d at 165.



with any ambiguity interpreted in favor of the licensee.<sup>591</sup>

The practice of medicine for purposes of Florida Statutes Chapter 458 is defined as "the diagnosis, treatment, operation, or prescription of any human disease, pain, injury, deformity, or other physical or mental condition."<sup>592</sup> While common sense may have indicated that staff privileges bore some relationship to the practice or the attempt to practice medicine, the court found that the statutory definition of the practice of medicine clearly prohibited the Board of Medicine from punishing a doctor for this type of misconduct, because the responses did not concern any form of a diagnosis, treatment, operation, or prescription for any human disease, and as such could not form the basis for disciplinary action.<sup>593</sup>

#### F. *Judicial Review of Agency Rule Making Activity*

While much of the decision in *Cataract Surgery Center v. Health Care Cost Containment Board*<sup>594</sup> may be criticized,<sup>595</sup> the court did avoid the pitfalls associated with trying to apply the new paradigm for judicial review announced in *Adam Smith Enterprises, Inc. v. Department of Environmental Regulation*.<sup>596</sup> In *Cataract Surgery Center*, the court echoed the decision of *Agrico Chemical Co. v. Department of Environmental Regulation*<sup>597</sup> when it noted that the standard of judi-

591. *Id.*

592. FLA. STAT. § 458.305(3) (1983).

593. The misrepresentations made by Dr. Elmariah were somehow related to his practice or attempt to practice, but it cannot be said that they were made "in" the practice of medicine. *Elmariah*, 574 So. 2d at 165; see FLA. STAT. § 458.331(k) (1983).

594. 581 So. 2d 1359 (Fla. 1st Dist. Ct. App. 1991).

595. See *supra* notes 438-48 and accompanying text.

596. 553 So. 2d 1260 (Fla. 1st Dist. Ct. App. 1989).

597. 365 So. 2d 759 (Fla. 1st Dist. Ct. App.), *cert. denied*, 376 So. 2d 74 (Fla 1979). In *Agrico Chemical Co.*, the court described the conceptual approach and standard of judicial review for administrative agency rule making activity:

Given a proposed rule within the general area of regulation delegated by the legislature to an [administrative] agency, the test of arbitrariness is the same for the proposed rule as it would be for a statute having the same effect.

Rulemaking by an [administrative] agency is quasi-legislative action and must be considered with deference to that function . . . . The challenge [to a proposed rule] under [FLA. STAT. ]§ 120.54(4) is a two-step process: The challenge is first heard before an administrative hearing officer whose

cial review applied when determining the validity or invalidity of an administrative agency's rules or proposed rules is very deferential.

An agency's construction of the statute it administers is entitled to great weight and is not overturned unless clearly erroneous. An agency is given broad discretion in the exercise of its lawful authority and the burden is on a petitioner to demonstrate that a rule is arbitrary and capricious.<sup>598</sup>

However, such broad administrative agency discretion in the rule making context was not recognized in *Manasota-88, Inc. v. Department of Environmental Regulation*<sup>599</sup> where the court embraced the *Adam Smith Enterprises*' two tier approach,<sup>600</sup> and through its application

order "shall be final [administrative] agency action." That final [administrative] agency action is subject to judicial review. Both the hearing officer (acting in a detached quasi-judicial capacity) and this Court should determine from the evidence presented whether or not there is competent, substantial evidence to support the validity of the rule.

Thus, in a [section] 120.54 hearing, the hearing officer must look to the legislative authority for the rule and determine whether or not the proposed rule is encompassed within that grant. The burden is upon one who attacks the proposed rule to show that the [administrative] agency, if it adopts the rule, would exceed its authority; that the requirements of the rule are not appropriate to the ends specified in the legislative act; that the requirements contained in the rule are not reasonably related to the purpose of the enabling legislation or that the proposed rule or the requirements thereof are arbitrary or capricious.

A capricious action is one which is taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or despotic. Administrative discretion must be reasoned and based upon competent substantial evidence. Competent substantial evidence has been described as such evidence as a reasonable person would accept as adequate to support a conclusion.

The requirement that a challenger has the burden of demonstrating [administrative] agency action to be arbitrary or capricious or an abuse of administrative discretion is a stringent one indeed. However, the degree of such required proof is by a preponderance of the evidence . . . .

*Id.* at 762-63 (citations omitted).

598. *Cataract Surgery Cir.*, 581 So. 2d at 1360-61.

599. 567 So. 2d 895 (Fla. 1st Dist. Ct. 1990), *rev. denied*, 581 So. 2d 164 (Fla. 1991).

600. In *Adam Smith Enters.*,

[the] court indicated that the standard of judicial review applied in evaluating the validity of a rule depends on how the issue reached the courts. If judicial review is conducted pursuant to a direct appeal from an adopted

demonstrated the dangers inherent in the technique of judicial review urged on the courts in *Adam Smith Enterprises*. The decision in *Manasota-88, Inc.* involved a challenge to the Department of Environmental Regulation amended rules concerning discharge source standards for groundwater. The primary standards addressed health-threatening contaminants, and the secondary standards addressed aesthetic factors in judging the effect of a discharge into a groundwater source.<sup>601</sup> The amended rules exempted "all existing dischargers from compliance with secondary standards unless [the Department of Environmental Regulation] determined that compliance was necessary to protect groundwater used or reasonably likely to be used as a potable water source."<sup>602</sup>

However, even in these latter cases, an exemption was available if the discharger could "demonstrat[e] that the economic, social, and environmental costs of compliance outweighed the economic, social, and environmental benefits of compliance . . . [as long as it involved no violation of] secondary standards at any private or public water supply

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agency rule using the informal rule making procedures, then the standard of judicial review is arbitrary and capricious. This is a less stringent standard of judicial review of the factual record than the competent substantial evidence which is applied in the review of adjudicatory decisions. "Under th[e] arbitrary and capricious standard . . . an agency is . . . subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether a rulemaker's empirical conclusions have support in substantial evidence. Rather, the arbitrary and capricious standard requires an inquiry into the basic orderliness of the rulemaking process, and authorizes the courts to scrutinize the actual making of the rule for signs of blind prejudice or inattention to crucial facts. [This requires] the reviewing court . . . [to] consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." However, if judicial review of an administrative rule arises out of the context of adjudicatory proceedings used during the rule making process, then the agency's quasi-legislative rule making process is converted to an adjudicatory process and the standard of judicial review for factual conclusions supporting the rule is the competent substantial evidence standard. This occurs because the hearing officer's factual conclusions become the basic record for the court to review.

Burris III, *supra* note 4, at 645-46 (citations omitted) (quoting *Adam Smith Enters.*, 553 So. 2d at 1273).

601. *Manasota-88, Inc.*, 567 So. 2d at 896.

602. *Id.*

well beyond the discharger's property boundary."<sup>603</sup> Manasota-88, Inc. and other environmental groups were parties participating in the rule making process. After the amended rules were adopted, they sought judicial review of their validity.<sup>604</sup>

The court noted that because of this procedural posture of the case, there was no administrative adjudicatory hearing record. In such cases, the standard of judicial review required that the rule be "reasonably related to the purposes of the enabling legislation, and . . . not arbitrary or capricious."<sup>605</sup> In such circumstances, all the reviewing court need do is determine that the administrative agency addressed "all [the] relevant factors . . . [in] good faith . . . and . . . used reason rather than whim to progress from consideration of these factors to its final decision."<sup>606</sup> The critical question was what constituted an adequate record in a case where no section 120.57 formal adjudicatory hearing was held.

On this point, the court ruled that a record in such cases consisted of:

(1) the agency's initial proposal, its tentative empirical findings, important advice received from experts, and the description of the critical experimental and methodological techniques on which the agency intends to rely; (2) the written or oral replies of interested parties to the agency's proposals and to all the materials considered by the agency; and (3) the final rule accompanied by a statement both justifying the rule and explaining its normative and empirical predicates.<sup>607</sup>

. . . .

[A] statement of the relevant facts considered by the rulemaker . . . [which] should reveal "if and how the rulemaker considered each factor throughout the process of policy formation," detailing for the reviewing court "the actual attention [the rulemaker] gave to the factors, and explain[ing] his final disposition with respect to each of them."<sup>608</sup>

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603. *Id.* at 896-97.

604. *Id.* at 897; see FLA. STAT. § 120.56 (1989).

605. *Id.* (quoting *General Tel. Co. v. Public Serv. Comm'n*, 446 So. 2d 1063, 1067 (Fla. 1984)).

606. *Manasota-88, Inc.*, 567 So. 2d at 897 (quoting *Adam Smith Enterps.*, 553 So. 2d at 1273).

607. *Id.* at 898 (citations omitted) (quoting *Adam Smith Enterps.*, 553 So. 2d at 1270).

608. *Id.* (quoting *Adam Smith Enterps.*, 553 So. 2d at 1273).

The court found that there was no detailed explanation of the consideration of each factor or evidence offered concerning each, and the reason for the ultimate disposition in the record. The court ordered the case remanded, because, albeit not explicitly stated, the inadequate record prevented the court from performing its judicial review function. The court also held that the rule was an invalid exercise of delegated authority, because the rule was not supported by an adequate record on file with the Secretary of State.<sup>609</sup> The APA requires that an administrative agency file "a summary of the rule, a summary of any hearings held on the rule, and a detailed written statement of the facts and circumstances justifying the rule."<sup>610</sup>

The problem with the reasoning and result in *Manasota-88, Inc.* is four-fold. First, the APA does not require administrative agencies to provide a detailed statement of how each factor was *precisely considered*. This requirement was a judicial invention. All the APA on its face or in the legislative history require is a statement of the facts *found* and the *circumstances* justifying the rule. The court erred in reaching a contrary conclusion. The statements filed with the rule should enable the court to determine that all the relevant facts were considered, as well as that the rule had adequate support in the record at least for application of the deferential "arbitrary and capricious" standard of review. By requiring more, the court must have envisioned applying a non-deferential version of the arbitrary and capricious standard of judicial review.<sup>611</sup> Further, this case *must* call into question thousands of rules which do not have this type of detailed statement of consideration and resolution of the appropriate factors on file as part of the rule making record.

Second, the *Manasota-88, Inc.* decision is another example of the courts creating a serious disincentive for administrative agency use of the rule making process. If the rule making process requires an administrative agency to provide a detailed examination of the evidence pro and con for each factor considered, an expensive and onerous process, there would be no reason to prefer it over developing public policy

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609. *Id.* In some cases the filing must be made in the office of the head of the administrative agency. FLA. STAT. § 120.54(11)(b) (1989).

610. FLA. STAT. § 120.54(11)(b) (1989).

611. A more diabolical explanation would be that the court may foresee continually remanding to matter to the administrative agency for more detailed factual findings on the assumption that eventually, the administrative agency will figure out either that the court is opposed to the rule or wants it adopted only after a drawn out hearing. *See* FLA. STAT. § 120.54(17) (1989).

through the use of nonrule policy orders. In fact, because the adjudicatory process limits participation, it may well be that it is a more manageable process than that imposed by *Manasota-88, Inc.*<sup>612</sup>

Third, even assuming an administrative agency has adequately detailed its decisions during the rule making process, it is extremely unlikely that the facts disclosed will provide new relevant information which will persuade the court to find that the administrative rule is invalid under the arbitrary and capricious standard of judicial review. This is so because the court is even more deferential toward administrative agency findings of fact than the competent substantial evidence standard of judicial review.

Fourth, the approach offered by the court will paralyze the informal rule making process because of the uncertainty over the question of what constitutes an adequate record. Administrative agencies will opt to hold hearings resembling a section 120.57 proceeding in order to avoid prolonged litigation over the issue of the adequacy of the statement in support of the rule. This will waste the limited resources of both the administrative agencies and the courts.

### G. *Unenlightening Judicial Review*<sup>613</sup>

During the survey period, the courts continued, on occasion, to render opinions which provided little or no guidance on the nature of the issue decided, and little or no explanation for why the court reached its decision. Particularly troubling are those opinions where the courts provided only a brief cursory discussion of a case, and summarily concluded that an agency's factual findings either did or did not satisfy the competent and substantial evidence standard of judicial review. For example in *Garcia v. Department of Professional Regulation*,<sup>614</sup> the court, after briefly restating the facts as found by the Secretary of the Department of Professional Regulation, summarily concluded that the "findings . . . [we]re sufficient to establish an immediate danger to the public."<sup>615</sup>

Similarly, in *Kan v. P.G. Cook Associates*,<sup>616</sup> the court recited in conclusory fashion that the appeals referee heard the evidence, and

612. Burris IV, *supra* note 4, at 667-73, 677-85.

613. Burris I, *supra* note 4, at 407-10; Burris II, *supra* note 4, at 779-81.

614. 581 So. 2d 960 (Fla. 3d Dist. Ct. App. 1991).

615. *Id.* at 961.

616. 566 So. 2d 932 (Fla. 3d Dist. Ct. App. 1990).

that the record provided competent and substantial evidence to support the findings of fact as reached by the appeals referee.

The shortcoming of . . . [this type] of opinion[] is "that the court[] ha[s] not engaged in any articulation of the reasons why these records are sufficient or insufficient to support an agency's factual findings." Such a failure is inconsistent with the vision of how a reviewing court would determine the adequacy of the factual record under the APA. Under the APA an appellate court is required to "deal separately with disputed issues of agency procedure, interpretations of law, determinations of fact, or policy within the agency's exercise of delegated authority." The function of [the] appellate court[] is limited in each of these categories. The only way to know if an appellate court has remained true to its limited role is by reviewing its explanation. Where there is no explanation or it is an unenlightening explanation, one merely stating a conclusion, then there is no basis for making this judgment. Th[is] type[] of opinion[] [is] also inconsistent with the general role appellate court opinions are designed to play in our legal system, providing "a reasoned justification for the result . . . [by] testing the decision against experience and against acceptability, buttressing it and making it persuasive to self and others." Such "justification and elaboration are expected in . . . [any] mature legal system." This requirement guards against judicial fiat and assures that the law is known and knowable rather than a body of hidden principles.<sup>617</sup>

While there may be a few circumstances when it is, for policy reasons, impractical for the court to provide a full explanation of why it reached a decision, it occurs far too often in Florida, solely because, for some unknown reason, the court is unwilling to offer a full explanation of its reasons for a decision.

## VI. CONCLUDING THOUGHTS

With perhaps the exception of the *Adam Smith Enterprises* decision, there has been relatively little fundamental change in administrative law in recent years. However, this period of relative calm and stability concerning the basic principles of administrative law is about to pass. The recent amendment to the APA, designed to curtail the use of nonrule policy,<sup>618</sup> and the likelihood of amendment of the APA rule

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617. Burris III, *supra* note 4, at 650-51 (citations omitted).

618. FLA. STAT. §§ 120.52(16), .535 (1991).

making process, as a result of the current executive and legislative efforts reconsidering that process, will restructure the administrative process in Florida.<sup>619</sup> It will take time for the courts to have an opportunity to examine the new structure. Until then, there will be some heated arguments over the scope of change brought about, and the meaning of specific provisions in the new processes. The recent decisions in *Chiles*<sup>620</sup> and *Locke*<sup>621</sup> based upon separation of powers also raise questions which may fundamentally affect the power of the legislature to control executive branch exercise of delegated authority and the scope of powers which may be delegated to administrative agencies.<sup>622</sup> The next five years will be a time of uncertainty in the administrative law area, as well as an interesting and challenging time for those who are practicing in this area of the law.

Sadly, during this period we will not have the benefit of the thoughtful insights of Professor Dore who recently passed away. Professor Dore was part of the original group who drafted the new APA in 1974. She zealously followed its implementation and the adoption of many amendments to the APA in subsequent years. When called upon she never hesitated to take the time from her busy schedule to offer advice to the legislative and executive branches of the government. She also did not hesitate to criticize and praise court decisions concerning the Florida administrative process. She devoted much of her professional life to trying to improve the administrative process as well as other aspects of Florida law. She was never shy about sharing her opinion and was always a source of witty and informative stories concerning how many of the changes in Florida law occurred. She will be missed by all, even those who disagreed with her on many issues.

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619. See Dore III, *supra* note 4, at 454-55 & n.114.

620. *Chiles v. Children A, B, C, D, E & F*, 16 Fla. L. Weekly S699 (1991).

621. *Locke v. Hawkes*, 16 Fla. L. Weekly S716 (1991).

622. See *supra* notes 5-37, 243-52 and accompanying text.



