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A National Perspective of Administrative Law and the Florida Administrative Procedure Act

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A NATIONAL PERSPECTIVE OF ADMINISTRATIVE LAW AND THE FLORIDA ADMINISTRATIVE PROCEDURE ACT

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I. A NEW ERA FOR ADMINISTRATIVE PROCEDURE

For one who has been identified for a number of years with the American Bar Association's efforts to achieve needed revisions in the Federal Administrative Procedure Act, the new Florida Administrative Procedure Act is very exciting, indeed. In enacting this comprehensive reform in the administrative procedures of state agencies, the Florida legislature has drawn upon the legal thinking and experience of the 1970's, rather than the 1940's when the last major administrative procedure acts were conceived.

Both the Federal Administrative Procedure Act and the model state administrative procedure act of the Uniform Law Commissioners, upon which Florida's earlier act was substantially based, represented in their day major milestones in the development of fair and efficient administrative agency procedures. They came at a time, however, when the number and scope of administrative proceedings were vastly smaller than they are today. There are now many more administrative agencies engaged in a much wider range of activities.

Increasingly, too, the proceedings involve individual members of the public, either directly as in the case of benefits, grants, permits and licenses, or indirectly as in the case of consumer and environmental proceedings. Institutions, such as common carriers and public utilities, and property owners are no longer the main participants in administrative proceedings with the federal or state administrative agencies. Since the people are sovereign under our concept of government, whether federal or state, it has become apparent that changes are necessary in our administrative procedures to accommodate this new force, this new group of participants. Agency proceedings now more directly affect individuals, and individuals are far more interested in such proceedings than in the past.

Finally, administrative regulation has become pervasive. Where a common carrier once might have been regulated as to its rates and facilities, it is now regulated not only in those areas, but in the

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fuel that it uses, the working conditions of its employees, the disclosure statements it must make in issuing securities, the manner in which it deals with consumer complaints, and the safety of its products. Where zoning used to be the primary regulation imposed upon the use of land, now everything from tree cutting to off-the-street parking facilities may be regulated.

I was honored to be a part of the ad hoc task force organized by the Director of the Center for Administrative Justice, an organization created in 1972 by the American Bar Association, to assist in the preparation of the initial draft of a revised administrative procedure act for the state of Florida.

At the instance of the Florida Law Revision Council and the Reporter, Arthur England, Jr., who had been engaged by the Council to prepare a total revision of Florida's Administrative Procedure Act, the task force met in September 1973 and prepared extensive drafts incorporating recent judicial and proposed statutory concepts dealing with administrative fairness, many of which had never before been given such specific legislative drafting attention. These drafts also devoted attention to expanding the procedures by which decisions of adjudication and rulemaking could be made in order to provide agencies with greater flexibility to conduct their affairs and the public with a greater ability to be heard effectively in such proceedings.

The initial draft went through a number of revisions very ably prepared and annotated by Arthur England, with particular assistance by Professor Levinson, until the fifth and final draft was presented to the Florida Law Revision Council in the spring of 1974. The final step was the consideration and adoption of the new Act by the Florida legislature later in the year.

II. Providing For the Public's Right to Know

While I will not attempt to mention all the excellent innovations and provisions in the Florida Act, I do want to direct your attention to a few of them.

First of all, there are a number of provisions in the new Florida Act designed to provide the public with much greater information. They include the requirement of rules for the scheduling of meetings, including the mandatory rule that an agency agenda be prepared at least seven days before the event by the agency and be available for distribution on request of any interested person.[1] All agency orders must be available for public inspection, as must a current subject matter

1. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.53(1)(d)).

index identifying for the public any rule or order issued after the effective date of the Act.[2]

To make such information more useful to the public, the Act requires that the Department of State conduct a systematic and continuing study of the rules of state agencies for the purpose of reducing their number and bulk and for removing redundancies. The rules are to be published in a permanent compilation with at least monthly supplements, as well as a weekly pamphlet which will contain a summary and index of all rules filed during the preceding week, all hearing notices, and a summary of all rules proposed for consideration. These publications are to be made generally available, and a requirement has been included that one copy be furnished to each depository library of the Florida state library system.[3]

There is also a requirement that in decisions which affect substantial interests, the notice of an opportunity for hearing in a formal proceeding shall include a short and plain statement of the matters asserted by the agency as well as by all parties of record. If the agency or any party is unable to state the matters in sufficient detail at the time the notice is given, upon timely written application a more definite and detailed statement shall be furnished not less than three days prior to the date set for the hearing.[4]

The requirements with respect to informal proceedings also provide the members of the public affected by the proceeding with much greater knowledge of the basis for the agency's action.[5] First of all, the agency is required to give affected persons reasonable notice of the agency's action, whether proposed or already taken, together with a summary of the factual, legal, and policy grounds for the agency action. Affected persons are given an opportunity to present written evidence in opposition to the agency's action or a written statement challenging the grounds on which the agency has chosen to justify its action. If such objections are overruled, the agency must provide a written explanation within seven days.

The provisions with respect to ex parte communications are very similar, in broad outline, to those proposed by the American Bar Association[6] and would make *publicly* available the substance of any

2. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.53(2)).
3. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.55).
4. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.57(1)(a)).
5. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.57(2)(a)).
6. For the text of American Bar Association proposals, see *The 12 ABA Recommendations for Improved Procedures for Federal Agencies, ABA Proposals for Amendments to the Administrative Procedure Act,* 24 AD. L. REV. 371, 389 (1972); *Proceedings of the 1970 Annual Meeting of the House of Delegates,* 95 A.B.A. REP. 524, 548-49 (1970).

such communication, as well as provide any party desiring to rebut the ex parte communication the opportunity to do so if he requests the opportunity for rebuttal within 10 days after notice of such communication.[7]

The exceptions from the section on rulemaking are limited to judges of industrial claims and unemployment compensation appeals referees.[8] This approach is consistent with Recommendation No. 2 of the American Bar Association. That recommendation urges that exemptions now included in the Federal Administrative Procedure Act be limited, thereby broadening the coverage of rulemaking provisions requiring notice and opportunity for public participation.

III. Other Safeguards in the Act

One of the principal complaints which has been made about the federal administrative agencies is their slowness to act, or to react, as the case may be, in rulemaking proceedings. A number of congressional hearings have focused upon the injuries to the public which have continued because of this failure of administrative agencies to act promptly. I was very encouraged to see that the Florida legislature has met this problem head on and has provided that in such rulemaking proceedings, for example, within 30 days after the conclusion of the hearing, the hearing officer shall render his decision and state the reasons therefore in writing.[9]

The Florida statute now also gives a strong push to consistency and uniformity in rules by providing for model rules of procedure to be developed by the Administration Commission and filed with the Department of State.[10] These model rules would be applicable to each agency to the extent the agency has not adopted a specific rule of procedure covering the subject matter contained in the model rules. The American Bar Association also has recommended that at least in rulemaking and formal adjudication, to the extent practicable, uniform rules should be issued by all agencies and should be sufficiently comprehensive to ensure fairness and expedition in all phases of the agency process.

I also note that Florida has included a procedure by which agency rules may be screened by a legislative committee in order to determine whether the proposed rule is within the statutory authority on which

7. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.66(2)).
8. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.54).
9. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.54(3)).
10. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.54(9)).

it is based.[11] Proposals of this type have also been discussed on the national level although Florida, I believe, is the first to adopt such a proposal by statute.

The Florida provision for declaratory statements by agencies also represents a means by which any person substantially affected by a rule may seek an *administrative* determination of the validity of the rule on the ground that the rule is an invalid exercise of validly delegated legislative authority, or that the rule is an exercise of invalidly delegated legislative authority, without being limited to seeking such redress only in the courts.[12] Again, there is a rigorous time schedule to speed such declaratory proceedings on their way. While meditation and reflection are desirable in decision writing, I believe that time limits may be desirable and that most of such declaratory matters should be able to be accomplished within such a time frame as prescribed by the Florida legislature.[13]

It is significant, also, that these and other hearings under the new Act will be conducted by hearing officers provided by the new Division of Administrative Hearings.[14] The creation of such a central hearing officer system is a major step in giving administrative hearings the appearance of fairness and impartiality, which is difficult to achieve when the hearing officers are a part of the agency staff. Indeed, this step brings to administrative proceedings the separation of executive and judicial functions which is a traditional part of our concept of government.

The provision with respect to *decisions which affect substantial interests*[15] is another significant step forward and is consistent with recommendations by the Administrative Conference of the United States. It very appropriately recognizes the fact that the old concepts of rulemaking and adjudication are sometimes too rigid to be used in administrative decision making. A more flexible approach based upon whether there are policy issues or disputed issues of material fact to be determined will result in better decisions than procedures based upon the notions of rulemaking and adjudication.

The new Florida Act represents a high level of recognition of the importance of the hearing record and the determinations made by a presiding officer. The Act provides that the final agency order may reject or modify the conclusions of law and interpretation of adminis-

11. Fla. Laws 1974, ch. 74-310, § 2 (§ 11.60(2)).
12. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.56(2)).
13. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.56(2)(a)).
14. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.65).
15. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.57).

trative rules contained in the recommended order prepared by the presiding officer. However, the final order 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.[16]

There is also the provision that if a majority of those who are to render the final order have not heard the case or read the record, a decision adverse to a party other than the agency itself shall not be made until a proposed order is served upon the parties and they are given an opportunity to file exceptions and present briefs and arguments to those who are to render the final order.[17] Such statutory provisions are a modern statement of the rationale of the famous *Morgan*[18] case, which states that he who hears shall decide and he who decides must hear or at least be familiar, himself, with the record.

There is also the very encouraging, candid requirement that findings of fact, if set forth in a manner which is no more than a mere tracking of the statutory language, shall be accompanied by a concise and explicit statement of the underlying facts of record which support the findings.[19] The record in an administrative proceeding is important and the decision, including the findings of fact, should reflect what is in that record.

The section on exemptions from the procedures required by the Act again parallels the thrust of an American Bar Association recommendation for improvements in the Federal Administrative Procedure Act. The section provides that the test of whether an exemption should be granted from the procedural requirements of the Act is, in part, whether the procedure "would be so inconvenient or impractical as to defeat the purpose of the agency proceeding involved . . . ."[20]

The American Bar Association proposal to limit exceptions to the role of the presiding officer in preparing the initial decision uses similar language, limiting exceptions to cases in which an expedited decision in a particular proceeding is "imperatively and unavoidably required to prevent public injury or defeat of legislative policies."

The provisions with respect to citizen enforcement of agency action by petition[21] are also close to federal legislation in the consumer field

16. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.57(l)(j)).
17. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.58(l)(d)).
18. Morgan v. United States, 298 U.S. 468 (1936).
19. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.59(2)).
20. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.63(l)(b)).
21. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.69(l)(b)).

which provides for such enforcement action after the agency concerned has had a certain time to move itself to correct the violation. The idea of a civil fine not to exceed $1,000 in the absence of any other specific statutory authority as a part of the petition for enforcement[22] is also in line with the proposals for putting teeth in the enforcement of administrative decisions. The Administrative Conference of the United States, for example, has a recommendation in this area.

These are only some of the many fine provisions in the new Florida Administrative Procedure Act. The Florida Law Revision Council and its Reporter, Arthur England, Jr., and the Florida legislature are to be congratulated on their decision to take this forward-looking step. Now the task is up to you, the administrators, the bar, and the public, to take advantage of these gains and make the Act work.

22. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.69(2)).