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A COMPARISON OF FLORIDA ADMINISTRATIVE PRACTICE UNDER THE OLD AND THE NEW ADMINISTRATIVE PROCEDURE ACTS*

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The 1974 Florida Administrative Procedure Act (APA) contains many innovations. Some are discussed in considerable detail in other presentations. I will mention those topics, but devote most of my time to matters which are not featured in another presentation.

The new APA significantly expands coverage, reaching more agencies and more types of functions than were covered under the old Act. The new Act, like the old one, excludes the legislature and the courts.¹ The Governor, who was expressly exempted from the old Act, is partially covered by the new Act. Section 120.52(1)(a) makes the Act applicable to the Governor in the exercise of all executive powers other than those derived from the constitution. I respectfully suggest that the Governor, by executive order, establish procedures for his office that are as similar as feasible to the APA. Such functions as executive clemency, appointments to fill vacancies, and indexing and publication of executive orders, seem to lend themselves to procedures which could be adapted from the APA.

The APA applies to all state agencies other than the legislature, the courts, and the constitutional functions of the Governor. The Act extends to the smallest organizational unit of each covered agency.² The old Act did not specify that the smallest units were included. The Act extends also to local governmental units, but only to the extent they are expressly made subject to the Act by general or special law, or by existing judicial decisions.³ Apparently this means, for the time being, that school boards are covered by the Act, county com-

* Portions of this paper summarize a longer article on the 1974 Administrative Procedure Act by the author, pending publication in the University of Miami Law Review.

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1. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.50).
2. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.52(1)(b)).
3. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.52(1)(c)).

missions may be, and city commissions are not. Here is a fruitful area for further reform.

The Act defines certain functions, which trigger various provisions. The function most broadly defined is "agency action," meaning "the whole or part of a rule or order or the equivalent, or denial of a petition to adopt a rule or issue an order."⁴ As thus defined, agency action is subject to a number of sections of the Act, including those dealing with judicial review and enforcement.

Other parts of the Act deal separately with rules and orders. For example, rulemaking is subject to its own distinctive requirements regarding notice, citizen petition, and publication;⁵ these same requirements do not apply to adjudication.⁶ Still other parts of the Act cut across the definitions of rule and order. Thus, formal proceedings are required in some but not all rulemaking, and in some but not all adjudication.⁷

The term "rule" is defined, approximately as in the old Act, to cover agency statements of general applicability, with a few exceptions.⁸ The definition of the term "order" is quite new, and quite significant. An "order" is a "final agency decision which does not have the effect of a rule and which is not excepted from the definition of a rule"⁹ Thus, under the new Act, with only a few exceptions clearly spelled out in the statute, all agency action is covered in one way or another, either as a rule, or as an order.

The new Act defines a "party" as one whose substantial interests are determined by an agency proceeding.¹⁰ This language, like the broad definition of the term "order," was a deliberate attempt by the Law Revision Council to remedy the situation which had developed as a result of cases interpreting the old APA. The courts held that certain types of agency action, although clearly affecting substantial interests, were neither rulemaking nor adjudication, and were therefore not covered by the Act at all. Perhaps the most influential of these cases was *Bay National Bank & Trust Co. v. Dickinson*,¹¹ which held that the Comptroller, when deciding whether or not to grant an application for a bank charter, was engaged in neither rulemaking nor adjudication, but was instead performing a "quasi-executive"

4. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.52(2)).

5. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.54).

6. See Fla. Laws 1974, ch. 74-310, § 1 (§§ 120.57-.59).

7. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.57).

8. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.52(13)).

9. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.52(8)).

10. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.52(9)).

11. 229 So. 2d 302 (Fla. 1st Dist. Ct. App. 1969).

function which was not covered by the APA. The court reached this result, in part, by noting that the Comptroller's decision would not affect any party's rights, duties, privileges or immunities. The new Act clearly covers bank chartering as well as such other matters as parole release and revocation, prison discipline, and campus discipline, to mention just a few of the more controversial examples.

The broad coverage of the new Act is feasible because the Act introduces two safety features, so as to prevent its broad coverage from becoming unduly burdensome. First, the Act introduces a new mechanism whereby agencies can request exemption from all or any part of the Act;¹² the exemption provisions are discussed in the Attorney General's presentation. Second, the Act introduces the informal proceeding for some types of adjudication, while preserving the formal proceeding for others,¹³ on the basis of criteria which I will discuss later. The new Act also makes innovations regarding procedural rules and model rules of procedure and these are discussed by the Attorney General.

Rulemaking has been greatly changed by the new Act. Ms. Dore discusses this area in detail, but I would like to comment on it briefly. The new rulemaking provisions subject the agencies to two sets of controls. One set was drafted by the Law Revision Council, and was generally included in the bill passed by the House. The other set of controls was drafted by the Senate Rules Committee, and was included in the Senate bill. The conference committee report, which ultimately was enacted, contained both sets of controls. I do hope we have not imposed excessive burdens on the rulemaking power of the agencies. If in fact we have done so, we are simply tempting the agencies to abandon rulemaking as a means of establishing policy; we are tempting them to develop their policy on an ad hoc basis through adjudication of one case after another. This would be a regrettable development at a time when the leading scholars emphasize the need to encourage agencies to develop policy by rulemaking rather than adjudication whenever feasible.¹⁴

The new Act deals separately with public access to records of final agency action, and publication of rules and other items. The Act requires each agency to make available, for public inspection and copying, all rules and orders, and a current subject-matter index of all rules and orders.¹⁵ No rule or order is valid for any purpose until

12. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.63).

13. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.57).

14. *See, e.g.*, K. DAVIS, ADMINISTRATIVE LAW 130-34 (1965).

15. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.53(2)).

it has been made available for public inspection together with the subject-matter index, unless the person against whom enforcement is sought has actual knowledge of it.¹⁶ The 1961 APA contained no comparable provision. The new guarantee of access to rules, orders and indexes is especially significant with regard to the development of *stare decisis* on the basis of reported agency precedents, as I will suggest later.

The new Act provides two distinct types of declaratory determinations. First, each agency is required to provide, by rule, for the filing and prompt disposition of petitions for declaratory statements as to the *applicability* of any statutory provision or of any rule or order of the agency.¹⁷ Similar mechanisms seem to have been available under the old APA, although not clearly spelled out in the statute. Second, any person substantially affected by a rule may seek an administrative determination of its *validity*. This matter is discussed by Ms. Dore as part of the rulemaking area. I will again mention it when we get to judicial review since, in my opinion, this administrative determination of the validity of a rule supersedes the jurisdiction previously conferred upon the circuit courts to render declaratory judgments concerning rules. Contrary views are expressed in some of the other presentations.

Three significant provisions of the new Act, appearing in different sections, can be combined so as to develop an approach toward administrative *stare decisis*. First, the final order in a proceeding which affects substantial interests must be in writing or stated in the record, and shall include findings of fact and conclusions of law, separately stated.¹⁸ Second, the public is given access to inspect and copy all agency rules and orders, and is provided a current subject-matter index.¹⁹ Third, in the area of judicial review, a court must remand a case to the agency upon finding that agency action is inconsistent with an agency rule, or with an officially stated agency policy, or with prior agency practice if deviation therefrom is not explained by the agency.²⁰ Prior agency orders can be regarded as indicators of prior agency practice, and therefore a reviewing court shall remand if the agency makes an unexplained departure from its own precedent. If the agency departs from precedent and offers an explanation, presumably the court will have to consider whether the explanation is satisfactory. An unsatis-

16. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.53(3)).

17. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.56(1)).

18. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.59(1)).

19. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.53(2)).

20. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.68(12)).

factory explanation could be regarded as an abuse of discretion, again requiring remand.

The new Act includes numerous provisions on the conduct of agency proceedings. These matters are generally dealt with in much greater detail in the new Act than in the old. A few brief highlights are worthy of special mention.

In agency proceedings for a rule or order, irrelevant, immaterial, or unduly repetitious evidence is to be excluded. All other evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs shall be admissible, whether or not it would be admissible in court.²¹ However, a reviewing court shall set aside or remand agency action if that action depends on any finding of fact that is not supported by *competent* substantial evidence in the record.²² Thus the new Act appears more relaxed regarding the admissibility of evidence by the agency, but retains the requirement of competent substantial evidence when it comes to judicial review.

The new Act sets a ninety-day time limit for rendition of the final order, following the conclusion of the hearing or other designated time if there has been no hearing. The ninety-day period can be waived or extended with consent of all parties.²³ The 1961 APA required prompt notification of agency action, but did not set a time within which the agency had to act.

Any individual serving alone or with others as an agency head shall be disqualified from serving in an agency proceeding for bias, prejudice, interest, or other causes for which a judge may be recused. If the disqualified individual is an appointed official, the appointing power may appoint a substitute; if the disqualified individual is an elected official, the Governor may appoint a substitute.²⁴ The 1961 Act contained somewhat similar provisions, but exempted certain officials, and also provided for the appointment of circuit judges as substitutes in some, but not all, situations.

The new Act spells out the subpoena and discovery powers of agencies and hearing officers. In the event of default, the party seeking the subpoena or discovery may bring judicial proceedings for enforcement. In the absence of any other statutory remedy, a violator may be subjected to a fine not to exceed \$500.²⁵ The 1961 Act authorized the issuance of subpoenas and the taking of depositions, but did not include any penalty provisions.

21. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.58(1)).

22. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.68(10)).

23. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.59).

24. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.71).

25. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.58(3)).

Whenever an agency determines the substantial interests of a party, the new APA guarantees either formal or informal proceedings.²⁶ Formal proceedings are required to the extent that the proceeding involves a disputed issue of material fact, unless waived by consent of all parties and the agency involved. Informal proceedings are required in all other determinations which affect substantial interests, unless otherwise agreed.

Substantial interests of parties are clearly affected by agency orders in adjudicatory proceedings. In addition, a party may assert that his substantial interests will be affected by the outcome of a rulemaking proceeding. If he demonstrates, and the agency determines, that the normal rulemaking process does not adequately protect his substantial interests, the agency shall convene a separate proceeding for that purpose, and may request similarly situated parties to join and participate in such a proceeding. This proceeding may be either formal or informal, depending on whether or not a material issue of fact is in dispute.

What is meant by the "substantial interests of a party" in these provisions? The Law Revision Council developed this expression with the intention of expanding the right to a hearing—whether formal or informal—beyond that which was recognized under prior law. Earlier I referred to the *Bay National Bank* case,²⁷ which held that a hearing was not required unless a party's rights, duties, privileges, or immunities were at stake. These words seem harmless enough, but they have become encrusted with judicial interpretations and the Law Revision Council preferred to express a new standard by the use of a new term, "substantial interests." The term was intended to extend the right to a hearing beyond the situations which had been covered by prevailing interpretations of the old Act. The new APA, as enacted, includes the term "substantial interests" as proposed by the Law Revision Council.

The new Act includes considerable detail on the conduct of formal proceedings, including the role of the hearing officer, notice, conduct of the hearing, participation of non-parties at the hearing, the record, the recommended order, and the final order. This area is treated in other presentations.

The 1961 Act contained no provisions comparable to the new provisions on the informal proceeding. This is one of the most significant innovations achieved by the new Act.

When an agency determines the substantial interests of a party in

26. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.57).

27. *Bay Nat'l Bank & Trust Co. v. Dickinson*, 229 So. 2d 302 (Fla. 1st Dist. Ct. App. 1969).

a situation where a formal proceeding is not required, the party is entitled to an informal proceeding, with specific provisions.²⁸ The agency is to give reasonable notice to affected persons of the agency's action, whether proposed or already taken, or of its decision to refuse action, together with a summary of the factual, legal, and policy grounds. Affected persons or their counsel are to have an opportunity to present written evidence in opposition to the agency's refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction. If the agency overrules the objections, it shall provide a written explanation within seven days.

The record in informal proceedings shall consist of: the notice and summary of grounds, evidence received or considered, all written statements submitted, any decision overruling objections, all matters placed on the record after an *ex parte* communication, and the official transcript.

Administrative law scholars have pointed out for a long time that the vast majority of agency actions are carried out in situations where a formal, trial-type hearing is neither required nor even feasible. Nevertheless, our sense of justice calls for a rational procedure, designed to encourage administrative fair play while providing an adequate basis for judicial review. The new APA attempts to meet this need. A proceeding which starts informally may disclose the existence of a material factual dispute. In that event the parties are entitled to have the matter converted into a formal proceeding.

As proposed by the Law Revision Council, the Act required oral testimony and argument if feasible. The legislature declined to follow this part of the proposal, and provided only the written process outlined above. Even though the Act does not mention oral proceedings, presumably it still permits them if the agency considers them appropriate. In some circumstances, indeed, oral proceedings are compelled by constitutional due process, as in the so-called "fair hearings" required by such cases as *Goldberg v. Kelly*.²⁹ I hope that agencies will provide for oral proceedings in many types of situations, as a means of expediting the process and making it more meaningful to the citizen involved.

The new Act contains more detail than did its predecessor on licensing.³⁰ One new requirement obliges the agency to conduct licensing proceedings with reasonable dispatch. Another new provision

28. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.57(2)).

29. 397 U.S. 254 (1970).

30. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.60).

states that when a licensee has made timely and sufficient application for the renewal of a license which does not automatically expire by statute, the existing license shall not expire until the application has been finally acted upon by the agency. If the application is denied or the terms of the license are limited by the agency, expiration is extended until the last day for seeking judicial review of the agency order, or until such later date as is fixed by the reviewing court. An agency may order summary suspension of a license, upon finding such action required by immediate serious danger to the public health, safety, or welfare. The agency shall promptly follow up by instituting revocation or suspension proceedings, with full procedural safeguards.

One of the most far-reaching changes in the new APA is the creation of the Division of Hearing Officers. Mr. Coan's presentation on California's experience under a similar type of organization covers this topic.

The new Act includes a prohibition against *ex parte* communications, together with remedies in case such communications are made.³¹

The new APA makes many changes regarding judicial review of agency action.³² A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. The 1961 APA contained no provisions on point. Case law developed along lines similar to the provisions of the new Act.

Except in matters for which judicial review by the supreme court is provided by law, all proceedings for review shall be instituted by filing a petition in the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides. Review proceedings are to be conducted in accordance with the Florida appellate rules.

Although some of those making presentations today disagree, in my view, the circuit courts have lost their prior jurisdiction to render declaratory judgments on the validity of administrative rules.³³ The prior forms of action appear to have given way to a simple petition for review, authorized by the 1972 revision of the judiciary article of the constitution, which confers upon the supreme court, district courts

31. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.66).

32. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.68).

33. Fla. Laws 1974, ch. 74-310, § 3(1) provides: "[T]he provisions of this act shall replace all other provisions in the Florida Statutes, 1973, relating to rulemaking, agency orders, administrative adjudication or judicial review"

of appeal and circuit courts the power of direct review of administrative action prescribed by general law. It remains for the supreme court to promulgate appropriate amendments to the Florida Appellate Rules, in order to implement the judicial review provisions of the new APA.

Under the new Act, "[t]he reviewing court shall deal separately with disputed issues of agency procedure, interpretations of law, determinations of fact, or policy within the agency's exercise of delegated discretion."³⁴

The Act goes on to state the standards of judicial review for each type of issue. The 1961 Act contained no express standards of review. Case law developed some standards, notably the requirement that findings of fact be supported by competent substantial evidence, but even the case law under the old Act does not approach the clarity or comprehensiveness of the new standards.

The court is to remand the case for further agency action if it finds that either the fairness of the proceedings or the correctness of the outcome may have been impaired by a material error in procedure or a failure to follow prescribed procedure. An agency's failure to comply with the requirements as to public access to its rules, orders and index shall be presumed to be a material error in procedure.

The court must set aside or modify agency action if it finds that the agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or the court shall remand the case to the agency for further action under a correct interpretation of the law. The court is to set aside agency action or remand the case to the agency if it finds that the agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record. However, the court shall not substitute its judgment for that of the agency as to the weight of the evidence in any formal or informal proceeding.

The court is to remand the case to the agency if it finds that the agency's exercise of discretion is outside the range of discretion delegated to the agency by law; in violation of a constitutional or statutory provision; or inconsistent with an agency rule, an officially stated agency policy, or a prior agency practice if deviation therefrom is not explained by the agency. However, the court shall not substitute its judgment for that of an agency on an issue of discretion.

The reviewing court's decision may be mandatory, prohibitory, or

34. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.68(7)).

declaratory in form, and it shall provide whatever relief is appropriate, irrespective of the original form of the petition.

Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a specified provision of the judicial review section of the Act, the court must affirm the agency's action. Thus the new Act spells out the presumption in favor of the validity of agency action. This presumption was generally recognized under prior law, but was not expressed in the old APA.

A major innovation in the new Act is a section providing for the enforcement of agency action.³⁵ This section provides a procedure for enforcement by the agency as well as enforcement by "any substantially interested person."³⁶ The forum is the circuit court and the forms of relief available are spelled out as well as the defenses that may be asserted.³⁷

The 1974 Act creates the Administrative Procedures Committee,³⁸ a standing joint committee of the legislature. The chairman of that committee, Senator Lewis, will discuss its role.

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

36. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.69(1)(b)).

37. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.69(5)).

38. Fla. Laws 1974, ch. 74-310, § 2 (§ 11.60).