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The Florida Bar
Journal & News Dept.
651 East Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5600

By The Way, More APA

by Judge Linda M. Rigot and Ralph A. DeMeo

The 1996 Legislature substantially revised the Administrative Procedure Act (APA), F.S. Chapter 120, which governs the relationship between state agencies and Florida's citizens. The new APA was the subject of the March 1997 special issue of this *Florida Bar Journal*. Since that time, the 1997 Legislature passed a "glitch bill" clarifying certain portions of the new APA, and the new Uniform Rules of Procedure for all agencies became effective. This article reviews the 1997 changes to the new APA, discusses the status of the new uniform rules, and includes a copy of the Uniform Rules of Procedure for administrative proceedings as a pull-out in the center of this issue of the *Bar Journal*.

The Polished APA

The revised APA became effective on October 1, 1996. In January 1997 the Governor appointed a working group to formulate an APA "glitch bill" for the 1997 legislative session. Key staff in the

Governor's office led the working group composed of officers of the Administrative Law Section of The Florida Bar, legislative staff, agency representatives, and administrative law practitioners.¹

The working group's final draft was approved by the executive council of the Administrative Law Section on March 12, 1997. That draft was subsequently amended, and CS/SB 1066 was passed by the legislature on April 29. It was presented to the Governor on May 14 and became law without the Governor's signature on May 29. It is codified in Chapter 97-176, *Laws of Florida*. CS/SB 1066 made clarifying changes to the APA in the areas of agency rulemaking, the scope of coverage of the APA, and the framework for administrative hearings. The material changes are reviewed herein.

Agency Rulemaking

Some relief from the notice and filing requirements of rulemaking has been given to educational units and

other local agencies. F.S. §120.54(2)(c)² now provides that local agencies need not hold public workshops for rule development in various regions of the state but only, if at all, in the agency's service area. Similarly, educational units and local units of government need not publish their rules or notices in the *Florida Administrative Weekly* or file them with the Joint Administrative Procedures Committee (JAPC). F.S. §120.81(1) and (2).

When an agency intends to repeal a rule, it need not publish a notice of rule development. F.S. §120.54(2)(a). Further, the notice of rule adoption need not include a reference to the notice of rule development. F.S. §120.54(3)(a).

When an agency intends to adopt a rule, it must publish in the notice of rule development either the preliminary text of the proposed rule or a statement of how the preliminary draft may be obtained without cost. F.S. §120.54(2)(a). The 1997 amendments also specify that the agency's decision

to engage in negotiated rulemaking and the various steps in that process are not agency action subject to challenge. F.S. §120.54(2)(d)3.

The 90-day deadline for completing the rulemaking process is extended by publication of a required notice of change or notice of public hearing. F.S. §120.54(3)(e)2. The deadline is also extended if any substantially affected person timely submits a good faith written proposal for a lower-cost regulatory alternative to a proposed rule. F.S. §120.541(1)(a). Finally, F.S. §120.54(3)(b) adds a deadline for the small business ombudsman's submittal of any regulatory alternative and extends the agency's deadline for completing the rule-making process when such alternatives are timely submitted.

Scope of Coverage

Under F.S. §120.52(1)(b) educational units are listed specifically as agencies subject to the APA. The exemption from §§120.569 and 120.57 applicable proceedings to involving the substantial interests of students in the state university system has been expanded to cover community college districts. F.S. §120.81(1)(f).

An award of attorneys' fees and costs is now precluded under F.S. §120.595(4) against an agency that uses an agency statement not adopted as a rule if the agency can demonstrate "the

statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds."

F.S. §120.66, which prohibits a presiding officer who is involved in the decisional process from receiving and not reporting an *ex parte* communication, now specifies that an agency head or designee is included within the term

a student cannot obtain a variance from or waiver of a rule of an educational unit. F.S. §120.81(1)(j). An agency also is precluded from granting variances or waivers to rules required by the federal government for any federally approved or delegated program unless a variance or waiver is authorized by the program or is also approved by the appropriate federal agency. F.S. §120.542(1).

Unless the petition seeks an emer-

gency variance or waiver, the agency is now authorized to request additional information; however, the petitioner may request the agency in writing to process the petition without the additional information.

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§120.542(7). The deadline for agency action on the petition is extended if the agency timely requests additional information. F.S. §120.542(8).

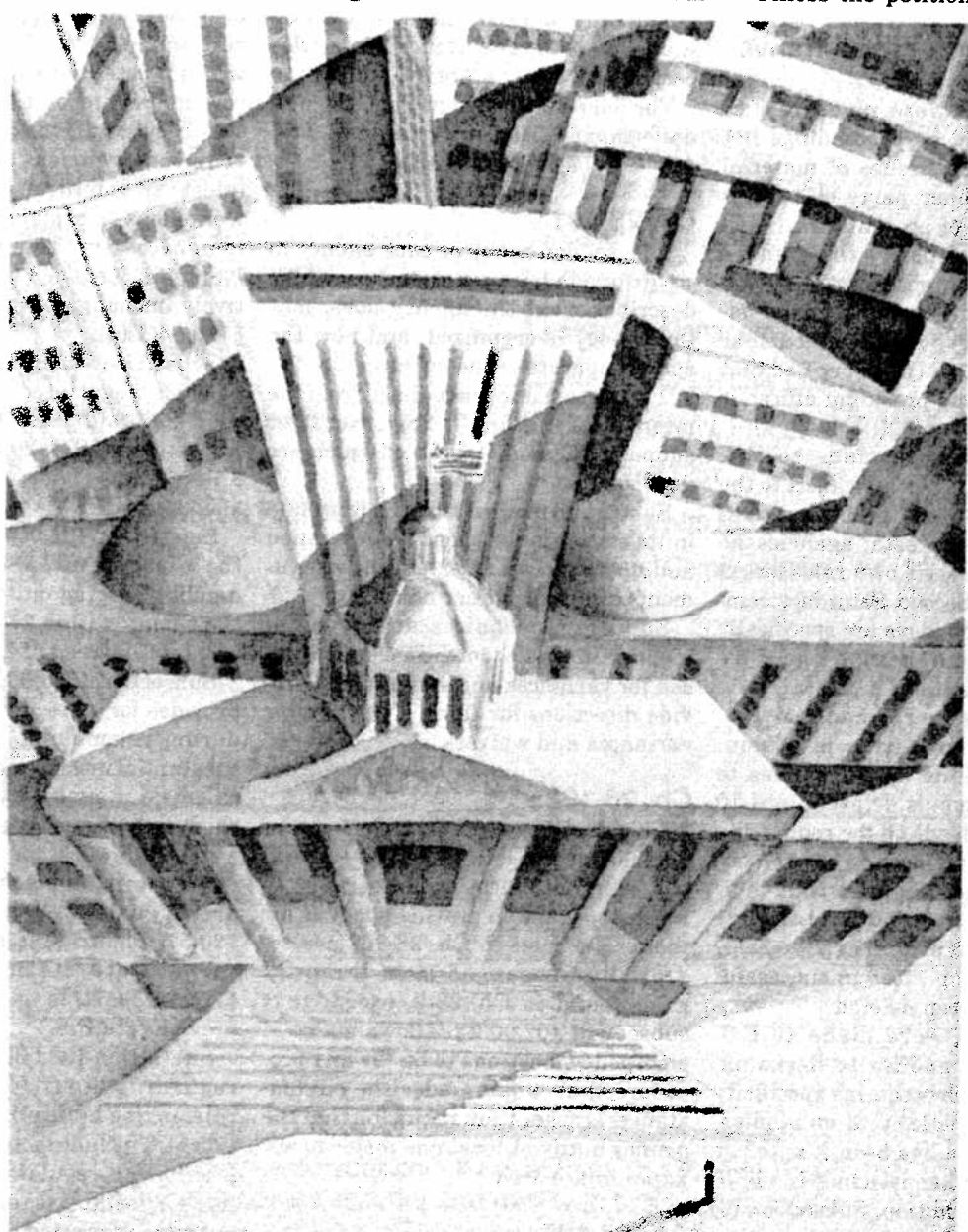
An agency may limit the duration of any variance or waiver granted or impose conditions on the grant but only to the extent necessary to achieve the purpose of the underlying statute. F.S. §120.542(1).

The APA now

requires the Uniform Rules of Procedure to cover denial or revocation of emergency and temporary variances and waivers and authorizes the uniform rules to provide for limitations on or prohibit public notice and comment on a petition for a temporary or emergency variance or waiver. F.S. §120.542(3).

"presiding officer."

A number of changes were made to Florida's unique waiver and variance provision, which became effective October 1, 1996. A public employee cannot obtain a variance from or waiver of a rule affecting him or her as a public employee. F.S. §120.542(1). Similarly,



The variance and waiver statute now specifies the contents of the notice the agency must publish when a petition is received. Notice of the disposition of the petition also must be published and the contents of that notice are specified. A copy of the petition must now be filed with JAPC and the agency is required to file with JAPC a copy of the order granting or denying the petition. F.S. §§120.542(5), (6), and (8).

Framework for Administrative Proceedings

Two changes were made to F.S. §120.57(2). First, in proceedings not involving disputed issues of material fact, the nonagency party or parties have the option of presenting written or oral evidence opposing the agency's intended action or refusal to act or a written statement challenging the basis for the agency's intended action or inaction. Second, it is now specified that the decision of the presiding officer is part of the record.

Two changes were made to F.S. §120.57(3). First, agencies subject to the APA are required to use the uniform rules relating to bid protests; agencies no longer can adopt their own rules for resolving protests. Second, Saturdays, Sundays, and legal holidays are specifically excluded in computing the 72-hour period for filing a notice of protest.

Two changes were made to F.S. §120.573, the mediation provision. First, the deadline for all parties to agree to mediation is delayed until 10 days after the deadline for requesting an administrative hearing or proceeding. Second, the language that indicated there was a second point of entry for requesting an administrative hearing or proceeding after unsuccessful mediation has been deleted.

Two changes were made to F.S. §120.60, which applies to licensing. Subsection (3) now requires specificity in the agency's notice that an application for licensure has been granted or denied, except when issuance is a ministerial act. In addition, Subsection (6) now specifies the procedure for and limits on an agency's emergency suspension order rather than merely cross-referencing requirements which apply to emergency rules, not emergency orders.

F.S. §120.68(3) regarding issuance of a stay pending the appeal of agency action suspending or revoking a license was amended so that the language now

reads as it did before the 1996 APA revision.

The Uniform Rules of Procedure

The Administrative Law Section of The Florida Bar, at the request of the Governor, drafted a comprehensive set of Uniform Rules of Procedure for all state agencies. These rules modified, in some cases significantly, the former Model Rules of Procedure found at FLA. ADMIN. CODE Ch. 28-1 *et seq.* These rules became effective on April 1, 1997.

The following is an outline of the new uniform rules that are located at FLA. ADMIN. CODE Ch. 28-101 *et seq.*

Ch. 28-101

This section requires each agency to create and maintain a statement which describes what the agency does, how the agency is organized, and how the agency operates. The rules in Ch. 28-101 are essentially unchanged from the prior rules found in Ch. 28-1, except for subparts (e) and (f), both of which are new rules.

Subpart (e) requires an agency to state in its statement of agency organization and operation whether and how documents can be filed electronically.

Subpart (f) requires an agency to identify in its statement a contact person for variances and waivers and provide directions for filing a petition for variances and waivers.

Ch. 28-102

This section requires an agency to give notice of public meetings (including emergency meetings), hearings, or workshops, and to provide agendas for them. The rules in Ch. 28-102 are essentially unchanged from the prior rules found in Ch. 28-2, except that subsection 102.003(2) allows notice of emergency meetings to be "by any procedure that is fair under the circumstances" rather than requiring that the agency notify at least one major newspaper in the area.

Ch. 28-103

This section requires an agency to provide advance notice of any rulemaking proceedings to any person who makes a written request. It also provides guidelines and criteria for determining when an agency must hold a rule development workshop. This section also authorizes agencies to use

negotiated rulemaking and provides criteria for determining when it should do so. The section also provides guidelines for public hearings, evidentiary proceedings during rulemaking, and petitions to initiate rulemaking.

The rules in Ch. 28-103 substantially amend the prior rules regarding rulemaking found in Ch. 28-3. Subsection 103.001 is a new rule that allows any person to be given advance notice of agency rulemaking proceedings. This rule implements F.S. §120.54(3)(a)3, which is essentially identical to its pre-revision counterpart, F.S. §120.54(1)(a).

Subsection 103.002 is a new rule that requires agencies, upon written request, to conduct rule development workshops or explain why a workshop is unnecessary. This rule implements F.S. §120.54(2)(c), which is substantively unchanged from the former F.S. §120.54(1)(d).

Subsection 103.003 is a new rule that permits negotiated rulemaking and provides guidelines for it. This rule implements F.S. §120.54(2)(d), which is a new statute added in the 1996 revision of the APA.

Subsection 103.004 does not change the prior rule except that a request for a public hearing must be submitted to the agency within 21 days after notice of intent, instead of 14 days.

Subsection 103.005 is a new rule that provides for an evidentiary proceeding during rulemaking. A person whose substantial interests are affected by the rulemaking proceedings, and who can show that the proceedings do not adequately protect his or her interests, can request that the proceedings be conducted pursuant to F.S. §§120.569 and 120.57. This rule is new even though the statute it implements (F.S. §120.54(3)(c)2) is unchanged from the previous statute.

Subsection 103.006 modifies the rule regarding petitions to initiate rulemaking by requiring that the petition also include facts showing that the petitioner is regulated by the agency or has a substantial interest in the rule or action requested. The statute implemented by this rule, F.S. §120.54(7), is unchanged from the prior statute.

Ch. 28-104

This section sets forth the uniform procedures for granting or denying petitions for variances from and waivers of agency rules. The rules in Ch. 28-104

are new. The purpose of the chapter is to implement F.S. §120.542, a statute added by the 1996 revisions, by providing a uniform procedure for granting or denying petitions for variances or waivers. A petition must be filed with the clerk of the agency that adopted the rule, and it must include: a caption; contact information for the petitioner and his or her attorney or qualified representative; the applicable rule; the statute the rule implements; the action requested; the facts justifying a variance or waiver; the reason the variance or waiver would serve the purpose of the statute; and a statement indicating if the variance or waiver is permanent or temporary. Subsection 104.002.

Subsection 104.003 allows any interested person or agency to comment on the petition within 14 days after notice has been published in the *Florida Administrative Weekly*.

Subsection 104.004 allows an individual to request an emergency variance or waiver by so stating in the caption and by including in his or her petition the facts creating the emergency and the facts that show the petitioner will suffer an immediate adverse effect without an expedited waiver or variance.

Subsection 104.005 requires the agency to issue a written order granting or denying an emergency petition within 30 days.

Subsection 104.006 requires the agency to respond within 15 days when

it receives an inquiry regarding the possibility of relief from a rule or the statutory remedies available.

Ch. 28-105

This section provides the procedure for petitioning for a declaratory statement and outlines the agency's methods of disposition of the petition. The rules in Ch. 28-105 are substantially the same as the prior rules governing declaratory statements in Ch. 28-4.

Ch. 28-106

This section provides the rules of procedure to be used in all agency hearings, mediations, and proceedings. The rules in Ch. 28-106 substantially amend the previous rules regarding decisions determining substantial interests found in Ch. 28-5.

Subsections 106.101 and 106.102 are unchanged.

Subsection 106.103, regarding computation of time, includes provisions which add one day to a time period when service is by overnight courier and no days to a time period when service is by electronic transmission.

Subsection 106.104 is new. It provides rules and policies for the filing of documents. The statute this rule implements, F.S. §120.569(2)(c), is unchanged from the old statute.

Subsection 106.105 contains new rules regarding appearances. It provides that counsel who files a request

for a hearing shall be deemed counsel of record, and any others who seek to appear must file a notice of appearance as soon as possible.

Subsections 106.106-106.110 are substantially the same as the prior rules.

Subsection 106.111 substantially amends the prior rule, Ch. 28-5.111, to provide for mediation as an alternative remedy to a hearing for agency decisions. The additions were required by F.S. §120.573, which authorizes mediation of disputes with agencies.

The rules in Ch. 28-106 Part II are generally the same as the previous rules. Technical differences include:

Subsection 106.204 requires motions to include a statement that the movant has conferred with the other parties of record.

Subsection 106.205 requires petitions for leave to intervene to be filed 20 days prior to final hearing, instead of five days.

Subsection 106.208 provides that the presiding officer shall set the time and place for all hearings, not the agency.

Subsection 106.211 authorizes the presiding officer to issue orders necessary to effectuate the just, speedy, and inexpensive determination of the case.

Subsection 106.213(5) allows testimony to be taken by video teleconference or by telephone.

Subsection 106.214 provides guidelines for videotaping proceedings.

Subsection 106.217 requires that exceptions to recommended orders must be filed with the agency within 15 days of entry of the order, instead of 20 days. It also provides that any party may file responses to another party's exceptions within 10 days.

Ch. 28-106 Part III revises the rules regarding proceedings where there are no disputed issues of material fact to give them the same organizational scheme as the rules regarding proceedings involving disputed issues of material fact.

Ch. 28-106 Part IV are new rules concerning mediation. The rules implement F.S. §120.573, a statute added in the 1996 revisions to the APA. The person seeking mediation must file a request for mediation. Subsection 28-106.402. The costs of mediation will be equally shared by the parties, unless otherwise agreed. Subsection 28-106.403. There must be an agreement to mediate between the parties. Subsection 28-106.404. Mediators must conform their conduct to the standard delineated



in the rules. Subsection 28-106.405.

Ch. 28-107

This section outlines the procedure for agency action on licensure applications. The rules in Ch. 28-107 are substantially the same as the prior rules governing licensing found in Ch. 28-6.

Ch. 28-108

Ch. 28-108 contains new rules that allow an agency to be excepted from the Uniform Rules of Procedure. These rules implement F.S. §120.54(5)(a)2. The revised statute replaced the term "model rules of procedure" with "uniform rules of procedure." Under the old statute (F.S. §120.54(10)), if an agency adopted a specific rule of procedure covering the subject matter of the model rule, the model rule did not apply. Under the revised statute, uniform rules apply to all agencies, and an agency must petition the Administration Commission (the Governor and cabinet) for an exception to the uniform rules.

To obtain an exception to the uniform rules, the agency head must file a petition with the Administration Commission and publish a notice of the same in the *Florida Administrative Weekly*. Subsection 28-108.001. Interested persons are then given an opportunity to comment on the petition before the commission makes its decision.

Ch. 28-109

This section provides guidelines for agencies when their proceedings involve the use of communications media technology. The rules in Ch. 28-109 are substantially the same as the prior rules governing communications media technology in Ch. 28-8.

Ch. 28-110

This section describes the procedure for protesting bid awards. The rules in Ch. 28-110 are new rules that establish a procedure for protests that arise from the contract procurement process. These rules implement F.S. §120.57(3), which had no counterpart in the old APA. The rules require that a notice of protest be filed with the agency within 72 hours of the posting of the bid tabulation or receipt of the notice of agency decision. A formal written protest must be filed within 10 days of the notice of protest. If a bond is required, it must be filed, at the latest, with the formal written protest.

Rules to Be Modified

On March 31, 1997, the day before the Uniform Rules of Procedure became effective, JAPC voted objections to portions of three of the uniform rules: subsection 28-103.005(1) and (5), which apply to evidentiary proceedings during rulemaking; subsection 28-106.302(1), which provides for evidence in proceedings not involving disputed issues of material fact; and subsection 28-110.005(2)-(4), which relates to the bid protest bond. Staff for the commission subsequently agreed to amend two of those rules to resolve JAPC's objections.

Further, clarifications made to the 1996 APA in the 1997 glitch bill necessitate additional revisions to the uniform rules. For example, an amendment to F.S. §120.57(2)(a)2 addressed JAPC's objection to subsection 28-106.302(1) and specifically gave the option to the nonagency party as to the type of evidence to be considered where no material facts are in dispute, a change contrary to the rule. The glitch bill also changed the timing for mediation requests, requiring those rule provisions to be amended. The videotaping rules no longer have a statutory basis and must be amended. Finally, the uniform rules are now required to include procedures for the revocation of emergency or temporary variances or waivers.

The Governor has reconvened the uniform rules working group and the rules are being analyzed so that all changes necessary to meet JAPC's objections and to conform the rules to the 1997 statutory amendments can be effectuated at one time. Since the revisions are not expected to be extensive and it will be a number of months before any rule revisions can be finalized, the complete set of Uniform Rules of Procedure is included in this issue of *The Florida Bar Journal*.

Conclusion

As a result of the 1996 APA, agencies are more accountable for their decisions; the kinds of rules agencies are permitted to promulgate are more limited; and the opportunities for substantially affected persons to challenge rules are more numerous.



In addition, the Governor's and legislature's common goals of flexibility and accountability are now codified in the APA. The 1997 APA "glitch bill," by clarifying agency rulemaking,

the scope of coverage of the APA, and the framework for administrative hearings, along with the Uniform Rules of Procedure, continue to move forward the laws regulating Florida's administrative law processes that touch the lives of all of its citizens. □

¹ The working group consisted of Scott Boyd, Martha Edenfield, Wade Hopping, Booter Imhof, Debby Kearney, Linda Lettera, Steve Mathues, Li Nelson, Steve Pfeiffer, Jim Rhea, Bob Rhodes, Linda Rigot, Larry Sellers, Dan Stengle, and Bill Williams. Others came to the meetings and participated fully.

² All references are to *Florida Statutes* (1996 Supp.), as amended by 1997 Fla. Laws ch. 176.

AUTHORS



RIGOTDEMEO

Linda M. Rigot is an administrative law judge with the Division of Administrative Hearings. She received her B.A. in 1966 and her J.D., cum laude, in 1969 from the University of Miami. She is a past chair of the Administrative Law Section of The Florida Bar, a member of the section's Executive Council, and a member of the steering committee for The Florida Bar's Florida Administrative Practice manual.

Ralph A. DeMEO is a shareholder in the Tallahassee law firm of Hopping Green Sams & Smith, P.A., where he practices environmental, land use, and administrative law. He received his B.A. and M.A. in English from Stetson University and his J.D. with honors from Florida State University. He is chair-elect of the Bar's Environmental and Land Use Law Section Executive Council, a member of the Administrative Law Section Executive Council, and past chair of The Florida Bar Journal Editorial Board.

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