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### Procedural Due Process: Florida's Uniform Administrative Procedure Act

Mark A. Evans

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# PROCEDURAL DUE PROCESS: FLORIDA'S UNIFORM ADMINISTRATIVE PROCEDURE ACT

MARK A. EVANS\*

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## INTRODUCTION<sup>1</sup>

An administrative agency is a governmental authority, other than a court or legislative body, which affects the rights of private parties through rule making or adjudication. In essence, an administrative agency is a unique conglomerate of the three facets of our governmental makeup, whose nature is incongruous to the concept of separation of powers—the touchstone of our system of government.<sup>2</sup>

Administrative law concerns itself with the powers and procedures of administrative agencies, including the law governing judicial review of administrative action.<sup>3</sup>

This article is primarily concerned with the procedural due process requirements in administrative law with respect to rule making and adjudication under the relatively new<sup>4</sup> FLORIDA UNIFORM ADMINISTRATIVE PROCEDURE ACT OF 1961,<sup>5</sup> and as such will analyze the A.P.A. in operation

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\* Executive Editor, *University of Miami Law Review*; Student Instructor for Freshman Research and Writing, University of Miami School of Law.

1. This *Survey* does not purport to cover the total scope of procedural due process, but will be limited to administrative procedure. Included within are cases reported through 187 Southern Reporter 2d. The criminal aspect of procedural due process has been amply surveyed in Wills, *Criminal Law & Procedure*, 20 U. MIAMI L. REV. 246 (1965), and many of the ramifications of civil procedural due process are alluded to in Massey and Westen, *Civil Procedure*, 20 U. MIAMI L. REV. 594.

2. The administrative process is often compared or contrasted with the judicial process, the executive process, and the legislative process. DAVIS, *ADMINISTRATIVE LAW & GOVERNMENT* 11 (1960).

3. Administrative action is here meant to include both the rule making power of the agency and its power to issue final orders.

4. Fla. Laws 1961, ch. 61-280 § 1, amended by Fla. Laws 1965, ch. 63-552 § 1.

5. FLA. STAT. § 120. ADMINISTRATIVE PROCEDURE ACT, hereinafter referred to and cited as

since its inception.<sup>6</sup> This analysis will necessarily concentrate upon the cases that have been decided under the ACT, but will not be limited thereto. New sections of the A.P.A., which greatly affect administrative procedure, but which have not yet been subjected to judicial interpretation, will also be analyzed where relevant. This article will seek to present to the reader a picture of the practical effects of the A.P.A.<sup>7</sup> and to otherwise acquaint him with its diverse ramifications.

It should be noted that while the A.P.A. applies only to state agencies which the ACT defines as "boards, commissions, departments, or officers authorized by law to make rules, except the legislature and judicial departments of government, the military, and the governor,"<sup>8</sup> the effective impact of this procedural codification should apply to county and municipal agencies as well. Although the legislatively defined scope of the A.P.A. does not encompass these local agencies, it is to be expected that the courts will use its provisions as a yardstick to determine the procedural level with which these agencies must comply. As of this *Survey* no specific case has definitively set this criterion, but analogy to court cases dealing with local agencies will be made with the A.P.A. wherever possible.

#### PURPOSE OF THE A.P.A.

The primary purpose of the A.P.A. is to set forth a uniform method of procedure under which each administrative agency will be obligated to operate<sup>9</sup> so as to afford the regulated individual the fundamental procedural guarantees insured to him by the federal<sup>10</sup> and state<sup>11</sup> constitutions. Both constitutions provide that no person shall be deprived of life, liberty, or property without due process of law. The Florida Constitution further provides that the courts of the state shall be open, so that every person for any injury done him in his lands, goods, person, or reputation shall

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the A.P.A. or the ACT, consisting of Parts I, II, III, created by Fla. Laws 1961, ch. 61-280, and replacing former chapter 120., GENERAL PROVISIONS RELATING TO BOARDS, COMMISSIONS, ETC. Florida's ACT is fashioned after the *Revised Model State Administrative Procedure Act*, The National Conference of Commissioners on Union State Laws 329-336 (1944). For an extensive analysis of the Model Act see COOPER, *STATE ADMINISTRATIVE LAW* (1965).

6. For an analysis of administrative procedural due process before the inception of the ACT, see generally 8 *MIAMI L.Q.* 176 (1954); 10 *MIAMI L.Q.* 129 (1956); 12 *U. MIAMI L. REV.* 288 (1958); 14 *U. MIAMI L. REV.* 501 (1960); 16 *U. MIAMI L. REV.* 685 (1962); 18 *U. MIAMI L. REV.* 888 (1964).

7. The Florida A.P.A. can be compared with the FEDERAL ADMINISTRATIVE ACT, 60 STAT. 237 (1946), 5 U.S.C. § 1001 (1952). For a comprehensive analysis of the Federal Act and its effect see JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965); Swartz, *The Administrative Act in Operation*, 29 *N.Y.U.L. REV.* 1173 (1954).

8. FLA. STAT. § 120.021(1) (1965).

9. FLA. STAT. § 120.011 (1965)

Legislative Intent for Part I.

It is the intent of the legislature to establish a uniform procedure to be used by agencies in adopting rules and to provide notice of the adoption and content of rules, and that Part I shall supersede all other laws on the same subject.

10. U.S. CONST. amend. XIV.

11. FLA. CONST. DECL. OF RIGHTS § 12.

have remedy by due process of law.<sup>12</sup> These are the basic constitutional provisions.

The essential elements of due process of law are notice and an opportunity to be heard in an orderly proceeding before a tribunal having jurisdiction of a matter. The constitutional requirement of procedural due process is of course applicable to administrative proceedings.<sup>13</sup>

Although notice and hearing are the minimum essential requisites whereby administrative adjudications comply with this requirement,<sup>14</sup> more is demanded of an administrative agency because of the power vested in it. Most administrative agencies comprise a single unit which has quasi-legislative power to promulgate rules and quasi-judicial power to determine whether its rules have been violated, and to enforce them appropriately. Thus, to provide a safeguard against abuse of these powers the A.P.A. contains provisions for a uniform procedure to be followed by agencies when adopting rules,<sup>15</sup> a uniform procedure for administrative adjudication,<sup>16</sup> and a uniform procedure for judicial review.<sup>17</sup>

## PART I: RULE MAKING<sup>18</sup>

### A. *Administrative Rules*<sup>19</sup>

In *Polar Ice Cream & Creamery Co. v. Andrews*,<sup>20</sup> the dual problem of rule making and venue arose concerning the A.P.A. Milk producers in the Pensacola Milk Marketing Area had voted to put themselves under

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12. FLA. CONST. DECL. OF RIGHTS § 4.

13. *Hime v. Florida Real Estate Comm'n*, 61 So.2d 182 (Fla. 1952).

14. *Keating v. State*, 173 So.2d 673 (1965).

15. FLA. STAT. § 120.011 (1965).

16. FLA. STAT. § 120.20 (1965).

17. FLA. STAT. § 120.30 (1965).

18. There is a distinction between "rule" and "order" as regards agencies, but oftentimes the terms are interchanged and confused. Briefly summarized, a rule has broader ramifications in that it has *general* application which affects the rights of the public or other interested parties, similar to the usual legislative enactment. Usually an order is more specific and applies only to a particular instance or party, similar to the usual judicial pronouncement. See FLA. STAT. § 120.21, Definitions for Part II of the A.P.A.

The confusion may lie in the word usage of "order" and "final order." Section 120.021 defines rule as, "Rule means rule, order, . . .", whereas § 120.30, DECLARATORY JUDGMENT ON VALIDITY OF RULES, uses the term "rule" and not "order." In § 120.031, REVIEW OF AGENCY ORDERS, the language is "order" and "final order."

The appellate relief to be had from a rule is quite different from that of an order. As per FLA. STAT. § 120.30 (1965) an action for declaratory judgment as regards the validity of a rule set by an agency may be brought in the circuit court of the county in which such person resides or in which the executive offices of the agency are maintained. With regard to final orders, FLA. STAT. § 120.31 (1965), any person may bring certiorari to the district court of appeal within the time and in the manner prescribed by the Florida appellate rules. Venue will lie in the county wherein the hearing before the hearing officer or agency was conducted, or if venue cannot be thus determined, then the appellate district wherein the agency's executive offices are located.

19. FLA. STAT. § 120.021 (1963).

20. 146 So.2d 609 (Fla. 1st Dist. 1962).

the control and jurisdiction of the milk commission. Polar, dissatisfied with the election, reduced the price it paid to its producers for milk. As a result of the action taken by Polar, the commission ordered Polar (and others similarly situated) to pay for the purchased milk on the same basis in effect before the election and subsequent control of the commission. Polar refused to comply with the order and a declaratory decree was sought by the commission in Leon County to determine the validity of the order. Polar moved to dismiss on the ground of improper venue. Polar, a domestic corporation, is located in Escambia County, Florida, where the books of the corporation and its entire bookkeeping facilities are located. All agreements between it and its producers had been made in Escambia County where the violation, *vel non*, occurred. The commission filed the action in Leon County because the executive offices of the agency are located there.<sup>21</sup> It was the commission's contention that since the order was applicable to Polar and others similarly situated, it was a rule and the commission was entitled to lay venue in the county wherein its offices were located. Polar argued that it was protected by the general venue provisions<sup>22</sup> and was not affected by the special venue provisions of the A.P.A.<sup>23</sup> The trial court denied the motion.<sup>24</sup>

Two interesting questions were raised by *Polar*, and although they deal with two separate sections of the Act they are so interrelated that it is necessary to discuss them together. The venue question (section 120.30(1)) was directly dependent upon the collateral question of whether the order set down by the commission was in fact a rule within the purview of the A.P.A. (section 120.021(2)). Both questions also depended on whether the commission was considered an "affected" or "interested" party within the meaning of the A.P.A.

The district court of appeal reversed<sup>25</sup> and remanded the case for

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21. FLA. STAT. § 120.30 (1965).

22. FLA. STAT. § 46.04 (1927).

23. *Supra* note 21.

24. The special venue provision of the A.P.A. on which the chancellor relied, denying Polar's motion to dismiss, applies to "any state board, commission, department or officer authorized by law to make rules, except the legislature and judicial departments of the government, the military and the governor." FLA. STAT. § 120.021 (1965). But Part III of this Act, relating to judicial review, provides that "only an *affected* party may obtain a judicial declaration as to the validity, meaning or application of any rule by bringing an action for declaratory judgment in the circuit court of the county in which such person resides or in which the executive offices of the agency are maintained." FLA. STAT. § 120.30(1) (1965).

25. *Supra* note 20, at 612. The court stated that venue statutes are characterized as statutes of convenience and that this philosophy would be defeated if,

[I]t would be possible for state agencies headquartered in Tallahassee to adopt by unilateral action rules and regulations and to issue orders affecting the rights of large segments of business and industry operating in the state, and by suit for declaratory decree instituted in Leon County require all affected parties to incur the inconvenience and expense of defending the action hundreds of miles from the county in which they live or maintain offices for the transaction of their business.

further proceedings,<sup>26</sup> holding that: (1) The order of the commission was not a rule within the purview of the Act in that it was not one of *general application*,<sup>27</sup> but was directed primarily to Polar as an individual milk distributor, and only secondarily to the other distributors of that area similarly situated and, (2) The commission is not an interested party as defined in section 120.021,<sup>28</sup> so as to be classified as an affected party under the special venue provision set forth in section 120.30,<sup>29</sup> which allows an affected party to obtain judicial declaration as to the validity, meaning or application of any rule.

In essence, the court limited the definition of a rule under the A.P.A. to promulgations of general application and held that only one to whom the rule applies can petition for declaratory judgment and thus invoke the special venue provisions of the A.P.A.

### B. Adoption<sup>30</sup> and Filing of Rules<sup>31</sup>

Only two cases touched upon the adoption, filing and publication of agency rules within the *Survey* period,<sup>32</sup> with neither decision offering a judicial interpretation of the pertinent sections. Certain amendments to these sections have introduced a radical change in the procedure required for the filing, the effective date, and the publication of all agency rules.

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26. FLA. STAT. § 53.17 (1965) provides for a transfer of venue. There are no provisions in the A.P.A. for an agency to bring an action for declaratory judgment.

27. FLA. STAT. § 120.021(2) (1965). Rule means rule, order, regulation, standard, statement of policy, requirement, procedure, or interpretation of *general application*, including the amendment or repeal thereof, adopted by an agency to implement, interpret or make specific the law enforced or administered by it, or to govern its organization or procedure affecting the rights, duties, privileges or immunities of, or procedures available to the public or interested parties . . . . [Emphasis added.]

28. *Supra* note 20, at 612. Stripped of its irrelevant verbiage, this section of the statute defines the term "rule" as a rule or order of general application adopted by an agency which affects the rights of the public or other interested parties.

29. *Supra* note 21.

30. FLA. STAT. § 120.031 (1965).

31. FLA. STAT. § 120.041 (1965).

32. In *Roper v. Structural Pest Control Comm'n*, 155 So.2d 846 (Fla. 3d Dist. 1963) the commission had permanently revoked the petitioner's licenses. On appeal the petitioners urged that the order of revocation be quashed because the rules of the respondent had not been published in accordance with the A.P.A. (*Infra* note 34) and thus had no legal effect. It was also argued that respondent erred in permanently revoking petitioners' licenses, as such revocation was in violation of the provisions of FLA. STAT. § 482.171. The court found that the rules had been properly filed with the office of the Secretary of State in accordance with the A.P.A., and held that there was no merit to petitioners' contention in this regard. The court did find that commission could not revoke petitioner's licenses permanently because FLA. STAT. § 482.071 contained the provision that revocation could not be for a period in excess of two years. The court quashed the permanent revocation and allowed the petitioners the right to re-apply for licenses after two years. In *Alderman v. Conner*, 152 So.2d 819, 820 (Fla. 2d Dist. 1963) the court merely cited A.P.A. § 120.321 which states that, "Nothing contained in section 120.041(3) and (4) shall affect or repeal the provisions of chapter 601." The case dealt with the revocation of a fruit dealer's license under the Florida Citrus Code, FLA. STAT. ch. 601 (1965).

Previously, an agency had to file any new rule with the Secretary of State,<sup>33</sup> the new rule becoming legally effective fifteen days after filing.<sup>34</sup> Now the rule becomes legally effective upon filing, but does not become operative until thirty days after the summary of the rule is published in a register provided for in the A.P.A.<sup>35</sup> Section 120.041 reads as follows:

#### FILING AND TAKING EFFECT OF RULES

- (1) Each agency shall file with the secretary of state a certified copy of each rule adopted by it.
- (2) Copies of all agreements, cooperative and reciprocal, or contracts and amendments thereto between federal and state agencies, between the several states and their agencies, and between state agencies and local units of government shall be filed with the secretary of state but shall not be published.<sup>36</sup>
- (3) *Each rule hereafter adopted shall become legally effective only upon filing but shall not become operative until thirty (30) days after the summary of the rule is published in the register except for emergency rules as provided in subsection. The operative date of any rule may be postponed subsequent to thirty days after the summary is published in the register by specifying such date in the rule adopted.*<sup>37</sup>

The innovation is twofold: (1) It creates an official compilation, publication and distribution of all pertinent rules adopted by an agency,<sup>38</sup> and, (2) It extends the notice requirement of fifteen days to well over thirty days, since the rule does not become operative until thirty days after it is published by the Secretary of State<sup>39</sup> whose publication is monthly.<sup>40</sup>

33. FLA. STAT. § 120.10, created by FLA. LAWS 1955, ch. 29777 § 1, replaced by FLA. STAT. § 120.041, created by FLA. LAWS 1961, ch. 61-280 § 1, and amended by FLA. LAWS 1963, ch. 63-552 § 2.

34. FLA. STAT. § 120.11, created by FLA. LAWS 1955, ch. 29777 § 2, replaced by FLA. STAT. §§ 120.041, 120.051, created by FLA. LAWS 1961, ch. 61-280 § 1, as amended by FLA. LAWS 1963, ch. 63-552 §§ 2, 3.

35. FLA. STAT. § 120.051(b) (1965) passed in conjunction with FLA. STAT. § 120.041(3) (1965).

36. Section (2) was not contained in the prior chapter 120., but the section is self explanatory and will not be discussed here.

37. Emphasis added.

38. Before the 1963 revision of the A.P.A. there was no uniform system for a central collection, recordation and publication of administrative rules.

39. FLA. STAT. § 120.041(3) (1965) and FLA. STAT. § 120.051(1)(b) (1965).

40. FLA. STAT. § 120.051(1)(e) (1965) qualifies §§ 120.041(3) and 120.051(1)(b).

All rules and regulations general in form but of such local or limited application as to make their inclusion in the Florida administrative code or any revision or supplement thereof impractical, undesirable or unnecessary shall be omitted therefrom but shall be filed in the office of the secretary of state. The exclusion of such local or limited rules from publication in the Florida administrative code shall not affect their validity or effectiveness.

As is pointed out in subsection (3), the operative date may be postponed beyond the thirty days after the summary is published in the register by the devise of a specification of a later date in the adopted rule itself.<sup>41</sup>

Some confusion may arise from the language of subsection (3), to wit: the terms "legally effective" and "operative." The previously applicable section<sup>42</sup> only used the phrase "effective or enforceable" and specifically provided that the date of the effectiveness and enforceability of rules was fifteen days after filing. As the subsection now reads, the rule becomes "legally effective" upon filing and becomes "operative" only after publication, a difference of well over thirty days. No mention of "enforceability" is made and the question still remains. A reading of the entire section suggests that the enforceability date of any rule is thirty days after its publication, but some clarification of the language would appear to be in order.

It should be noted that the procedure for emergency rules, excluded from the filing requirement of subsection (3), has also been radically changed from the replaced section of chapter 120.<sup>43</sup> The new subsection<sup>44</sup> reads as follows:

In any particular proceedings in which a state agency makes a finding, including a statement of facts constituting an alleged emergency, in writing, that the adoption of a rule is necessary for the immediate preservation of the public health, peace, and

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FLA. STAT. § 120.051(1)(i) (1965) must also be taken into consideration when dealing with limited or local rules.

(1) The secretary of state shall:

(i) Before excluding any rule of limited or local application from publication in the Florida administrative code where such exclusion is objected to by the agency adopting the rule, obtain an interpretation from the attorney general as to whether the rule is of such limited or local application as to warrant exclusion.

41. *Supra* text accompanying note 37.

42. FLA. STAT. §§ 120.10 and 120.11 (1955) both repealed by Fla. Laws 1961, ch. 61-280 § 4; Fla. Laws 1961, ch. 61-516, § 1. Section 120.11 read as follows:

No rule or regulation adopted on or after January 1, 1956, shall take effect or be enforceable, except as herein provided, until fifteen days after the filing thereof as required by § 120.10. No rule or regulation adopted before January 1, 1956, shall be effective or enforceable after January 1, 1956, until the same shall be filed with the secretary of state.

43. FLA. STAT. § 120.14 (1955) repealed, Fla. Laws 1961, ch. 61-280, § 4; Fla. Laws 1961, ch. 61-516, § 1.

Upon affidavit by the properly authorized officer of any such agency that an emergency exists which will gravely affect the health, safety or welfare of the citizens of this state, any such rule or regulation adopted and promulgated because of such emergency shall become enforceable as the rule or regulation may provide if a copy thereof shall be filed with the secretary of state within five days of such date; provided, however, that such rule or regulation shall not be enforceable or binding during such period of five days upon any party without actual notice of said rule or regulation. Upon failure of the agency to file such emergency rule or regulation within five days, such rule or regulation shall not be deemed to have been adopted because of an emergency and shall have no effect until filed in the office of the secretary of state for a period of fifteen days as heretofore provided.

44. FLA. STAT. § 120.041(3) excludes emergency rules from the filing requirement.



safety or general welfare, a rule may be adopted as an emergency rule. A rule adopted as an emergency rule shall remain in effect ninety days, unless such a rule so adopted be deemed necessary as a permanent rule, in which case it shall be adopted in the manner otherwise provided in this part.<sup>45</sup>

In the new subsection the requirement of an affidavit, signed by the properly authorized officer of the agency and submitted to the Secretary of State, attesting that an emergency did exist, has been eliminated. Similarly, the requirement that a copy of the rule itself be submitted is conspicuously absent. Possible ramifications of these deletions become clearer when viewed in the light of still another conspicuously absent provision of notice.

It had been provided that no emergency rule was enforceable unless submitted to the Secretary of State within five days of the date of adoption and that such rule or regulation was not enforceable or binding during such period upon any party without actual notice of the rule or regulation.<sup>46</sup> If the rule was not filed within the five days after adoption then the rule was held not to be an emergency rule, and thus it had to be filed with the Secretary for fifteen days to be effective.

From a literal interpretation of the former subsection the theme appears to be public protection from a necessary evil—the emergency rule. Although emergency rules are often both necessary and proper, they present the hazard of unknown potential restrictions on those who may be affected by them; hence, the legislature took pains to provide notice to the unsuspecting. However, with the new subsection all vestiges of notice are gone and the dangerous possibility of a rule existing without either public knowledge or opportunity for discovery appears to be great. No matter how grave the emergency, based on the scope of sections 120.031-041 and 120.051, some form of notice should be required and the various agencies should have to follow a more refined procedure in such situations.

### C. *Publication*<sup>47</sup>

As previously stated, no rule, unless of a local or very limited application,<sup>48</sup> becomes operative unless it is first published in the register.<sup>49</sup> By virtue of section 120.041(3), and passed in conjunction with it, section 120.051<sup>50</sup> provides Florida with a permanent compilation of all agency

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45. FLA. STAT. § 120.041(4) (1965).

46. *Supra* note 43.

47. FLA. STAT. § 120.051 (1965).

48. *Supra* note 40.

49. *Supra* note 35.

50. Section 120.051 reads, in part, as follows:

(1) The secretary of state shall:

(a) Conduct a systematic and continuing study of the rules and regulations of this state for the purpose of reducing their number and bulk, removing redundancies and unnecessary repetitions, and make such changes in style and

rules and also with a monthly bulletin and supplement. The compilation, now available, is entitled the Florida Administrative Code<sup>51</sup> and is the official compilation of rules and regulations of all regulatory state agencies. Published along with the Code is the bulletin, *Florida Administrative Register*, in which every rule must first be published to become operative. The Code is supplemented monthly, or as often as possible.

D. *Disqualification of Members of any Commission or  
Administrative Body*<sup>52</sup>

In *Bieley v. Brown*,<sup>53</sup> the appellant, a practicing attorney, instituted suit in chancery to enjoin a Deputy Industrial Commissioner from hearing any further cases in which the appellant represented claimants before the Florida Industrial Commission. The chancellor denied the temporary injunction and dismissed the complaint on the ground that the court lacked jurisdiction over the subject matter.

The district court held that since appellant was attempting to secure a blanket disqualification of a commissioner his action was improper in two respects. In the first instance, exclusive procedure for disqualification of a commissioner is set forth in the A.P.A.:

Any member of a commission elected by the people of the state and authorized by the statutes to exercise judicial powers may be disqualified, either voluntarily or involuntarily, from serving in a particular investigation, inquiry, hearing, trial, appeal, matter or thing *on the same grounds, in the same manner and to the same extent as circuit judges may be disqualified from acting in a judicial capacity.*<sup>54</sup>

Although there is only a reference in section 120.09(1) of the A.P.A. to section 38.10 (which actually deals with the disqualification of judges)

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form as shall be required to comply with the rules promulgated under paragraph (c).

(b) Publish in a permanent compilation entitled Florida administrative code all rules adopted by each agency, and publish a monthly bulletin entitled the Florida administrative register containing a summary of and an index to all rules filed during the preceding month. Supplementation of the code shall be made monthly or as often as is practicable.

51. Sections 120.051(1)(f)-(g) and (2) provide for copies of the code and register.

(1) The secretary of state shall:

(f) Make copies of the Florida administrative code and register available for sale at a price fixed by the secretary of state. Copies shall be made available to other state agencies at cost.

(g) Furnish free copies of the Florida administrative code to the following: one set each to the supreme court of the United States; the circuit court of appeals of the fifth circuit of the United States; the federal district courts within the state; the Florida supreme court; the Florida district courts of appeal; the Florida circuit courts; . . .

(2) Notwithstanding any other provisions of law each agency may print its rules in cooperation with and through the secretary of state; . . .

52. FLA. STAT. § 120.09 (1955) republished to conform to FLA. STAT. § 120.09 (1961).

53. 168 So.2d 552 (Fla. 3d Dist. 1964).

54. FLA. STAT. § 120.09(1) (1965). (Emphasis added.)

the court stated that “. . . an examination of the original title to this act (chapter 120)<sup>55</sup> clearly indicates the Legislative intent to make this method of disqualification available to appointed commissioners as well as to elected commissioners.”<sup>56</sup> The court thus reads section 38.10 into the A.P.A., holding that the proper procedure for seeking disqualification of a commissioner is through a filed affidavit of prejudice. If the commissioner refuses to recuse himself, the party may then seek appropriate review before the Full Commission and the Supreme Court of Florida, the bodies which supervise the deputy commissioners.<sup>57</sup> The court went further and held that a blanket disqualification of a commissioner was not available under Florida law.<sup>58</sup>

## PART II: ADMINISTRATIVE ADJUDICATION PROCEDURE [NEW]<sup>59</sup>

### A. *Definitions*

For purposes of clarity, the Legislature set forth a number of definitions of the critical terms used in this part of the Act.

- (1) Agency means the governing body of any state board, commission or department, or state officer who constitutes the agency authorized by law to adjudicate any party's legal rights, duties, privileges or immunities, except the legislature, courts and governor.
- (2) Adjudication means agency proceeding for the formulation of an order.
- (3) Order means the whole or any part of the final decision (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing.
- (4) Party means individuals, partnerships, corporations, associations, or public or private organizations of any character, and any other agency allowed to intervene in an agency proceeding.
- (5) License means the whole or part of any agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission.
- (6) Licensing means agency process respecting the grant, re-

55. Fla. Laws, 1951 ch. 26854.

56. *Supra* note 53, at 553.

57. FLA. STAT. §§ 440.25 and .27 (1965).

58. *Ginsberg v. Holt*, 86 So.2d 650 (Fla. 1956).

59. FLA. STAT. § 120.20 (1965)

Legislative Intent for Part II

It is the intent of the legislature to establish minimum requirements for the adjudication of any party's legal rights, duties, privileges or immunities by state agencies. Subsequent inconsistent laws shall supersede part II only to the extent that they do so by express reference.

newal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license.

(7) Agency proceeding means any agency process as defined in subsections (2), (3), (5) and (6).<sup>60</sup>

### B. Notice of Hearing<sup>61</sup> and Hearing Guaranteed<sup>62</sup>

In *Keating v. State*,<sup>63</sup> a liquor license issued to a tenant of a building was revoked<sup>64</sup> by an order which further provided that no liquor license could be issued for use at the location of the building for two years.<sup>65</sup> The landlord, who had no knowledge of the revocation hearing, appealed to the Beverage Director to have the revocation order against him modified and the Director did so. In a subsequent action,<sup>66</sup> the respondent, a competitor of the landlord, succeeded in obtaining an order enjoining the Director from modifying the original revocation. Certiorari was granted by the supreme court because of conflicting decisions in the district courts on the matter of standing in the respondent to challenge the order of the Director.<sup>67</sup> That court approved the respondent's standing<sup>68</sup> and then set forth the vital issues to be resolved:

(1) Does F.S. § 561.85, F.S.A.,<sup>69</sup> violate the constitutional guarantees of due process and equal protection when it permits the Beverage Department to issue a so-called padlocking order without notice to the landlord, and without affording the landlord an opportunity to be heard?

60. FLA. STAT. § 120.21 (1965). The word "agency" as defined in this section is sufficiently broad so as to embrace the department of public safety. Fla. OP. ATT'Y GEN. 062-47.

61. FLA. STAT. § 120.23 (1965) provides that,

Parties affected by agency action shall be timely informed by the agency of the time, place, and nature of any hearing; the legal authority and jurisdiction under which the hearing is to be held; and the matters of fact and law asserted. In fixing the time and place for hearings due regard shall be had for the convenience and necessity of the parties or their representatives. Each agency shall adopt appropriate rules of procedure for notice and hearing.

62. FLA. STAT. § 120.22 (1965).

Any party's legal rights, duties, privileges or immunities shall be determined only upon public hearing by an agency unless the right to public hearing is waived by the affected party, or unless otherwise provided by law.

63. 173 So.2d 673 (Fla. 1965).

64. FLA. STAT. § 561.29 (1941) provides for the suspension of liquor licenses.

65. FLA. STAT. § 561.58 (1941) provides that the director can prohibit or permit a license to be issued for the location of the place of business formerly operated under such revoked license.

66. *Keating v. State ex rel. Ausebel*, 167 So.2d 46 (Fla. 1st Dist. 1964).

67. In *Baker v. State ex rel. Hi-Hat Liquors, Inc.*, 159 Fla. 286, 31 So. 2d 275 (1947) it was held that a licensee had no legal standing to challenge an order affecting another's license on the ground that it might affect his profits.

68. *Supra* note 63, at 675.

We are convinced that we should recede from *Baker* . . . , insofar as it holds that a licensee competitor has no standing to maintain an action of the kind here involved merely because as a business competitor the profits or commercial advantages which he might gain in eliminating his competition "are too elusive and uncertain to sustain the action."

69. *Supra* note 65.

(2) Does a landlord have a protectable constitutional right to have his premises used for the sale and consumption of alcoholic beverages?<sup>70</sup>

The court answered the second question by stating, "[A] liquor license has come to have the quality of property, with an actual pecuniary value far in excess of the license fees exacted. . . ." <sup>71</sup> Further, the court stated:

It is indeed a serious matter for government to confiscate property, or to interfere with any legitimate use thereof. . . . Under no circumstances can private property be taken by the state without due process of law. . . . [T]he landlord . . . should be given notice that he may be deprived of such use and an opportunity to make a defense and to be heard in opposition to such action on the part of the State. Notice and hearing . . . are the minimum required before a liquor license can validly be suspended or revoked by the Director. . . .<sup>72</sup>

After determining that a constitutional right was involved the court answered the first question by finding that section 561.58 of Florida Statutes, standing alone, was unconstitutional, but that A.P.A. sections 120.22, 120.23, supplied the deficiency of notice and hearing in the statute. The court stated that section 561.58 "and the appropriate sections of the Administrative Procedure Act when taken together meet the minimum requirements of due process of law."<sup>73</sup> It was, therefore, unnecessary to invalidate the statute.

The modified order of the Director was allowed to stand. The appeal taken by the landlord and the subsequent reinstatement of the landlord's license by the Director had satisfied the requirements of due process. If the modifying order had not been granted by the Director, however, the landlord would have been deprived of his property without procedural due process.

The *Keating* decision thus makes crystal clear the import of any statute that grants quasi-judicial power to an administrative agency. The court held that any such agency must provide notice and hearing even though the applicable statutes do not provide for it, lest their determination fail to comport with due process of law.

In this area the A.P.A. provides that "Each agency shall adopt appropriate rules of procedure for notice and hearing."<sup>74</sup> It specifies the notice procedure as follows:

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70. *Supra* note 63, at 676.

71. *Ibid.*

72. *Id.* at 677.

73. *Id.* at 678.

74. FLA. STAT. § 120.23 (1965).

Parties affected by agency action shall be timely informed by the agency of the time, place, and nature of any hearing; the legal authority and jurisdiction under which the hearing is to be held, and the matters of fact and law asserted.<sup>75</sup>

One additional requirement of importance is contained within this section but it has not undergone judicial interpretation. The portion reads as follows:

In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.<sup>76</sup>

To date, of twenty-five agencies, thirteen<sup>77</sup> have adopted appropriate rules of procedure under A.P.A. section 120.23, but twelve,<sup>78</sup> although they

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75. *Ibid.* See *Robins v. Florida Real Estate Comm'n*, 162 So.2d 535 (Fla. 3d Dist. 1964). The district court held, *inter alia*, that information did not state with any degree of exactness when or in what specific manner he had violated provisions of FLA. STAT. 475.01, and was insufficient to inform broker of the nature of the charges brought against him and should be quashed.

76. In *Ammerman v. Florida Bd. of Pharmacy*, 174 So.2d 425 (Fla. 3d Dist. 1965) a situation arose which appears at first blush to be in contravention of this clause. The petitioner stated, as his basic contention on appeal, the denial of procedural due process in that the commission's hearing, on his license revocation, was held on a Sunday. The court dismissed this point without statement.

It appears to this writer that the fixing of a hearing date for a Sunday contravenes the language of § 120.23.

In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

As petitioner made this Sunday hearing his major contention on appeal we can only assume that this date was disagreeable to him. If so, then "due regard" was certainly not accorded. It would also be noted that Sunday is usually not considered a day for conducting business, especially the important business of conducting a hearing that affects the livelihood of the petitioner. The petitioner's contention in this regard is well founded and the court should have considered it to a greater extent.

77. Florida Air Pollution Comm'n, FLA. STAT. § 403. (1957) implemented by FLA. AD. CODE, ch. 28-1 (1965); State Bd. of Cosmetology, FLA. STAT. §§ 477.16, 477.23 (1963) implemented by FLA. AD. CODE, ch. 60-1.25 (1965); Florida Dental Examiners, FLA. STAT. § 466. (1961) implemented by FLA. AD. CODE, ch. 120-3.04 (1965); State Bd. of Health, FLA. STAT. 381. (1955) implemented by FLA. AD. CODE, ch. 170A-1,4 (1965); Florida Hotel & Restaurant Comm'n, FLA. STAT. § 509.261 (1957) implemented by FLA. AD. CODE, ch. 175-1.02(3) (1964); Florida Installment Land Sales Bd., FLA. STAT. § 478.161 (1963); Florida Bd. of Medical Examiners, FLA. STAT. § 458.121 (1961) implemented by FLA. AD. CODE, ch. 210A-4 (1963); Chiropractic, FLA. STAT. §§ 460.131-37 (1963); Florida State Bd. of Nursing, FLA. STAT. § 464.21(4) (1963) implemented by FLA. AD. CODE, ch. 240-5. (1963); Professional Teaching Practices Comm'n, FLA. STAT. § 231.28 (1963); Florida R.R. & Pub. Util. Comm'n, FLA. STAT. §§ 323., 347., 350., 364., 366. (1957) implemented by FLA. AD. CODE, ch. 310. (1963); Florida Real Estate Comm'n, FLA. STAT. § 475. (1947) implemented by FLA. AD. CODE, ch. 315A-16 (1963); Florida Watchmakers Comm'n, FLA. STAT. § 489.09 (1964).

78. Florida Bd. of Architecture, FLA. STAT. §§ 467.08, 467.14 (1951); Florida Industrial Comm'n, FLA. STAT. § 215.19 (1957); Motor Vehicle Comm'n, FLA. STAT. §§ 320.65-66 (1941); Naturopathy, FLA. STAT. § 462.15 (1963); Florida State Bd. of Dispensing Opticians, FLA. STAT. § 484.10 (1963); State Bd. of Osteopathic Medical Examiners, FLA. STAT. § 459.14 (1927); Florida Bd. of Pharmacy, FLA. STAT. § 465.101 (1963); Florida State Bd. of Examiners of Psychology, FLA. STAT. § 490.081 (1963); Florida Sec. Comm'n, FLA. STAT. §§ 517.11,16,19,20 (1961); Structural Pest Control Comm'n, FLA. STAT. § 482.171 (1963);

provide for notice and hearing in one form or another, apparently fail to provide all of the statutory essentials.<sup>79</sup>

The *Keating* case and the A.P.A. strongly suggest that if an agency does not adopt appropriate rules and abide by them fully in its procedure the courts will demand full notice and hearing as satisfaction of the requirements of procedural due process. The *Keating* case application of the A.P.A. has constructed the foundation which may well lead to a uniformity of procedure in notice and hearing requisites.

The need for such uniformity regarding notice was highlighted in *Roper v. Structural Pest Control Comm'n.*<sup>80</sup> In *Roper* the petitioner was served notice under section 482.171(1) of Florida Statutes which simply provides for "reasonable notice" of a hearing. No other statute required a more specific period of time for notice of the hearing. The petitioner in *Roper* was given ten days' notice but the date of the hearing was included. He thereafter urged that because he had only ten days to prepare for the hearing he had been denied due process. The court apparently anxious to validate the proceedings of the commission, took judicial notice of a rule of the respondent-commission requiring ten days' notice before a hearing,<sup>81</sup> and held that the day of the hearing was included within the ten days. The case raises two questions: (1) What constitutes "reasonable notice" as to time allowed before a hearing? (2) Why should each agency set an arbitrary number of days?

The ten-day rule has since been replaced by a twenty-day rule,<sup>82</sup> and the situation with this agency has been somewhat alleviated, but the problem still exists as to a uniformity of rules for length of notice for all agencies. Legislation to require a specific number of days for notice is suggested and any such requirement should be similar to the requirement of A.P.A. section 120.041(3), which requires of all agencies uniform notice before a rule becomes operative.

### C. Conduct and Record of Hearing<sup>83</sup>

In *Nicholas v. Wainwright*,<sup>84</sup> a prisoner's petition for habeas corpus questioned the legality of his detention, contending that his "gain time" had been illegally cancelled by the Deputy Director of the Board of Commissioners of State Institutions.

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Florida Barbers' Sanitary Comm'n, FLA. STAT. §§ 476.15,31 (1941); Florida Beverage Dep't, FLA. STAT. § 561.29(3), 561.58 (1961).

79. An agency may fail to provide notice of either the legal authority and jurisdiction under which the hearing is being held; the matters of law and fact asserted; or the nature of the hearing; or fail to provide notice and hearing to all persons affected by the agency's actions. *Supra* note 74.

80. *Supra* note 32.

81. *Id.* at 847.

82. FLA. STAT. § 482.171 (1959) implemented by FLA. AD. CODE ch. 333-6.01 (1963).

83. FLA. STAT. § 120.24 (1965).

84. 152 So.2d 458 (Fla. 1963).

The applicable statute<sup>85</sup> provided that upon good behavior a prisoner could be released on recommendation to the Board by the Director, prior to the terminal date fixed by sentence. In this case, however, no recommendation was made, and the prisoner was questioning the duty of the Deputy Director to withhold his recommendation. In denying the prisoner's writ the court held that this prerogative of the Director fell within his power as a hearing officer. The court stated, "The Legislature has recognized the propriety of a hearing officer as a functionary of an administrative agency by the enactment of chapter 120. . . ."<sup>86</sup> The court concluded that it was without power to act, as "the final responsibility for forfeiting gain time must be exercised by the Board itself"<sup>87</sup> and that this must be done pursuant to recommendation by the Director.

The case presented an extreme situation<sup>88</sup> in terms of the power in the hearing officer; in the more usual case, the hearing officer is estopped from acting individually.<sup>89</sup> Only the agency itself (the Board) has the power of final determination.<sup>90</sup> Moreover, A.P.A. section 120.28 provides that

No hearing examiner shall, in any proceeding where he has presided as hearing examiner or a factually related proceeding, participate or advise the agency in entering its order except through his recommended order.

#### D. Agency's and Examiner's Hearing Powers<sup>91</sup>

The agency, member of the agency, or the hearing examiner shall have authority, subject to the agency's published rules, to

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85. FLA. STAT. § 944.28 (1965).

86. *Supra* note 84, at 460.

87. *Id.* at 461.

88. The court suggested that in a situation such as this the Legislature should enact further legislation to avoid this difficulty of presenting prisoner's qualifications as to gain time.

89. In *Thorn v. Florida Real Estate Comm'n*, 146 So.2d 907 (Fla. 2d Dist. 1962) the court stated that the statutes that provide for a hearing examiner make no provision for, nor do they give force and effect to, his findings.

90. In holding hearings or in utilizing the hearing examiner method of conducting hearings the executive board of the department of public safety must officially call the hearing, designate the time and place for such hearing, give notice thereof, and in cases where a hearing examiner is used, designate the person or persons before whom the hearing is to be held. In this regard, the executive board is required to adopt appropriate rules of procedure for notice and hearing as required by § 120.23. The conduct and record of such hearing is set forth in § 120.24; and the hearing examiner's powers are contained in this section. All parties are to be afforded the right to participate in the proceedings as set forth in § 120.26. The hearing examiner would make a recommended order to the executive board, which order must include findings of fact as required by subsection (8) of this section. However, it would be the executive board that would be the sole trier of facts; and it would be the executive board that would render the final decision with respect to a hearing held before an examiner. OP. ATT'Y GEN. 062-47.

The state board of medical examiners may delegate to a panel consisting of three of its members the following duties: take testimony at administrative hearings, make findings of fact, and submit a recommended order to the board. However, the board cannot abdicate its responsibility for final determination of matters and entry of proper orders. OP. ATT'Y GEN. 063-93.

91. FLA. STAT. § 120.25 (1965).



- (1) Administer oaths and affirmations,
- (2) Issue subpoenas authorized by law,
- (3) Rule upon offers of proof and receive relevant evidence,
- (4) Take or cause depositions to be taken whenever the ends of justice would be served thereby,
- (5) Regulate the course of the hearing,
- (6) Hold conferences for the settlement or simplification of the issues by consent of the parties,
- (7) Dispose of procedural requests or similar matters, and
- (8) Enter any order to carry out the purposes of this law, or as to a member of the agency or hearing examiner make recommended orders to the agency . . . which orders shall include findings of fact.

In *Central Truck Lines, Inc. v. King*,<sup>92</sup> the Railroad and Public Utilities Commission issued an order which granted only partially a motor carrier's application for extension of its certificate. The only stated basis of its ruling was that public convenience and necessity demanded the modification. The petitioner-motor carrier contended that the order was not predicated on a finding of facts stated in the record. The Florida Supreme Court agreed and stated:

It is crystal clear from the face of the Commission's order that no findings of fact are contained therein which the Commission predicated its ultimate conclusion. . . . The Commission . . . neglected to follow the mandate of . . . Chapter 120, Administrative Procedure Act, Section 120.25(8). . . .<sup>93</sup>

The court predicated its opinion upon language used by the United States Supreme Court.<sup>94</sup>

The question is not merely one of the absence of elaboration or of a suitably complete statement of the grounds of the Commission's determination . . . but of the lack of the basis or essential findings required to support the Commission's order. In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission but to ascertain whether its findings are properly supported.<sup>95</sup>

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92. 146 So.2d 370 (Fla. 1962).

93. *Id.* at 372.

94. *Florida v. United States*, 282 U.S. 194 (1931).

95. *Id.* at 215.

In *Polar Ice Cream & Creamery Co. v. Andrews*,<sup>96</sup> discussed earlier, the court echoed this aspect of the *Central Truck Lines* case by stating that in such cases the appellate courts are not the fact finding bodies; by virtue of the A.P.A., boards, bureaus, agencies and commissions are the "fact finders" and are required to show their findings of fact on the essential issues which justify their orders.<sup>97</sup> In *Polar* the petitioner was charged by the Florida Milk Commission with violation of chapter 501, Florida Statutes, relating to the regulation of the state milk industry. After a hearing before the commission, at which testimony by both parties was heard, the commission, without making findings of fact, entered an order revoking petitioner's license. The court held that

[T]he "Administrative Procedure Act," does not contemplate that agencies having the attributes of a "fact-finder" are required to outline step by step the evidentiary facts leading to the ultimate conclusion, *but means that findings of fact on essential issues must be such as to justify the entry of the final order.*<sup>98</sup>

The reader will recall the prior altercation between the milk commission and *Polar* previously discussed.<sup>99</sup> The present action was a continuation of that disagreement. A reading of the cases together serves as an example of the importance of the A.P.A. In both instances the milk commission apparently overstepped its bounds and disregarded established procedure; both times the A.P.A. was applied and the commission was thwarted.

An interesting question regarding the power of a hearing examiner was raised in *Kirk v. Publix Supermarkets*.<sup>100</sup> The petitioner, Kirk, filed a Workmen's Compensation claim for benefits and remedial treatment. The claim was controverted by the employer. On motion by employer the deputy ordered the petitioner to submit to a physical examination and to produce for the employer's attorney copies of reports of physicians who had previously examined or treated him and records relating to his admission to two hospitals. The deputy stated in the order that failure to comply would result in a dismissal of the claim. Petitioner complied with the requirement of the physical examination, but refused to submit the requested reports, and at the final hearing the petitioner claimed that the reports were work products and privileged. The deputy rejected the argument and the petitioner requested an appealable order. The deputy dismissed the claim and stated that the petitioner's claim would not be

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96. 150 So.2d 504 (Fla. 1st Dist. 1963).

97. *Accord*, *McRae v. Robbins*, 151 Fla. 109, 9 So.2d 284 (1942); *Laney v. Holbrook*, 150 Fla. 622, 8 So.2d 465 (1942); *Six Mile Creek Kennel Club v. State Racing Comm'n*, 119 Fla. 142, 161 So. 58 (1935). See Part II(E) *infra*.

98. *Supra* note 96, at 506. (Emphasis added.)

99. *Supra* Part I, notes 20, *et seq.*

100. 185 So.2d 161 (Fla. 1966).

entitled to further consideration until he complied with the order to produce. The Full Commission affirmed the deputy's order.

On review the court stated that the deputy could compel the petitioner to produce the reports, and then continued to the more critical question of whether the deputy had the power to dismiss a claim in the event that a party refused to make discovery when ordered to do so. The deputy had followed Florida Rule of Civil Procedure 1.31 which allows a court to stay proceedings or to dismiss the action under such circumstances. The court said, "It would seem logical that a deputy ought to have the same power; however, we are forced to conclude that he does not."<sup>101</sup> Citing section 440.33, Florida Statutes, the court noted that this section requires that a deputy certify the facts to the appropriate circuit court<sup>102</sup> whenever a person neglects or refuses to produce any document after having been ordered to do so. It is then the circuit court which determines whether to dismiss or to otherwise punish the refusal as a contempt of the court. The court concluded,

It is elemental that when the Legislature provides that an administrative power shall be exercised in a certain way such prescription precludes the doing of it in another way. We are therefore forced to conclude that the deputy did not under these facts have the authority to dismiss the claim, and that *he should have certified the matter to the circuit court pursuant to Sec. 440.33.*<sup>103</sup>

Highly interesting was the dissenting opinion of Justice Ervin. He felt that section 120.25 of the A.P.A. authorized the deputy commissioner to proceed as he did. He correctly pointed out that the A.P.A. relates to all administrative proceedings of state agencies, including their hearings and adjudications. In this the A.P.A. is supplemental to, in that it replaces, prior laws regulating hearings and administrative procedures.

Section 120.25, later in time than § 440.33(2), provides that a state agency, through its hearing examiner (in this instance the Deputy Commissioner) may issue subpoenas authorized by law, rule upon offers of proof and receive relevant evidence, dispose of procedural requests or similar matters, regulate the course of a hearing, and "enter any order to carry out the purposes of this law."<sup>104</sup>

He concluded his opinion by stating:

Armed with this authority, I think it lay within the power of the Deputy to enforce his order to require the claimant to produce for the employer's attorney copies of reports. . . . Compliance

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101. *Id.* at 163.

102. The court construed the language "appropriate court" contained in § 440.33 to mean circuit court in the county where the deputy is acting.

103. *Supra* note 100, at 164. (Emphasis added.)

104. *Ibid.*

could be enforced either by suspension or dismissal of the claim.<sup>105</sup>

The writer is prone to agree with Justice Ervin in this respect. The A.P.A. is ostensibly designed to create uniform rules of procedure for state agencies. Given this pervading legislative intention and the encompassing list of broad hearing powers afforded the hearing examiner under section 120.25, it would seem only logical that the A.P.A. was meant to supersede other procedures set forth long before the A.P.A. was made operative. Indeed, if the A.P.A. received so narrow an interpretation as to allow various agencies to utilize diverse and unrelated procedures, the main purpose of uniformity would clearly be defeated.

#### *E. Procedures for Due Process During Hearing*

The procedural rights afforded the individual when he participates in an agency hearing are clearly enumerated in the A.P.A. itself:

- (1) To present his case or defense by oral and documentary evidence,
- (2) To submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts,
- (3) To submit for the consideration of the hearing examiner, member of the agency, or the agency if it receives the evidence, proposed findings and conclusions and supporting reasons therefor,
- (4) To submit exceptions to the order of the agency or to a recommended order, if one is made, and make oral arguments in support of any such exceptions,
- (5) To make offers of settlement or proposals of adjustment,
- (6) To be accompanied, represented, and advised by counsel or to represent himself, and
- (7) To be promptly notified of the denial in whole or in part of any written application, petition or other request, and of any other agency action affecting substantive or procedural rights taken in connection with any agency proceeding.<sup>106</sup>

Although the A.P.A. is primarily concerned with state agencies and as such is binding only upon state agencies, it can be expected that the standard procedure for assuring due process will be applied to municipal and county agencies when cases concerning hearings of these agencies come before the courts. Procedural due process should mean the same thing before all agencies, be they state or local.

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105. *Ibid.*

106. FLA. STAT. § 120.26 (1965).

### F. Evidence

The hearing examiner, member of the agency, or agency shall give probative effect to evidence which would be admissible in civil proceedings in the courts of this state, but in receiving evidence due regard shall be given to the technical and highly complicated subject matter agencies must handle and the exclusionary rules of evidence shall not be used to prevent the receipt of evidence having substantial probative effect. Otherwise effect shall be given to the rules of evidence recognized by law in this state.<sup>107</sup>

No case was decided during the *Survey* period directly touching upon this section of the A.P.A., but it should be noted that there have been previous judicial interpretations of the evidentiary practices of administrative agencies. In *Florida State Bd. of Dental Examiners v. Feinglass*<sup>108</sup> the court stated the general rule:

We note as a general rule, administrative tribunals are not bound by the strict or technical rules of evidence governing jury trials . . . .<sup>109</sup>

## PART III: JUDICIAL REVIEW

### A. Declaratory Judgment on Validity of Rules

(1) Any affected party may obtain a judicial declaration as to the validity, meaning or application of any rule by bringing an action for a declaratory judgment in the circuit court of the county in which such person resides or in which the executive offices of the agency are maintained. This subsection shall not apply to chapter 212.

(2) In addition to any other ground which may exist, any rule may be declared invalid, in whole or in part, for a substantial failure to comply with the provisions of this chapter, or in the case of any emergency rule, upon the ground that the facts recited in the statement do not constitute an emergency.<sup>110</sup>

As this section of the A.P.A. has been discussed under the rule making procedure of administrative agencies<sup>111</sup> and especially with regard to *Polar Ice Cream & Creamery Co. v. Andrews*,<sup>112</sup> it will not be belabored here.

107. FLA. STAT. § 120.27 (1965).

108. 166 So.2d 686 (Fla. 3d Dist. 1964).

109. *Id.* at 687. *Accord*, *Sauls v. DeLoach*, 182 So.2d 304 (Fla. 1st Dist. 1966); *Agner v. Smith*, 167 So.2d 86 (Fla. 1st Dist. 1964). See also note 125 *infra*.

110. FLA. STAT. § 120.30 (1965).

111. See Part I: RULE MAKING, and notes 20-29 *supra*.

112. 146 So.2d 609 (Fla. 1st Dist. 1962).

### B. Review of Agency Orders

Perhaps the most progressive and revolutionary innovation of the A.P.A. is contained in section 120.31(1) dealing with the judicial review of administrative orders.

Because of the pertinent language contained in this section and the judicial interpretation afforded it in the following cases the relevant portions are set forth below.

(1) As an alternative procedure for judicial review, and except where appellate review is now made directly by the supreme court, the final orders of an agency entered in any agency proceeding, or in the exercise of any judicial or quasi-judicial authority, shall be reviewable by certiorari by the district courts of appeal within the time and manner prescribed by the Florida appellate rules. If judicial review is sought under this section, the petition shall so state. The venue of the proceedings for such review shall be the appellate district which includes the county wherein hearings before the hearing officer or agency, as the case may be, are conducted, or if the venue cannot be thus determined, then the appellate district wherein the agency's executive offices are located.

(2) In cases where certiorari is granted pursuant to this section, the court may issue its mandate, or order, with directions to the agency to enter such order in the proceedings as is appropriate on the record, or the court may remand the cause for such further proceedings, including the taking of testimony, as may to the court seem necessary or proper:

- (a) To accord the parties due process of law;
- (b) To establish a sufficient record, for review;
- (c) To accord the parties their constitutional, statutory or procedural rights; and
- (d) To accomplish the purposes and objectives of the law pursuant to which the administrative proceeding was initiated.<sup>113</sup>

In *Rogers v. King*<sup>114</sup> the Florida Real Estate Commission entered an order revoking real estate salesmen's licenses. On appeal, the district court, although finding that the evidence was sufficient to support the examiner's findings that the salesmen were guilty, quashed the order, and directed the commission to "punish the petitioners in like manner as by said order it punished their co-defendant. . . ."<sup>115</sup> The effect of this decision was to order the commission to reduce the revocation of the sales-

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113. FLA. STAT. § 120.31 (1961). (Emphasis added.)

114. 161 So.2d 258 (Fla. 1st Dist. 1964).

115. *Id.* at 259.

men's licenses to a six-month suspension, thus substituting the court's judgment for that of the agency. This decision was upheld by the Florida Supreme Court in *Florida Real Estate Comm'n v. Rogers*,<sup>116</sup> as not marginal to the statutes of Florida governing commissions.<sup>117</sup>

The court stated that final rulings and orders of the commission shall be subject to change upon writ of certiorari issued to the district courts of appeal, as provided by the A.P.A. It quoted section 120.31(2):

In cases where certiorari is granted pursuant to this section, the court may issue its mandate, or order, *with directions to the agency to enter such order in the proceedings as is appropriate on the record*, or the court may remand the cause for such further proceedings, including the taking of testimony, as may to the court seem necessary or proper. . . .<sup>118</sup>

What the court did in essence was to interpret section 120.31(2) as a broadening of certiorari, granting to the district courts<sup>119</sup> the power, when reviewing an administrative order, to reweigh the evidence in the record and upon finding that the order is inappropriate to substitute its judgment for that of the agency. The court concluded:

[W]hile the Legislature vested in the Real Estate Commission the power to suspend licenses for such period of time as it thought appropriate to the circumstances, or to revoke the same, it also gave the district courts the power to review such action and to enter such orders with reference thereto as it determined appropriate on the record before it. *This power necessarily includes the power to modify or increase the penalties imposed by the Commission.*<sup>120</sup>

Justice Barnes, dissenting,<sup>121</sup> decried the portent of the decision. To his view, it was not the Legislature's intention to broaden the nature of certiorari power in this manner. The A.P.A. only provides for judicial review,

[A]nd does not indicate an intent to grant a power to the reviewing court to substitute its judgment for that of the commission, or the judgments of the *scores of other governmental agencies* rendered in quasi-judicial proceedings.<sup>122</sup>

116. 176 So.2d 65 (Fla. 1965).

117. The court coupled the statutory provisions for writ of certiorari, as concerns real estate license law in FLA. STAT. § 475.35 (1947), with the additional power as provided by the A.P.A.

118. *Supra* note 116, at 67. (Emphasis is the court's.)

119. In *Sauls v. DeLoach*, *supra* note 109, the court read § 120.31(3) together with the certiorari power provided by FLA. CONST. art. 5, § 5(3).

120. *Supra* note 116, at 67. (Emphasis added.)

121. *Id.* at 67.

122. *Id.* at 68. (Emphasis is the court's.)

Under the *Rogers* decision the court may well have decided that the judicial function includes the responsibility to review de novo every penalty imposed by an administrative agency. If employed with appropriate judicial restraint, which would offer de novo review only to the more serious violations of agency discretion, this broadened scope of certiorari may yield a very desirable check on administrative abuse. It apparently had this effect in *Rogers*.

Nonetheless the decision is contrary to a number of previous cases.<sup>123</sup> Until this decision the Florida courts were almost unanimous in holding that it was never appropriate to substitute their judgment for that of the agency.<sup>124</sup> The established scope of review has been to limit certiorari to determine whether procedural due process had been accorded the party by the agency, whether the agency had jurisdiction of the cause, whether essential elements of law had been observed by the agency, or whether the charges were supported by substantial competent evidence.<sup>125</sup> Indeed, the *Rogers* case was brought before the Florida Supreme Court on conflict certiorari.<sup>126</sup> The second district in *Carter v. Florida Real Estate Comm'n*,<sup>127</sup> a case analogous in proceeding to *Rogers*, but holding conversely, related:

This court is not in a position to determine, as a matter of law, that the six month's suspension would render the order of the

123. *E.g.*, *Butler v. Carter*, 123 So.2d 313, 316 (Fla. 1960).

[T]he findings and conclusions of the Commission will not be set aside on certiorari, even though the reviewing court might have reached different conclusions on the evidence.

*DeGroot v. Sheffield*, 95 So.2d 912 (Fla. 1957); *City of Pensacola v. Maxwell*, 49 So.2d 527 (Fla. 1950); *Pensacola Transit, Inc. v. Douglass*, 34 So.2d 555 (Fla. 1948); *McFall v. Florida State Bd. of Dental Examiners*, 173 So.2d 458 (Fla. 2d Dist. 1965) (circuit judge reviewing case on certiorari cannot substitute personal opinion for the opinion of the Board); *Central & So. Florida Flood Control Dist. v. Scott*, 169 So.2d 368 (Fla. 2d Dist. 1964) (courts should not substitute their judgment for that of governmental agencies); *Agner v. Smith*, 167 So.2d 86 (Fla. 1st Dist. 1964); *Florida State Bd. of Dental Examiners v. Feinglass*, 166 So.2d 686 (Fla. 3d Dist. 1964); *Dade County v. Carmichael*, 165 So.2d 227 (Fla. 3d Dist. 1964); *City of Miami v. Babey*, 161 So.2d 230 (Fla. 3d Dist. 1964); *Pauline v. Lee*, 147 So.2d 359 (Fla. 2d Dist. 1962); *Carter v. Florida Real Estate Comm'n*, 122 So.2d 420 (Fla. 2d Dist. 1960).

124. *Ibid.*

125. *Butler v. Carter*, *supra* note 123; *DeGroot v. Sheffield*, *supra* note 123; *Pensacola Transit, Inc. v. Douglass*, *supra* note 123; *McGuaran v. Susskind*, 175 So.2d 218 (Fla. 3d Dist. 1965); *McFall v. Florida Bd. of Dental Examiners*, *supra* note 123; *Agner v. Smith*, *supra* note 123; *Dade County v. Carmichael*, *supra* note 123. For an extensive study of the substantial evidence rule see *Parsons, The Substantial Evidence Rule in Florida Administrative Law*, 6 U. FLA. L. REV. 481 (1953).

126. The supreme court in *Florida Real Estate Comm'n v. Rogers*, *supra* note 116, at 65, stated:

In the decision sub judice, the First District Court held that the *Carter* case, *supra*, "is distinguishable from the case on review because the facts here involved are such that we are in a position to determine, as a matter of law, that the Commission abused its discretion in imposing the subject sentences on the petitioners." We agree with the contention of petitioner that these two decisions are in conflict.

127. 122 So.2d 420 (Fla. 2d Dist. 1960).



Commission invalid. To do so would be to substitute the judgment of this court for that of the respondent.<sup>128</sup>

Now, although substantial competent evidence must still be present to support a finding, a penal type ruling may nevertheless be overruled or modified as the case may be, even if such evidence is present; in other words, substantial competent evidence is no longer the standard for determining the correctness of an agency's decision, at least where the decision is penal in its nature.

Since the supreme court's decision in *Rogers* there have been three further decisions applying section 120.31,<sup>129</sup> and interestingly enough two of those cases have been from the second district, the district overruled by *Rogers*. The court in *Davis v. State*,<sup>130</sup> citing *Rogers*, and quoting from section 120.31(2), reversed a disciplinary action of the State Dental Board. The three-month suspension of petitioner's license for having unintentionally displayed an oversized sign was ". . . inordinately severe and constitutes an abuse of the discretion vested in the board by the statute."<sup>131</sup> The court also based its conclusion on the principle that

a corresponding responsibility rests upon such boards and agencies to refrain from taking such disciplinary action as will seriously reflect upon or destroy the good name and reputation of those under their jurisdiction except in cases which fully warrant such extreme action.<sup>132</sup>

The situation presented in *Davis* is but another illustration of the importance of the *Rogers* broadening of the review power of the courts.

In *Sugar Cane Growers Co-op v. Florida Revenue Comm'n*,<sup>133</sup> involving a revenue commission's order setting a deficiency levy for sales and use tax, the second district held that there had been an abuse of discretion on the part of the commission in the assessment of an additional maximum penalty of twenty-five percent for late payment of taxes. The court, quashing the penalty, stated:

This Court has authority to review such penalties under the provisions of the Administrative Procedure Act, Chapter 120, F.S.A., *Florida Real Estate Commission v. Rogers*. . . .<sup>134</sup>

A question which still remains open is whether the court will sub-

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128. *Id.* at 421.

129. *Sauls v. DeLoach*, *supra* note 109; *Davis v. State*, 181 So.2d 559 (Fla. 1st Dist. 1965); and *Sugar Cane Growers Co-op. v. Florida Revenue Comm'n*, 179 So.2d 393 (Fla. 2d Dist. 1965). For one of the rare occasions before *Rogers*, see *Florida Bar v. Rassner*, 161 So.2d 1 (Fla. 1964).

130. 181 So.2d 559 (Fla. 1st Dist. 1965).

131. *Id.* at 562.

132. *Id.* at 561.

133. 179 So.2d 393 (Fla. 2d Dist. 1965).

134. *Id.* at 396.

stitute its judgment when necessary, for the scores of county and municipal agencies not within the A.P.A. In *McGuaran v. Susskind*<sup>135</sup> a City of Miami Beach detective was removed from office by the Personnel Board of the City of Miami Beach. The Third District Court of Appeal acknowledged that the *extent* of its review was *limited* to whether, upon the points properly raised, the circuit court applied the applicable law and acted in accordance with the established procedure.<sup>136</sup> The court cited *City of Miami v. Babey*<sup>137</sup> as authority for this proposition. In *Babey* the court had stated that “. . . it was not the prerogative of the circuit court to substitute its judgment for that of the Board.”<sup>138</sup> *McGuaran* also relied upon *Ammerman v. Florida Bd. of Pharmacy*<sup>139</sup> which similarly was concerned with the “substantial evidence rule.”<sup>140</sup> Although *Ammerman* was concerned with a state agency as opposed to *McGuaran* and *Babey*, it did not purport to discuss any of the provisions of the A.P.A., including section 120.31(2), which was applicable to that case. As a result the decision indicated the absence of A.P.A. influence upon the *McGuaran* court. It is interesting to note that all of the above cited cases were decided in the Third District Court of Appeal, which to date has not recognized A.P.A. section 120.31(2) or the *Rogers* decision, even though again recently confronted with the situation. In *Florida State Bd. of Dental Examiners v. Graham*,<sup>141</sup> petitioner’s license to practice dentistry was suspended for six months. As a prerequisite for reinstatement petitioner had to undergo a psychiatric examination whose results were satisfactory to the agency. The circuit court quashed the order in its entirety, and on appeal the third district reversed in part, reinstating the six-month suspension.<sup>142</sup> In reversing the circuit court, the district court held that there was substantial competent evidence to support the findings of the agency and as such they *must be sustained*.<sup>143</sup> The court further held that

It is well established that a reviewing court will not on petition for certiorari determine the weight and credibility of the evidence.<sup>144</sup>

In so holding, the court cited *Florida State Bd. of Dental Examiners v. Feinglass*,<sup>145</sup> *McFall v. Florida State Bd. of Dental Examiners*,<sup>146</sup> and

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135. 175 So.2d 218 (Fla. 3d Dist. 1965).

136. Emphasis added. The court cited *Morris v. City of Hialeah*, 140 So.2d 615 (Fla. 3d Dist. 1962).

137. 161 So.2d 230 (Fla. 3d Dist. 1964).

138. *Id.* at 232.

139. 174 So.2d 425 (Fla. 3d Dist. 1965).

140. *Supra* note 125.

141. 187 So.2d 104 (Fla. 3d Dist. 1966).

142. The court held that the prerequisite of the psychiatric examination was unreasonable and an abuse of power. The court cited §§ 120.22-.23 and 120.26.

143. Emphasis added.

144. *Supra* note 141, at 106.

145. 166 So.2d 686 (Fla. 3d Dist. 1964).

146. 173 So.2d 458 (Fla. 2d Dist. 1965).

*Ammerman v. Florida Bd. of Pharmacy*.<sup>147</sup> It would appear that each of these decisions has been overruled by *Rogers* and should not have been relied upon in the *Graham* decision. *Ammerman* and *McFall* both held that the findings of an administrative agency will be overturned on review only upon a showing that they are not supported by "substantial competent evidence" and *Feinglass* held that the question of both weight and credibility of evidence is one for the agency's determination and not for the court and as such the court should decline to substitute its judgment for that of the agency. Furthermore, in *Graham* the court failed to mention the provisions of section 120.31 relating to review, but relied instead on section 120.27, which deals primarily with the procedure for receiving evidence by the agency.<sup>148</sup> While section 120.27 had not previously undergone judicial interpretation, it is the writer's opinion that in view of section 120.31, section 120.27 was not meant to be applied to determine the extent of appellate power. For one thing, section 120.27 falls within the A.P.A. subpart, ADMINISTRATIVE ADJUDICATION PROCEDURE, whereas section 120.31 is placed under the subpart, JUDICIAL REVIEW. Neither the cases cited in *Graham* nor section 120.27 appear to have been applicable. The court would have been better advised to have applied section 120.31 and the decisions thereunder.

The portent of the *Rogers* decision is more readily suggested by a glance through the history of Florida administrative agencies. These bodies have reigned over the breadth of our economic and political life, secure in the knowledge their judgments would be relatively free from judicial interference. The only limitations were that their judgments be grounded on substantial evidence and tempered with a modicum of procedural due process. The *Rogers* decision may very well become a hallmark in a new era of judicial review of administrative law in Florida.

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147. 174 So.2d 425 (Fla. 3d Dist. 1965).

148. See text *supra* Part II, section F, and note 109.