Nova Law Review

Volume 14, *Issue* 3 1990 *Article* 2

Administrative Law

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Abstract

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KEYWORDS: usurpation, seizure, sunshine

Survey Part I

Administrative Law*

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The rise of administrative bodies probably has been the most significant legal trend of the last half-century and perhaps more values are affected by their decisions than those of all the courts, review of administrative decisions apart.[1]

Despite th[e] chorus of abuse and tirade, the growth of the administrative process shows little sign of being halted. [I]ts extraordinary growth in recent years, the increasing frequency with which government has come to resort to it, the extent to which it is creating new relationships between the individual, the body economic, and the state, already have given it great stature.[2]

I. Introduction

This article provides an overview of the administrative law decisions[3] by the Florida appellate courts during the survey period.[4] As in

1. FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).
2. J. LANDIS, THE ADMINISTRATIVE PROCESS 4-5 (1938).
3. This article does not generally discuss cases concerning the Workers' Compensation system because its administrative hearing system is not subject to the Florida Administrative Procedure Act. FLA. STAT. § 120.52(1)(c) (1989) ("A judge of compen-

past years this article perhaps errs on the side of comprehensiveness. Most of the cases discussed do not, in and of themselves, raise new and/or important developments in Florida administrative law. But I firmly believe that such a comprehensive approach is justified as "each [decision] . . . add[s] a bit to our knowledge of how the courts are interacting with administrative agencies, and thus, is valuable."[5]

II. Constitutional and Jurisdictional Issues

A. The Delegation Doctrine[6]

"There is no doubt that the development of the administrative agency in response to modern legislative and administrative need has placed severe strain on the separation-of-powers principles in its pris-

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sation claims shall not, in the adjudication of workers' compensation claims, be considered an agency or part of an agency for the purposes of this act.").

4. The decisions discussed in this article appear in volumes 532-53 of the Southern Reporter, Second Series. Earlier discussions of Florida administrative law have appeared in a variety of law reviews and books. *See, e.g.*, FLORIDA ADMINISTRATIVE PRACTICE (Florida Bar 3d ed. 1990); A. ENGLAND & H. LEVINSON, FLORIDA ADMINISTRATIVE PRACTICE MANUAL (1979) (3 volumes); Burris, *Administrative Law, 1988 Survey of Florida Law*, 13 NOVA L. REV. 727 (1989) [hereinafter Burris II]; Burris, *Administrative Law, 1987 Survey of Florida Law*, 12 NOVA L. REV. 299 (1988) [hereinafter Burris I]; Dore, *Access to Florida Administrative Proceedings*, 13 FLA. ST. U.L. REV. 967 (1986); Dubbin and Dubbin, *Administrative Law: Access to Review of Official Action - Standing Under the Florida Administrative Procedure Act*, 35 U. MIAMI L. REV. 815 (1981); Fleming and Mallory, *Administrative Law*, 33 U. MIAMI L. REV. 735 (1979); England and Levinson, *Administrative Law*, 31 U. MIAMI L. REV. 749 (1977); Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 615 (1975); Levinson, *A Comparison of Florida Administrative Practice Under the Old and the New Administrative Procedure Acts*, 3 FLA. ST. U.L. REV. 72 (1975). *See generally* A. BONFIELD, STATE ADMINISTRATIVE RULE MAKING (1986) (a general discussion of state administrative law issues).

5. Burris II, *supra* note 4, at 729.

6. As noted in Burris I, *supra* note 4, at 302 n.15,

> [t]raditionally this doctrine was labeled the nondelegation doctrine. This clearly was a misnomer as courts almost never found the delegation of quasi-legislative or quasi-judicial authority, or the aggregation of legislative, executive and judicial functions in one body to be constitutionally flawed. 'The designation of the doctrine by this name occurred because strongly worded *dictum* in the early Supreme Court cases on the issue indicated a hostility in principle to such actions by Congress, even though all the delegations in these cases were held constitutionally sound.' In keeping with the national reality, rather than the myth, I have labeled this section as delegation doctrine.

tine formulation."[7] The Florida Supreme Court responded to this concern in *Askew v. Cross Key Waterways*[8] by adopting a very rigorous formalistic approach to delegation issues which cast considerable doubt on the validity of many statutory delegations of authority to administrative agencies.[9]

> But since 1981, the Florida courts have gradually abandoned the rigorous application of the formalist approach to the delegation doctrine outlined in the *Cross Key* decision. Instead the courts have adopted a pragmatic approach to delegation issues, similar to that used in the federal courts. This has resulted in a marked decline in the use of the delegation doctrine to declare statutes unconstitutional, a trend that began in 1981 and that has continued. The process of abandoning or ignoring the requirements outlined in the *Cross Key* decision continued during this past year.[10]

Under the pragmatic approach now used by the courts the critical inquiry in delegation cases is "whether the statute contains sufficient standards or guidelines to enable the agency and the courts to determine whether the agency is carrying out the legislature's intent."[11] The degree of specificity required will vary with "the subject matter dealt with and the degree of difficulty involved in articulating finite standards."[12] The delegation doctrine is designed to "permit administration of legislative policy by an agency with the expertise and flexibility needed to deal with complex and fluid conditions . . . which . . . make direct legislative control impractical or ineffective . . . [and] make the drafting of detailed or specific legislation impractical or undesirable."[13] While the courts continue to ritualistically refer to the *Cross Key* decision, the nature of the inquiries made under the rubric of the delegation doctrine is now pragmatic, designed to assure in a minimalistic fashion that the legislature, and not administrative agencies, is making fundamental policy decisions.

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7. Buckley v. Valeo, 424 U.S. 1, 280-81 (1976) (White, J., concurring in part, dissenting in part).
8. 372 So. 2d 913 (Fla. 1979) (clarified on rehearing denial).
9. *See* Burris I, *supra* note 4, at 304-07.
10. Burris II, *supra* note 4, at 729-30; *see also* Burris I, *supra* note 4, at 302-12.
11. Department of Ins. v. Southeast Volusia Hosp. Dist., 438 So. 2d 815, 819 (Fla. 1983).
12. *Askew*, 372 So. 2d at 918 (clarified on rehearing denial).
13. Jones v. Department of Revenue, 523 So. 2d 1211, 1214 (Fla. 1st Dist. Ct. App. 1988).

An example of this new pragmatic approach is *Appalachee Regional Planning Council v. Brown*,[14] in which the court held that the Florida Regional Planning Council Act[15] was not an unconstitutional delegation of legislative authority. In the Florida Regional Planning Council Act the legislature authorized regional planning councils to charge fees for the review of the development of regional impact associated with planned building projects.[16] It was argued that this was an unconstitutional delegation because the legislature had not provided sufficient guidance in how the fees should be set. The court found that the number of

> variables inherent in the review process require flexibility in determining fees for that process because the fee amount is a function of the nature of the particular development proposal. Like the D[evelopment] of R[egional] I[mpact] review process itself, the fees resulting from that process are subject to variations that are beyond the expertise and calculability of the legislature.[17]

In light of the complexity of the issue and the fact that the legislature clearly intended the regional planning councils to collect the cost of the review process the court held that the rules governing fee collection were "merely technical implementations of a fundamental legislative policy decision."[18] The power of the regional planning councils over the setting of fees is not absolute. It is limited by a reasonableness requirement which is implied in all such delegations of authority not limited by precise statutory standards.[19]

This type of reasoning and result is part of the continuing abandonment of any rigorous application of the *Cross Key* approach to these issues and is part of the growing list of cases which signal the still unacknowledged abandonment of the *Cross Key* philosophy concerning delegation issues.

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14. 546 So. 2d 451 (Fla. 1st Dist. Ct. App. 1989).

15. FLA. STAT. §§ 186.501-.513 (1989).

16. FLA. STAT. § 186.505(12) (1989). Other statutes were also relied upon as a basis for regional planning councils promulgating rules regulating the collection of fees. FLA. STAT. §§ 163.01(5)(h), 380.06(22)(c) (1988).

17. *Appalachee Regional Planning Council*, 546 So. 2d at 453.

18. *Id.*

19. *Id.* at 452-53.

B. Separation of Powers Prohibiting the Usurpation of Functions

While the Florida courts have retreated from the rigorous application of the delegation doctrine, they have remained particularly attentive to separation of powers concerns in other contexts. In addition to providing the foundation for the delegation doctrine, the doctrine of separation of powers also prohibits one branch of the government from exercising the core powers of another branch.[20]

This principle, in part, as several cases during this survey period illustrate, prohibits the legislature and executive branches from usurping the power of the courts. Typical of this was *Watson v. First Florida Leasing, Inc.*,[21] in which the court held that the legislature impermissibly invaded the court's core function when it passed a statute concerning procedures to be used in an action against an estate.[22] Because the statute invaded one of the court's core functions, procedural rule making, the statute's notice requirements were unconstitutional.[23] In *Laborers' International Union of North America Local 478 v. Burroughs*,[24] the court clarified the scope of its decisions in *Broward County v. LaRosa*[25] and *Metropolitan Dade County Fair Housing and Employment Appeals Board v. Sunrise Village Mobile Home Park, Inc.*[26] both of which concerned the circumstances which permit an administrative agency to award monetary damages without invading the core judicial function.[27] In this case the court read the *LaRosa* and *Sunrise Village* decisions as merely constitutionally barring administrative agencies from "award[ing] common law damages for humiliation, embarrassment, and mental distress," because such damage awards concern inju-

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20. The government also cannot delegate its police powers to a private party. Such action is beyond the legislature's authority whether done by statute or contract. *See* P.C.B. Partnership v. City of Largo, 549 So. 2d 738, 741 (Fla. 2d Dist. Ct. App. 1989).

21. 537 So. 2d 1370 (Fla. 1989).

22. FLA. STAT. § 733.705(3) (1987).

23. *Watson*, 537 So. 2d at 1371; *see id.* at 1372 (Grimes, J., concurring in part, dissenting in part). *See also* Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, 541 So. 2d 1121, 1123 (Fla. 1989), *reh'g denied*, (The legislature cannot expand the types of parties who can bring suit on the behalf of others.).

24. 541 So. 2d 1160 (Fla. 1989).

25. 505 So. 2d 422 (Fla. 1987).

26. 511 So. 2d 962 (Fla. 1987).

27. These decisions cast considerable doubt on the ability of administrative agencies to award damages for administrative violations in any circumstance which paralleled a common law cause of action.

ries which are not easily quantified.[28] The court held that the Metropolitan Dade County Fair Housing and Employment Appeals Board had the authority to award damages for violations of administrative rules and statutes when such damages were easily quantifiable. Among the damage awards permitted the Board was the right to award back pay.[29]

The courts are also prohibited from invading the core functions of the other branches of government. In *Gattis v. Florida Parole & Probation Commission*,[30] the court rejected such an argument when it held that the statutory requirement that the Parole and Probation Commission give the sentencing court notice of and opportunity to object to a presumptive parole release date for a prisoner did not invade an executive branch core function. The statute did not grant the trial court any power over the parole process. The role of the trial court was limited to providing the Parole and Probation Commission with additional information which might demonstrate good cause for extending a presumptive parole release date.[31] The Florida Parole and Probation Commission under the amended statute remains in control of the decision process.[32] In such cases there is no unconstitutional invasion of the executive function.[33]

In a related area, the separation of powers doctrine also prohibits voluntary delegation by the courts of their functions to the executive branch. As the court noted in *Hamrick v. State*,[34] courts may not delegate fact finding functions to executive branch employees when this

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28. *Burroughs*, 541 So. 2d at 1162.

29. *Id.* at 1162-63. The court also held that the Metropolitan Dade County Fair Housing and Employment Appeals Board award of future pay rather than reinstatement and attorney's fees was invalid, because the award of such damages and attorney's fees was not authorized by statute or ordinance. *Id.* at 1163-64. *Cf.* Rodriguez v. Tax Adjustment Experts of Fla., Inc., 551 So. 2d 537 (Fla. 3d Dist. Ct. App. 1989), *reh'g denied*, (The court held that a special master appointed by the Dade County Property Appraisal Adjustment Board was a quasi-judicial officer.).

30. 535 So. 2d 640 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*.

31. FLA. STAT. §§ 947.1745(4) & 947.165(1) (1987).

32. *See also* Sandlin v. Criminal Justice Standards & Training Comm'n, 531 So. 2d 1344 (Fla. 1988) (If ultimate authority or control of the executive branch was not invaded, then listing of factors to be considered was not an invasion of the executive branch's power.).

33. *Gattis*, 535 So. 2d at 641. The court also rejected the claim that the new statutory procedure was an *ex post facto* law. *Id.* at 641-42.

34. 532 So. 2d 71 (Fla. 1st Dist. Ct. App. 1988).

function was assigned by the legislature to the courts.[35] However, once the court has rendered its decision, it may then assign the performance of ministerial details necessary to the implementation of its decision to an executive branch employee.[36] While the former involves the invasion of the court's core function the latter does not.[37] An other example of this type of distinction is *Liebman v. State*,[38] in which the court limited the scope of its decision in *Bentley v. State*.[39] In *Bentley*, the court held that a hearing officer cannot make the initial determination of whether a person is competent, because such a determination is part of the core judicial function and must be performed by a court. In *Liebman* the court held that it was not an impermissible invasion of the core judicial function "for a hearing officer to conduct a hearing as to incompetency for *continued* hospitalization placement so long as a circuit court makes the *initial* determination."[40] Such a delegation of authority was not an impermissible invasion of the circuit court's exclusive jurisdiction, but rather a mere grant of concurrent jurisdiction to a hearing officer.[41]

C. Accountability: Was the Agency Acting Within the Scope of Its Authority or *ultra vires*?

The courts have used two approaches in resolving questions concerning whether an agency acted beyond the scope of its delegated au-

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35. *Id.* at 72 (The court improperly permitted a probation officer to determine whether a defendant was capable of making restitution in a criminal case.).

36. Langston v. State, 551 So. 2d 1268, 1269 (Fla. 1st Dist. Ct. App. 1989).

37. *Compare id. with Hamrick*, 532 So. 2d 71 (Fla. 1st Dist. Ct. App. 1988). Similarly agencies may not impermissibly delegate their authority. *See* 1800 Atlantic Developers v. Department of Envtl. Regulation, 552 So. 2d 946, 955-56 (Fla. 1st Dist. Ct. App. 1989) (per curiam), *reh'g denied*, (The court noted that an agency cannot delegate to a hearing officer authority to set policy when the legislature has specifically required the agency to set policy in the area.); Cotter v. District Bd. of Trustees of Pensacola Junior College, 548 So. 2d 731, 732-33 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*, (The court held that the Board of Trustees did not improperly delegate its duties under the APA to conduct a hearing and make a decision by having an attorney assist it in ruling on evidentiary questions. In *dicta* the court warned that the role of advisor must remain just that and any intrusion into or "undue influence" over the ultimate decision making process would be reversible error.).

38. 549 So. 2d 239 (per curiam), *clarified on reh'g*, 555 So. 2d 1242 (Fla. 4th Dist. Ct. App. 1989).

39. 398 So. 2d 992 (Fla. 4th Dist. Ct. App. 1981).

40. *Liebman*, 549 So. 2d at 240 (emphasis in the original).

41. *Id.* at 241-42.

thority. The first approach is a rigid one. Under it the courts limit an agency to only those powers provided in the statute and will not approve any claim of implied authority. The second approach is more flexible. Under it the courts are willing to recognize in some limited circumstances that an agency has some implied powers.

An example of the first approach is *Board of Trustees of the Internal Improvement Trust Fund v. Barnett*.[42] In *Barnett*, the court approved of the circuit court's determination that, absent express statutory authorization, the withdrawal of consent for a private party to use submerged lands owned by the state was unlawful when made by Board of Trustees of the Internal Improvement Trust Fund.[43] The reasoning offered by the court to support this result was an example of the classic doctrine that administrative agencies have no implied powers. The Board of Trustees of the Internal Improvement Trust Fund was authorized by statute only to approve of private party use of submerged lands. The statute did not authorize the Board of Trustees of the Internal Improvement Trust Fund to withdraw the permission once it was given. Any claim of implied powers by an administrative agency is *ultra vires*. As *Barnett* and other cases illustrate, the Florida courts have not hesitated to use the *ultra vires* doctrine in holding an agency action was beyond its authority.[44] "It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute. A rule which purports to do so constitutes an invalid exercise of delegated legislative authority."[45]

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42. 533 So. 2d 1202 (Fla. 3d Dist. Ct. App. 1988).

43. *Id.* at 1205-06.

44. *See* Division of Admin. Hearings v. Department of Transp., 534 So. 2d 1219, 1220 (Fla. 1st Dist. Ct. App. 1988) (per curiam) (The court summarily affirmed the decision of a hearing officer declaring the Division of Administrative Hearings' purposed rules invalid exercises of delegated authority because they were arbitrary, involved to creation of "unbridled discretion, and improperly authorized a hearing officer to impose sanctions."); Laborers' Int'l Union of North America, Local 478 v. Burroughs, 541 So. 2d 1160, 1163-64 (Fla. 1989); Burris, *The Administrative Process and Constitutional Principles* in FLORIDA ADMINISTRATIVE PRACTICE § 1.19 (The Florida Bar 3d ed. 1990). *Cf.* American Inst. of Defensive Driving, Inc. v. Traffic Ct. Rev. Comm., 543 So. 2d 218 (Fla. 1989), *reh'g denied*, (The court held by implication that the traffic court review committee had no express or implied power to review the determinations of the chief judge.).

45. Department of Business Regulation v. Salvation Ltd., Inc., 452 So. 2d 65, 66 (Fla. 1st Dist. Ct. App. 1984). *Cf.* Evans Packing Co. v. Department of Agric. and Consumer Servs., 550 So. 2d 112, 120-21 (Fla. 1st Dist. Ct. App. 1989) (The court held in part that the agency could not adopt a testing procedure through adjudication

While it is generally true that the *ultra vires* doctrine prohibits claims of implied power by administrative agencies, in some limited circumstances the courts have recognized that administrative agencies can claim implied powers without violating the *ultra vires* doctrine. One such circumstance is when the legislature has delegated authority to an administrative agency to grant a privilege or a license, but has failed to expressly grant the administrative agency authority to withdraw or revoke the privilege or license. In such cases the courts have been most receptive to implied power claims in order to assure that the agency has this authority to guard the public interest.[46] The implied power claimed in these types of cases is an expansion of the agency's implementing power. It does not enhance or expand the basic jurisdiction of the agency. It merely grants the agency a means not explicitly provided for in the statute to implement its statutory authority.[47] The problem with the decision in *Barnett* is that the court apparently did not recognize that this case probably qualified as a circumstance where an implied power claim should have been recognized as valid. The Board was authorized to consent to a private party's use of submerged land owned by the state. It is reasonable in such a case to imply the statutory authority to withdraw consent for the use of these submerged lands in order to adequately protect the public interest. But this would probably not save the Board's decision in this case because any claim of implied authority generally must be implemented by adoption of administrative rules. There were no such rules in this case.

The danger is that in approving implied powers arguments the courts open the door to the possibility of an agency improperly expanding its jurisdiction beyond that authorized by the statute. In *Flor-*

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when the legislature had directed adoption of such procedures through the rule making process.); Yacucci v. Hershey, 549 So. 2d 782, 783-84 (Fla. 4th Dist. Ct. App. 1989) (per curiam) (The court held that a public defender could not be appointed to represent parents of a child in a dependency action, because it was not part of the duties of the Public Defender's office enumerated by statute.); State v. Parsons, 549 So. 2d 761 (Fla. 3d Dist. Ct. App. 1989) (The court rejected the claim that the Florida Marine Patrol had the authority to cite persons for non-criminal traffic violations.).

46. *See, e.g.*, Florida Comm'n on Human Relations v. Human Dev. Center, 413 So. 2d 1251 (Fla. 1st Dist. Ct. App. 1982); Board of Educ. v. Nelson, 372 So. 2d 114, 116 (Fla. 1st Dist. Ct. App. 1979).

47. *See* Manasota 88, Inc. v. Tremor, 545 So. 2d 439 (Fla. 2d Dist. Ct. App. 1989) (The court held that an agency does have the implied authority to order on remand that a hearing officer conduct a formal evidentiary hearing in order to assure the agency has an adequate record for resolving the matters at issue.).

ida League of Cities, Inc. v. Department of Insurance and Treasurer,[48] the city of St. Petersburg and the Florida League of Cities challenged the validity of the Department of Insurance proposed rules imposing regulations on municipal retirement and pension plans on the ground that it was an invalid exercise of legislatively delegated authority.[49] The hearing officer rejected this claim and held that all, but two of the proposed rules, were a valid exercise of legislatively delegated authority,[50] because the 1986 amendments to the laws regulating municipal fire fighters' retirement and pension plans were designed to establish minimum standards for operating such plans.[51] The court recognized the appropriate approach to judicial review of an agency interpretation of a statute, in a rule context, is one of deference as expressed in the *Board of Optometry v. Florida Society of Ophthalmology*.[52] However, the court rejected the Department of Insurance's interpretation of the statute and held the statute was not an express preemption of municipal authority as required by the Florida Constitution[53] and statutes.[54] The court held most of the proposed rules were invalid because they expanded the authority of the Department of Insurance beyond that established by the statutory scheme.[55] A general statement of intent to

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48. 540 So. 2d 850 (Fla. 1st Dist. Ct. App. 1989).

49. *Id.* at 853-54. It was alleged that the statutory provisions were not intended to apply to so-called local retirement and pension plans administered by municipal governments and that the proposed rules attempted to preempt local authority over these plans without express legislative authorization to do so. *Id.* at 855. It was also alleged that the rules were not supported by an adequate economic impact statement. *Id.* at 854. Because of the court's resolution of the other issue it did not decide this issue. *Id.* at 869.

50. *Id.* at 852. The administrative hearing was held pursuant to section FLA. STAT. § 120.54(4)(a) (1989). The hearing officer found that deference was owed to the Department of Insurance's contemporaneous interpretation of these statutory amendments. The proposed rules were a reasonable and necessary means of implementing its interpretation of the statutory amendments. *Florida League of Cities*, 540 So. 2d at 855.

51. *Florida League of Cities*, 540 So. 2d at 853. The statutes have been held on their face to be constitutionally valid. City of Orlando v. Department of Ins., 528 So. 2d 468 (Fla. 1st Dist. Ct. App. 1988).

52. 538 So. 2d 878 (Fla. 1st Dist. Ct. App. 1988), *clarified on reh'g*, 538 So. 2d 888 (Fla. 1st Dist. Ct. App. 1989); *see infra* notes 370-409 and accompanying text.

53. FLA. CONST. art. VIII, § 2(b).

54. FLA. STAT. § 166.021(1)-(4) (1987).

55. The court invalidated proposed rules 4-54.024(3), 4-54.029(2), 4-54.035, 4-54.036, 4-54.037, 4-54.039, 4-54.040, 4-54.041, 4-54.047, 4-54.048(3)&(5)-(6), 4-54.049. *Florida League of Cities*, 540 So. 2d at 860-69. The court expressed no opinion

impose minimum standards was not sufficient to imply preemption in light of the legislative history in this area which contained express statements of non-preemption. This result was supported by the requirement established in another statute that preemption must be *expressly* provided for in a statute in order to preempt local powers over a subject matter.[56]

The result in *Florida League of Cities* is the correct one. It is consistent with the distinction between implied powers argument used to expand agency jurisdiction beyond that delegated to it by the legislature as compared to when it is merely used to provide additional powers for implementing agency policy in an area clearly within its delegated area of authority. Courts must reject the former argument if the courts are going to meaningfully restrict agency jurisdiction to those subject matter areas in which the legislature delegated them authority. While the latter argument poses no such danger of impermissible expansion of agency jurisdiction.[57]

D. Procedural Due Process

Procedural due process protects an individual from the government arbitrarily depriving him or her of a constitutionally protected liberty or property interest. The initial issue in all such cases is whether a constitutionally protected liberty or property interest is at stake. If not, then procedural due process does not constrain the government's action. The finding of a constitutionally protected liberty interest generally turns on the court holding that a fundamental right, such as freedom of speech or privacy, is at stake.[58] The finding of a constitutionally protected property interest is more complex, because it turns on state law.[59] State law or other governmental conduct creates a constitution-

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on the validity of proposed rules 4-54.033, 4-54.034, and 4-54.048(5). *Id.* at 862, 868. The court did not find that all the proposed rules were beyond the power of the Department of Insurance to promulgate. The Court found that proposed rules 4-54.045 and 4-54.048(7) were a valid exercise of its delegated authority. *Id.* at 859-60.

56. *Florida League of Cities*, 540 So. 2d at 858-59.
57. *See* Burris I, *supra* note 4, at 316-22.
58. Burris I, *supra* note 4, at 323 n.167.
59. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) states:

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

ally protected property interest when the *Roth/Sindermann* mutuality of expectation test is satisfied.[60]

> To have a property interest in a [governmental] benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must . . . have a legitimate claim of entitlement to it.[61]

A legitimate entitlement is established by (1) the state's unilateral promise of benefit in its laws or administrative rules, or (2) the conduct of the state and the individual which creates "mutually explicit understandings that support . . . [the] claim of entitlement."[62]

In several cases during this survey period, Florida courts apparently used these principles to find there was no constitutionally protected property interest.[63] In *Metsch v. University of Florida*,[64] the court noted that the University of Florida College of Law admissions process had not created a constitutionally protected liberty or property interest because there was no explicit policy of entitlement and no mutuality of expectation.[65] In *Lake Hospital and Clinic, Inc. v. Silversmith*,[66] the court held, in part, that the legislature had a statutory scheme which protected staff privileges at private hospitals, but that nothing in the statutory scheme created a constitutionally protected property interest in staff privileges. The court therefore concluded that procedural due process does not constrain the revocation of staff privileges at private hospitals.[67] In *Striton Properties, Inc. v. City of Jacksonville Beach*,[68] the court held that the negotiated agreement between

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ment to those benefits.
See also Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985).

60. *Roth*, 408 U.S. at 564; Perry v. Sindermann, 408 U.S. 593 (1972).

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

62. *Sindermann*, 408 U.S. at 601.

63. The courts did not always make explicit reference to these principles in resolving issues in this area. *See* Polakoff v. Department of Ins. and Treasurer, 551 So. 2d 1223, 1225, 1227 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*, (The court implicitly recognized that a license to be a bail bondsman was a constitutionally protected property interest.).

64. 550 So. 2d 1149 (Fla. 3d Dist. Ct. App. 1989) (per curiam).

65. *Id.* at 1150.

66. 551 So. 2d 538 (Fla. 4th Dist. Ct. App. 1989), *reh'g denied, reh'g en banc & motion for clarification denied.*

67. *Id.* 543-44.

68. 533 So. 2d 1174 (Fla. 1st Dist. Ct. App. 1988), *reh'g denied.*

Striton Properties and the Community Redevelopment Agency of the City of Jacksonville Beach for the redevelopment of part of the city did not create a constitutionally protected property interest, because the agreement was never approved by the city as required by statute.[69] Until such approval was given Striton Properties had only a unilateral property interest expectation.[70]

Once a court determines that a constitutionally protected liberty or property interest is at stake, it must determine whether the procedural protection, if any, provided by the state is sufficient. The nature of the procedural protection which is constitutionally required will vary depending on the context. In *Mathews v. Eldridge*,[71] the Supreme Court adopted a balancing approach to this question.

> More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[72]

During this survey period the courts decided a limited number of cases concerning the constitutional adequacy of the procedure provided by the state. In *South Florida Natural Gas Company v. Public Service Commission*,[73] the court held that the Public Service Commission, in exercising its rate making authority, may permit its staff to question witnesses appearing before it and may participate in the discussions concerning evaluation of evidence. Participation by staff to this limited extent is designed to insure the Public Service Commission can make an informed decision concerning rate requests and does not violate procedural due process.[74] In *Ridgewood Properties, Inc. v. Department of*

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69. *Id.* at 1178; FLA. STAT. § 163.358 (1977).

70. *See also* City of Key West v. R.L.J.S. Corp., 537 So. 2d 641, 644, 646-48 (Fla. 3d Dist. Ct. App. 1989), *reh'g denied*, (The court rejected a claim of vested constitutionally protected property right as a result of receiving a building permit.).

71. 424 U.S. 319 (1976).

72. *Id.* at 334-35.

73. 534 So. 2d 695 (Fla. 1988) (per curiam).

74. *Id.* at 697-98. *Cf.* Cotter v. District Bd. of Trustees of Pensacola Jr. College, 548 So. 2d 731 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*, (The court held that

Community Affairs,[75] the court doubted that the "Department Secretary . . . [could] appear as a[n expert] witness [at an administrative hearing] when the same Secretary is the one who later enters the final order" without violating procedural due process principles.[76] It seems clear that such a participation is an aggregation of functions which violates the due procedure requirement of a neutral decision maker.[77] In *Arthritis Medical Center, Inc. v. Department of Health and Rehabilitative Services*,[78] the court noted procedural due process requires personal service in order for an administrative agency to acquire jurisdiction over a person or artificial entity. The Department of Health and Rehabilitative Services could establish jurisdiction only by serving the registered agent of Arthritis Medical Center. It failed to do so. The court reversed the administrative order, because an administrative agency cannot impose a penalty when it never properly established its jurisdiction.[79] What is remarkable about these cases is not the result in each instance, but the fact that the courts ignored the *Mathews v. Eldridge* paradigm for deciding such questions.

E. Subpoenas

Most administrative agencies are authorized to issue subpoenas.[80]

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participation by an attorney as advisor to the Board of Trustees in a hearing did not violate the APA.).

75. 548 So. 2d 1165 (Fla. 1st Dist. Ct. App. 1989) (per curiam).

76. *Id.* at 1166, *aff'd*, Ridgewood Properties, Inc. v. Department of Community Affairs, 14 Fla. L. Weekly 2110 (1989) (per curiam) (It is not permissible for the Secretary to testify.).

77. Burris I, *supra* note 4, at 330-31.

78. 543 So. 2d 1304 (Fla. 4th Dist. Ct. App. 1989).

79. *Id.* at 1305. In some cases procedural due process claims are not resolved because the court found the agency failed to follow its established procedures. In Weyburn v. Department of Health and Rehabilitative Servs., the court held, in part, that the a recipient of Aid to Families with Dependent Children could not have her benefits reduced for failure to participant in the work incentive program until notice was sent for an appointment to discuss the recipient's failure to comply with the requirements of the work incentive program. In this case all the notices which were sent concerned rescheduling of the recipient's work incentive program orientation appointment. These notices did not satisfy the notice requirement which must precede any reduction in benefits. The Court noted that this result was also consistent with the strong preference in the administrative regulations for conciliatory resolution of these types of problems rather than the imposition of sanctions. 535 So. 2d 680, 681-82 (Fla. 1st Dist. Ct. App. 1988).

80. *See* FLA. STAT. § 120.58(1)(b) (1989).

There are three constitutional based limitations on the issuance of administrative subpoenas: (1) the investigation must be within the scope of the agency jurisdiction; (2) the testimony and/or material sought must be reasonably relevant and material; and (3) the disclosure sought must not be of a privileged nature.[81] These limitations were imposed by the Supreme Court to guard against agency fishing expeditions. In *Fagan v. Department of Professional Regulation*,[82] the court held the reasonable cause requirement for the issuance of a subpoena for patient records in a physician disciplinary case was satisfied by expert opinion that the records did not support the physician's "pattern excessive surgery" and the occurrence of many strange, perhaps unbelievable questions and coincidences."[83] The court rejected as insufficient grounds for quashing the subpoena the bare assertion that the subpoena was unreasonable or unduly burdensome. The court also noted that the privacy rights of patients named in the records could not be asserted by the physician, as the disclosure of these records was for the benefit of the patients not the physician. In such a case the physician lacks standing to assert any interests of the patients.[84]

F. Search and Seizure

At one time there was a consensus in the courts that the fourth amendment[85] prohibition against unreasonable searches and seizures did not apply to administrative searches and seizures, because such activities did not strike at the core of what the fourth amendment was designed to protect.[86] Non-criminal administrative searches and seizures were not meant to permit invasion of a home or business to discover criminal wrong doing. The interest in avoiding invasions of pri-

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81. United States v. Morton Salt Co., 338 U.S. 632, 652-53 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 204-10 (1946); *see* Endicott Johnson Corp. v. Perkins, 317 U.S. 501 (1943); Hernandez v. State, 350 So. 2d 792 (Fla. 1977).

82. 534 So. 2d 802 (Fla. 3d Dist. Ct. App. 1988).

83. *Id.* at 803.

84. *Id.*

85. U.S. CONST. amend IV. The Florida constitutional provision regulating searches and seizures requires that it be interpreted as coextensive with the rights conferred under the fourth amendment of the United States Constitution. FLA. CONST. art. I, § 12 (as amended 1982); *see* Bernie v. State, 524 So. 2d 988 (Fla. 1988); State v. Lavazzoli, 434 So. 2d 321 (Fla. 1983); State v. Ridenour, 435 So. 2d 193 (Fla. 3d Dist. Ct. App. 1984).

86. Frank v. Maryland, 359 U.S. 360, 365-67 (1959).

vacy in non-criminal searches and seizures, like those involved in the administrative context, was not of the same category of interest.[87] Thus, warrantless administrative searches were the norm.

With the decisions in *Camara v. Municipal Court of City & County of San Francisco*[88] and *See v. Seattle*[89] the United States Supreme Court made the fourth amendment prohibition against unreasonable search and seizures applicable to administrative searches and seizures. However, administrative searches and seizures are not governed by the same requirements as apply to traditional searches and seizures conducted as part of a criminal investigation. Administrative searches and seizures are governed by a reasonableness requirement. This reasonableness approach requires the balancing of the need for the search against the degree of privacy invasion which will occur.[90] The reasonableness standard is used in judging whether probable cause exists to support a warrant, as well as to determine whether a warrantless search was lawful.[91] The requirement of probable cause under the reasonableness standard can be satisfied in three ways:[92] (1) if entry was refused for a routine inspection and there has been a passage of time since the last inspection;[93] or (2) if a complaint was received of a violation;[94] or (3) if other reasons exist for immediate entry.[95]

In *Fowler v. Unemployment Appeals Commission*,[96] the court reaffirmed its decision in *City of Palm Bay v. Bauman*,[97] by holding that unemployment benefits could properly be denied when a dispatcher in the Sheriff's Department had refused to take a urinalysis test. Fowler's refusal to take the urinalysis test was misconduct justifying withholding of unemployment compensation even when the Sheriff's Department had not adopted a policy requiring such tests. The court did not view

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87. *Id.*; *see* Donovan v. Dewey, 452 U.S. 594, 606-08 (1981) (Stevens, J., dissenting); Marshall v. Barlow's, Inc., 436 U.S. 307, 325-39 (Stevens, J., dissenting) (The court questioned the correctness of the *Camara* decision.).

88. 387 U.S. 523 (1967).

89. 387 U.S. 541 (1967).

90. *Camara*, 387 U.S. at 535-39; *See*, 387 U.S. at 545-46.

91. *Camara*, 387 U.S. at 539-40.

92. *See generally* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 238-270 (2d ed. 1978).

93. *Camara*, 387 U.S. at 538-39.

94. *Id.* at 540.

95. *Id.*

96. 537 So. 2d 162 (Fla. 5th Dist. Ct. App. 1989).

97. 475 So. 2d 1322 (Fla. 5th Dist. Ct. App. 1985).

such tests as a violations of any fourth amendment interest. The court found that no formal policy was needed in order to discipline an employee in this circumstance,

> when the employer has a reasonable suspicion of drug use by the employee . . . . Reasonable suspicion is all that is required. Failure to submit to a test, after being warned that failure to do so may result in dismissal, constitutes a deliberate disregard of the employer's interests, particularly where the employee is engaged in the kind of work for which full mental and physical competence is essential, not only for the employer's and employee's welfare, but for the safety and welfare of the general public.[98]

This result appears to be consistent with the Supreme Court's recent decision in *National Treasury Employees Union v. Von Raab*,[99] which applied the reasonableness standard to these types of searches and seizures.

G. Privilege Against Self-Incrimination

The privilege against self-incrimination applies to administrative investigations.[100] In *Rainerman v. Eagle National Bank of Miami*,[101] the court noted that the privilege against self incrimination can be asserted by a person during discovery in a civil proceeding if there were "reasonable grounds to believe that direct answers to deposition or interrogatory questions would furnish a link in the chain of evidence needed to prove a crime against him."[102] There is no reason to not apply this holding to discovery conducted in an administrative

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98. *Fowler*, 537 So. 2d at 164. *Cf.* Gonzalez v. State, 541 So. 2d 1354 (Fla. 3d Dist. Ct. App. 1989) (per curiam) (search of prisoners); T.J. v. State, 538 So. 2d 1320 (Fla. 2d Dist. Ct. App. 1989) (The search of a middle school student was permitted based upon reasonable suspicion.).

99. 109 S. Ct. 1384 (1989).

100. *See* Maness v. Meyers, 419 U.S. 449, 464 (1975); Arnette v. Florida State University, 413 So. 2d 806 (Fla. 1st Dist. Ct. App. 1982); Boynton v. State *ex rel.* Mincer, 75 So. 2d 211 (Fla. 1954) (The privilege applies to civil proceedings which involve forfeiture or penalty.). But several commentators have noted that it is general not a very effective check on the investigative powers of administrative agencies. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 296-98 (2d ed. 1978).

101. 541 So. 2d 740 (Fla. 3d Dist. Ct. App. 1989) (per curiam).

102. *Id.* at 741. *See also* Pillsbury Co. v. Conboy, 459 U.S. 248, 266 (1983).

proceeding.[103]

H. Standing[104]

1. Formal Administrative Hearing

A party is entitled to a formal hearing under the APA if "the substantial interests of a party are determined by an agency . . . whenever the proceeding involves a disputed issue of material fact."[105] There has been and continues to be an inordinate amount of litigation over whether a party has a substantial interest, which shall be determined by an agency, entitling the party to invoke the APA formal hearing process. An alleged adverse economic impact, by itself, continues to be insufficient to satisfy the substantial interest test for standing to invoke a formal administrative hearing.[106] In *Florida Society of Ophthalmology v. Board of Optometry*,[107] the court held that physicians specializing in ophthalmic medicine and their professional associations did not have standing under section 120.57[108] to challenge the licensing of optometrists, by the Board of Optometry, to administer and prescribe topical ocular drugs as part of their treatments.[109] The Board of Optome-

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103. *See* FLA. STAT. § 120.58(1)(b) (1989).

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

105. FLA. STAT. § 120.57 (1989). There are some exceptions to the formal hearing requirement. FLA. STAT. § 120.57(5) (1989).

106. In U.S. Sprint Communications Co. v. Nichols, the court held that the Public Service Commission is not required to hold a formal hearing where its action was merely a restatement of its prior decision concerning rates with a correction of an inadvertent error. 534 So. 2d 698 (Fla. 1988). This type of correction does not result in any substantive change in policy which affects a party's substantial interests. Thus, the only hearing the party was entitled to occurred at the time the Public Service Commission's original decision was made. *Id.* at 699-700.

107. 532 So. 2d 1279 (Fla. 1st Dist. Ct. App. 1988), *reh'g denied* [hereinafter *Florida Soc'y of Ophthalmology II*].

108. FLA. STAT. § 120.57 (1989).

109. In 1986, the legislature passed a statute authorizing the licensing of optometrists, who met certain requirements, to administer and prescribe drugs. FLA. STAT. § 463.0055 (1987). The Board of Optometry promulgated rules to implement the statute. FLA. ADMIN. CODE r. 21Q-10.001. This move was attacked in a variety of legal forums by medical and osteopathic physicians and their professional associations. *Florida Soc'y of Ophthalmology II*, 532 So. 2d at 1280 n.1. In this case the petitioners at-

try had denied the request for a section 120.57(1) formal hearing on each licensing application because the parties requesting the formal hearing did not have substantial interests at stake in the licensing decisions.[110] The Board of Optometry found that the injuries complained of by the petitioners were primarily economic in nature. It concluded, relying on *Shared Services, Inc. v. Department of Health and Rehabilitative Services*,[111] that this type of injury will not confer standing where the statute clearly did not include competitive economic interests in the zone of interests protected by the statute or administrative rules.[112]

The court agreed with the Board of Optometry, because any other result would require the courts to permit any interested citizen to have standing under section 120.57 "by merely expressing an interest" in an agency's decisions.[113] This would lead to chaos by "imped[ing] the ability of . . . agenc[ies] to function efficiently and inevitably [would] cause an increase in the number of litigated disputes well above the number that administrative and appellate judges are capable of handling."[114] The test for standing under section 120.57 is whether a person "1) . . . will suffer [an] injury in fact of sufficient immediacy, and 2) that . . . [the] substantial injury is of a type or nature the proceeding is designed to protect."[115] The court concluded that the petitioners

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tacked the validity of the rules implementing the new licensing provisions in addition to requesting a formal hearing under FLA. STAT. § 120.57(1) on each application for a license under the new licensing statute. *Florida Soc'y of Ophthalmology II*, 532 So. 2d at 1281; *see* FLA. STAT. §120.57(1) (1989).

110. The Board of Optometry rejected as insufficient on this point alleged claims of "economic injury to licensed physicians practicing ophthalmic medicine, . . . loss of public respect for the medical profession, and . . . decline in the quality of eye care . . . available to the public." *Florida Soc'y of Ophthalmology II*, 532 So. 2d at 1281. However, the Board of Optometry did grant the petitioners standing to challenge the validity of rule 21Q-10.001 and the application form in an administrative hearing as an "invalid exercise of delegated legislative authority." *Florida Soc'y of Ophthalmology II*, 532 So. 2d at 1283.

111. 426 So. 2d 56 (Fla. 1st Dist. Ct. App. 1983).

112. *Florida Soc'y of Ophthalmology II*, 532 So. 2d at 1283-85.

113. *Id.* at 1284.

114. *Id.*

115. Agrico Chemical Co. v. Department of Envtl. Regulation, 406 So. 2d 478, 482 (Fla. 2d Dist. Ct. App. 1981), *rev. denied*; Freeport Sulphur Co. v. Agrico Chemical Co., 415 So. 2d 1359 (Fla. 1982); Sulphur Terminals Co. v. Agrico Chemical Co., 415 So. 2d 1361 (Fla. 1982). The two elements of this standing test serve different purposes. "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." *Florida Soc'y of Ophthalmology*, 532 So. 2d at 1284.

did not satisfy either part of this test for standing under section 120.57. First, the degree of potential economic loss alleged was too indefinite to satisfy the immediacy requirement. Second, nothing in the statutes made competitive economic injury a factor in the licensing decision process, so it was not in the zone of interest protected.[116]

Similarly in *Metsch v. University of Florida*,[117] the court held that an applicant denied admission to the University of Florida College of Law was not entitled to a formal administrative hearing, because the desire to study law at a particular institution was not a substantial interest under the APA.[118] The court indicated that a substantial interest would be at stake if Metsch alleged and proved that the admissions process had created a constitutionally protected liberty or property interest. But in this case it was clear the state had not created such an interest.[119]

But in other cases involving employment or licensing of an individ-

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116. *Florida Soc'y of Ophthalmology II*, 532 So. 2d at 1285-86.

The court also dealt with two other points concerning standing. First, the court noted that this result was not inconsistent with Florida Medical Ass'n v. Department of Professional Regulation, 426 So. 2d 1112 (Fla. 1st Dist. Ct. App. 1983), because that case dealt with a challenge to a "proposed rule as an invalid delegation of legislative authority." The standard for standing in that circumstance is governed by FLA. STAT. §§ 120.54(4)(a) & 120.56(1). The test for standing under these statutory provisions is not as stringent as for FLA. STAT. § 120.57. A person could have standing, as in this case, under FLA. STAT. §§ 120.54(4)(a) & 120.56(1), but not have standing under FLA. STAT. § 120.57. *Florida Medical Ass'n*, 426 So 2d at 1286-88. Second, the court rejected the petitioners request for standing based upon the non-economic claim that a decline in the quality of medical treatment of eye problems will result. The court found that no showing was made that such an injury will in fact occur. It is just an unsupported allegation which is contrary to the decision already reached by the legislature in passing the new licensing statute. Further, there was no basis for granting the petitioners standing in this case to litigate claims concerning the quality of health care. This is a matter more properly pursued by petitioners' patients. In this case there are no policy reasons to justify granting the petitioners third party standing to litigate these matters. *Id.* at 1286.

117. 550 So. 2d 1149 (Fla. 3d Dist. Ct. App. 1989) (per curiam).

118. *Id.* at 1150-51. Unless the agency action is exempted, a party is entitled to a formal administrative hearing only if "the substantial interests of a party are determined by an agency . . . [and] the proceeding involves a disputed issue of material fact." FLA. STAT. § 120.57 (1989).

119. *Metsch*, 550 So. 2d at 1150. The court also noted that even if Metsch did have substantial interests determined by an agency he still was not entitled to a hearing, because it would have found that he was subject to the exemption for " 'any proceeding in which the substantial interests of a student are determined by the State University System.' " *Id.* (quoting FLA. STAT. § 120.57(5) (1989)).

ual the courts easily found that both elements of the standing requirement were satisfied. In *Taylor v. School Board of Seminole County*,[120] the court held that an employee who had been notified that her employment was terminated has a "substantial interest . . . [which has been] determined by an agency,"[121] and given her allegations, concerning disputed facts, is entitled to the formal hearing she requested.[122]

2. Formal Administrative Hearing in a Rule Challenge

The APA also provides that a party "substantially effected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority."[123] The standing requirements under this provision of the APA are not as rigorous as for a formal administrative hearing, but still provide a substantial check on access to the administrative process. In *Board of Optometry v. Florida Society of Ophthalmology*,[124] the court held that physicians specializing in ophthalmic medicine and their professional associations did not have standing to challenge the validity of the licensing rules, promulgated by the Board of Optometry, as an invalid exercise of delegated authority in an administrative proceeding.[125] The court found that the mere "overlapping of the traditional practice of ophthalmology with the optometrists' newly granted authority to . . . [prescribe topical ocular] drugs . . . is not legally sufficient" to satisfy the standing requirement for an attack on the validity of a rule in an administrative proceeding.[126] A party satisfies the standing requirement in this circumstance only if it can show it would suffer "a direct injury in fact of 'sufficient immediacy and reality.' "[127] This test for standing precludes a party from asserting "purely specula-

120. 538 So. 2d 150 (Fla. 5th Dist. Ct. App. 1989).

121. FLA. STAT. § 120.57 (1989).

122. *Taylor*, 538 So. 2d at 150; *accord* Zarifian v. Department of State, 552 So. 2d 267 (Fla. 2d Dist. Ct. App. 1989) (per curiam).

123. FLA. STAT. § 120.56(1) (1989).

124. 538 So. 2d 878 (Fla. 1st Dist. Ct. App. 1988), *clarified on reh'g*, 538 So. 2d 888 (Fla. 1st Dist. Ct. App. 1989) [hereinafter *Florida Soc'y of Ophthalmology III*].

125. *See* FLA. STAT. § 120.56(1) (1989).

126. *Florida Soc'y of Ophthalmology III*, 538 So. 2d at 881.

127. *Id.* The court noted that this standing requirement under FLA. STAT. § 120.56(1) was more stringent than the "substantially affected" standing requirement under FLA. STAT. § 120.54(4)(a), but offered no opinion as to whether these parties could even satisfy the standing requirement under section 120.54(4)(a). *Florida Soc'y of Ophthalmology III*, 538 So. 2d at 881-82 n.1.

tive and conjectural" claims, as such claims do not satisfy the standing requirement of section 120.56(1).[128] The legislature no longer grants the medical profession the exclusive right to prescribe topical ocular drugs. This legislative action destroyed any economic interest of the medical profession had in avoiding competition.[129] The interest of the medical profession in the quality of eye care available to the public is too speculative and conjectural to satisfy the sufficient immediacy and reality requirement for section 120.56(1) standing. The hearing officer erred in concluding that these claims were sufficient to establish that the physicians specializing in ophthalmic medicine and their professional associations had standing under section 120.56(1).[130]

This decision is inconsistent with *dicta* in the court's earlier opinion in *Florida Society of Ophthalmology v. Department of Professional Regulation*.[131] The court pointed out that "any substantially affected person" may challenge the validity of a proposed agency rule based upon a claim that it "is an invalid exercise of delegated legislative authority."[132] This statutory scheme requires only that a party make a theoretical showing to establish standing under the "substantially affected person" standard. However, when a party, as in this case, challenges the validity of a statute, on delegation grounds, under the declaratory judgment statute, the party has standing only if there is an actual controversy. A mere theoretical showing of a controversy is insufficient.[133] In this case the plaintiffs did not allege an actual controversy.[134]

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128. *Id.*

129. Where the parties would be regulated by the proposed rules they would have standing. Coalition of Mental Health Professions v. Department of Health and Rehabilitative Servs., 546 So. 2d 27, 28 (Fla. 1st Dist. Ct. App. 1989). *Cf.* Sarasota County Pub. Hosp. Bd. v. Department of Health and Rehabilitative Servs., 553 So. 2d 189 (Fla. 2d Dist. Ct. App. 1989), *reh'g denied*, (standing for a comparative hearing concerning a certificate of need application).

130. The court held that the Department of Professional Regulation had been granted standing by the legislature to challenge the validity of these rules under FLA. STAT. § 120.56(1); *Board of Optometry III*, 538 So. 2d at 882, 888-89; FLA. STAT. § 455.217 (1987). The court in the later portions of its opinion ultimate held the rules were invalid. *Board of Optometry III*, 538 So. 2d at 882-88; *infra* notes 187-210 and accompanying text.

131. 532 So. 2d 1278 (Fla. 1st Dist. Ct. App. 1988) [hereinafter *Florida Soc'y of Ophthalmology I*].

132. *Id.* at 1279; *see* FLA. STAT. § 120.54(4)(a) (1989).

133. *See also Florida Soc'y of Ophthalmology III*, 538 So. 2d at 880-81.

134. *Florida Soc'y of Ophthalmology I*, 532 So. 2d at 1279. The court re-

The irony is that the decision in *Florida Society of Ophthalmology III* denied the physicians, specializing in ophthalmic medicine and their professional associations standing, but they ultimately succeeded on the merits of their claims, because the Department of Professional Regulation did have standing.

3. Standing in Other Contexts

When courts viewed an economic interest involving a real and immediate controversy, they did not hesitate to find standing. In *Hillsborough County v. Unterberger*,[135] the court held that an attorney appointed to defend an indigent criminal defendant had standing to challenge the constitutionality of the administrative order by the chief judge setting the hourly rate of compensation for such service and the statute which authorized such an order. The attorney's interest in compensation for his service was sufficient to satisfy the requirement for standing.[136]

I. Exhaustion of Administrative Remedies

"As a general proposition, where an administrative remedy is provided by statute, relief must be sought by exhausting this remedy before the court will act."[137] Generally this is not a jurisdictional re-

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manded the case to the trial court with leave for the plaintiffs to amend their complaint to satisfy this requirement.

135. 534 So. 2d 838 (Fla. 2d Dist. Ct. App. 1988).

136. *Id.* at 841. The court also indicated in *dicta* that the attorney may have standing to assert his client's constitutional right to effective representation by counsel as part of his attack on the administrative order and statute. *Id.* The court ultimately held the administrative order and statute were both constitutional as to any interests asserted by the attorney. The court noted that no showing had been made that either the administrative order or the statute adversely impacted on the rights of criminal defendants. *Id.* at 841-42. *But see* White v. Board of County Comm'rs of Pinellas County, 537 So. 2d 1376, 1379-80 (Fla. 1989) (The court indicated that the statutory maximum attorney fee must be waived in most if not all capital cases.); Leon County v. McClure, 541 So. 2d 630 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*, (The court approved of an award of attorney's fee in excess of the statutory amount.). *Cf.* Board of County Comm'rs of Hillsborough County v. Scruggs, 545 So. 2d 910 (Fla. 2d Dist. Ct. App. 1989) (per curiam) (The case dealt with the authority of courts to award an attorney's fee in excess of the statutory maximum in civil cases.).

137. Halifax Area Council v. City of Daytona Beach, 385 So. 2d 184, 186 (Fla. 5th Dist. Ct. App. 1980).

quirement,[138] but rather a prudential one

> designed to assure: (1) that courts do not stray from their limited role of judicial review in the administrative process; (2) that agencies have an opportunity to perform the duties delegated to them by the legislature; and (3) that agencies have the initial opportunity to correct any errors that occurred during the administrative process.[139]

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

In *City of DeLand v. Lowe*,[140] the court held that the circuit court erred in not dismissing a suit challenging a zoning decision, because there was no final agency decision until the administrative appeal process was exhausted.[141]

> As an administrative agency, the Board of Adjustment should be given the opportunity to interpret its own rules. This serves the purpose of preventing needless litigation and fosters settlement negotiations. Permitting the Board to hear the case will greatly benefit circuit court and appellate review by creating a solid factual record and serves to narrow and more precisely frame the issues.[142]

In *Department of Professional Regulation v. Marrero*,[143] Dr. Marrero, a physician already licensed to practice medicine in Pennsyl-

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138. *But see* Park v. Dugger, 548 So. 2d 1167, 1168 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*, (The court held that exhaustion of administrative remedies was a jurisdictional prerequisite to a circuit court having jurisdiction to issue a writ of *mandamus*.); Leonard v. Morgan, 548 So. 2d 803, 804 (Fla. 1st Dist. Ct. App. 1989) (per curiam), *reh'g denied*, (Exhaustion of administrative remedies may be required where the legislature has given an administrative agency exclusive jurisdiction to rule on the matter initially.).

139. Burris I, *supra* note 4, at 344. Because the exhaustion of administrative remedies requirement is prudential courts may waive it in appropriate cases. One exception to the exhaustion of administrative remedies requirement is when the case involves constitutional issues which an agency cannot address in its administrative proceeding. *Leonard*, 548 So. 2d at 804; *see also* Public Serv. Comm'n v. Fuller, 551 So. 2d 1210, 1212-13 (Fla. 1989).

140. 544 So. 2d 1165 (Fla. 5th Dist. Ct. App. 1989).

141. *Id.* at 1168-69. The appellate court also noted that it disagreed with the circuit court's resolution of several legal issues. *Id.* at 1169.

142. *Id.* at 1169.

143. 536 So. 2d 1094 (Fla. 1st Dist. Ct. App. 1988).

vania, applied for a license to practice medicine in Florida. Dr. Marrero appeared before the Board of Medicine and a question arose concerning evaluations of Dr. Marrero and the possibility that he was suffering from personality problems. The Board of Medicine requested that Dr. Marrero appear at a second meeting and suggested that he provide the board with a psychiatric evaluation. Dr. Marrero subsequently accepted employment in Pennsylvania and requested that his application for a license to practice medicine be withdrawn. The Board of Medicine refused to grant the request for withdrawal of the application and denied his application.[144] Dr. Marrero filed suit in circuit court seeking to enjoin the Board of Medicine from taking any further action on his application. The circuit court enjoined the Board of Medicine from taking any further action on Dr. Marrero's application.

The district court of appeal reversed, because there was no indication in the record that the Board of Medicine was acting without colorable statutory authority "clearly in excess of its implicitly or reasonably delegated powers."[145] Absent this circumstance, a party is required to exhaust his administrative remedies before judicial review will be available.[146] The Board of Medicine, not the circuit court, should decide after a full administrative hearing, if one is requested, whether it has the authority to deny an application for a license to practice medicine after the applicant has requested that his application be withdrawn.[147] The administrative hearing is the appropriate and adequate forum for resolving the issue raised by Dr. Marrero. An administrative hearing will provide the reviewing court with a complete record and properly allow the Board of Medicine and the Department of Professional Regulation to exercise their discretion in determining this type of policy question.[148]

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144. The Board of Medicine retained jurisdiction until its next meeting thereby giving Dr. Marrero another chance to appear before the denial of the application became final. *Id.* at 1095.

145. *Id.* at 1096. The court noted that there are precedents which support the Board of Medicine's claim that it has the implied power to act as it did in this case. *Id.* at 1097-98.

146. *Fox*, 545 So. 2d at 1095 (citing Department of Envtl. Regulation v. Falls Chase Special Taxing Dist., 424 So. 2d 787, 796-97 (Fla. 1st Dist. Ct. App. 1982)). The court also noted that this result was consistent with the primary jurisdiction doctrine. *Id.* at 1097.

147. *Id.* at 1096.

148. *Id.* at 1097. *But see* City of Tallahassee v. Talquin Elec. Coop., Inc., 549 So. 2d 725 (Fla. 1st Dist. Ct. App. 1989) (not requiring exhaustion of administrative

In *Florida Society of Newspaper Editors v. Public Service Commission*,[149] the court noted that "[e]xhaustion of administrative remedies is a question of judicial policy, not jurisdiction."[150] When, as in this case, administrative remedies are available which can provide a remedy for the alleged wrong, then a circuit court can decline to exercise jurisdiction under the exhaustion of administrative remedies doctrine.[151] Nothing in the public records and sunshine laws precludes the application of the exhaustion of administrative remedies doctrine.

III. Government in the Sunshine

The Public Records[152] and Sunshine[153] statutes are designed to assure public access to the decision making process of governmental institutions and records of such institutions. As a result of these two statutes the operation of Florida governmental institutions is very open to public scrutiny. The courts have, generally, rigorously enforced the requirements of both these statutes.

A. Public Records Act

The Public Records Act[154] creates a presumption that all state, county, and municipal records are open for public inspection unless exempted under the act. An agency claiming exemption from the disclosure requirement established by the public records act bears the burden of proving that the exemption claimed was properly invoked. The motive of the party seeking disclosure is irrelevant in determining whether a record must be disclosed.[155]

The Public Records Act can even reach a private party under contract to perform a governmental service. In *Fox v. News-Press Publish-*

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remedies).

149. 543 So. 2d 1262 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*.

150. *Id.* at 1266.

151. *Id.* at 1266-67.

152. FLA. STAT. §§ 119.01-.14 (1987).

153. FLA. STAT. § 286.011 (1987).

154. FLA. STAT. §§ 119.01-.14 (1987). *See* Burris II, *supra* note 4, at 761-64; Burris I, *supra* note 4, at 382-84; Peltz, *Use of the Florida Public Records Act as a Discovery Tool in Tort and Administrative Litigation Against the State*, 39 U. MIAMI L. REV. 291 (1985).

155. News-Press Publishing Co. v. Gadd, 388 So. 2d 276, 278 (Fla. 2d Dist. Ct. App. 1980), *reh'g denied*.

ing Company, Inc.,[156] the court held, in part, that a towing company which had the exclusive towing contract with the City of Fort Meyers was required to open its records concerning cars it towed under the terms of its contract and under the public records law.[157] The court applied a totality of circumstance test focusing on whether the private actor was performing an essential governmental function in determining when such a result was required.[158] In this case the court concluded that the towing company in removing wrecked and abandoned vehicles from public ways was performing a governmental function.[159]

A writ of *mandamus* is the usual form of judicial relief used to remedy a violation of the Public Records statute. But nothing in the statute makes it the exclusive remedy. In *Daniels v. Bryson*,[160] the court held that injunctive relief may be granted under the Public Records statute only "where there is a demonstrated pattern of non-compliance with . . . [the statute], together with a showing of likelihood of future violations [and that a writ of] *[m]andamus* would not be an adequate remedy."[161] The limitations of the writ of *mandamus* remedy were noted by the court in *Florida Society of Newspaper Editors v. Public Service Commission*.[162] The court observed that a writ of *mandamus* may not be used to direct an agency to perform an act within the scope of its discretionary authority or to alter or amend an agency act or decision within the scope of its discretionary authority.[163] An agency responding to public records law requests normally is engaged in a non-discretionary act. It is performing a mere ministerially

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156. 545 So. 2d 941 (Fla. 2d Dist. Ct. App. 1989), *reh'g denied*.

157. However, the court ultimately held that the towing company did not need to open its records because no showing was made that the records requested were in its custody. *Id.* at 943-44.

158. As the court states,

> While there is no one factor that determines when records of a private business under contract with a public entity fall within the preview of the public records law, a totality of factors which indicate a significant level of involvement by the public entity, such as the City [of Fort Meyers] . . . can lead to the conclusion that records are subject to the Public Records Act.

Id. at 943.

159. *Id.*

160. 548 So. 2d 679 (Fla. 3d Dist. Ct. App. 1989), *reh'g denied*.

161. *Id.* at 680-81. The court ultimately concluded that the requirements for injunctive relief were not present in this case. *Id.* at 681.

162. 543 So. 2d at 1262.

163. *Id.* at 1264.

function of "compar[ing] . . . the document in question with the pertinent exemption provision."[164] An agency must disclose any document requested which does not fall within one of the statutory exemptions.[165] But, unlike most other exemptions, the statutory "exemption for 'proprietary confidential business information' requires an exercise of [agency] discretion."[166] It is not self-evident whether a document is in this category, and an agency must determine if the document requested is in fact subject to the proprietary confidential business information exemption. In such cases the writ of *mandamus* is not the appropriate judicial remedy.[167] The appropriate remedy is to exhaust administrative remedies which are available or file suit requesting an injunction.[168]

Courts, in applying the requirements of the Public Records Act, are sensitive to the exemptions provided and will use them to limit access in appropriate cases. In *Dickerson v. Hayes*,[169] the court held that those portions of the rating sheets, created by examiners during an oral examination as part of a promotion evaluation process, which contained the answers to the questions asked were specifically exempted from the public records law.[170] The petitioner received all that he was entitled to under the public records law — a copy of his complete rating sheet and portions of the other rating sheets which contained the examiners' impressions and grades for the responses, but not the answers of the other job applicants.[171] In appropriate circumstances the courts will even judicially create an exception to the Public Records Act requirements in order to preserve constitutional rights. In *Wolfinger v. Sentinel Communications Co.*,[172] the court noted that pretrial discovery material in the possession of the State Attorney was clearly subject to disclosure under the Public Records law.[173] However, in a criminal case the statutory requirement of disclosure must be balanced against the constitutional right to a fair trial.[174] Hence, the court reversed the trial court's

164. *Id.*
165. *Id.* at 1264-65.
166. *Id.* at 1265.
167. *Florida Soc'y of Newspaper Editors*, 543 So. 2d at 1265.
168. *Id.* at 1266; *see supra* notes 137-51 and accompanying text.
169. 543 So. 2d 836 (Fla. 1st Dist. Ct. App. 1989).
170. *Id.* at 837; FLA. STAT. § 119.07(3)(c) (1989).
171. *Dickerson*, 543 So. 2d at 836-37.
172. 538 So. 2d 1276 (Fla. 5th Dist. Ct. App. 1989), *reh'g denied*.
173. *Id.* at 1277.
174. *Id.*; Florida Freedom Newspapers, Inc. v. McCrary, 520 So. 2d 32 (Fla. 1988).

order directing disclosure and remanded the case to the trial court directing it to balance the interest in a fair trial against the statutorily created presumption in favor of disclosure before ordering disclosure.[175]

B. Sunshine Act

The Florida Sunshine Law provides that official action taken by state and local agencies must occur only at "public meetings open to the public at all times" unless the Florida Constitution provides otherwise.[176] The purpose of the law was to ensure that the shaping of public policy by governmental institutions occurs in the public domain. The courts have generally interpreted the statute very broadly in order to fully achieve its purpose. In *Spillis Candela & Partners, Inc. v. Centrust Savings Bank*,[177] the court held that an *ad hoc* advisory committee appointed by the Dade County Board of Rules and Appeals to report on whether the plans for the Centrust Tower parking garage complied with fire resistivity provisions of the South Florida Building Code was subject to the requirements of the Sunshine Law. "An *ad hoc* advisory board even if its power is limited to making recommendations to a public agency and even if it possesses no authority to bind the agency in any way, is subject to the [requirements of the] Sunshine Law."[178] When the *ad hoc* advisory committee reached its decisions in private discussions, it violated the open meeting requirement of the Sunshine Law. This violation could only be cured by a "full, open public hearing" by the Dade County Board of Rules and Appeals.[179] This did not occur. But there are limits to the scope of the Sunshine Law. In *City of Sunrise v. News and Sun-Sentinel Company*,[180] the court held that the planned meeting between the mayor and a city employee was not subject to the Sunshine Law, because it did not involve a meeting between two or more public officials and that the mayor was not acting on behalf of any body of public officials.[181]

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175. *Wolfinger*, 538 So. 2d at 1278.
176. FLA. STAT. § 286.011 (1987); *see also* Burris I, *supra* note 4, at 381-82.
177. 535 So. 2d 694 (Fla. 3d Dist. Ct. App. 1988) (per curiam).
178. *Id.* at 695.
179. *Id.*
180. 542 So. 2d 1354 (Fla. 4th Dist. Ct. App. 1989).
181. *Id.* at 1355-56.

IV. The Administrative Procedure Act

In order for an agency to escape the requirements of the APA, an agency must be excluded from coverage in the APA[182] or an agency decision process must be expressly excluded from the APA by a subsequent statute.[183] Courts are reluctant to find that such an express subsequent statutory exemption has been created.[184]

A. Rules Versus Orders

Generally, agencies can create legally binding policy by either using their rule making authority[185] or by properly developing policy positions in adjudicatory proceedings.[186] The latter have been labeled incipient rules by the courts, because they are developed in the case by case adjudicative process through a series of orders.[187] There are several critical distinctions between the two processes.[188] One such distinction

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182. FLA. STAT. §§ 120.50, 120.52(1)(c) (1989).

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

184. *See* City of Destin v. Department of Transp., 541 So. 2d 123, 127 (Fla. 4th Dist. Ct. App. 1989).

185. *See* FLA. STAT. § 120.54 (1989).

186. "While the Florida APA . . . requires rulemaking for policy statements *of general applicability*, it also recognizes the inevitability and desirability of refining incipient agency policy through adjudication of individual cases." McDonald v. Department of Banking and Fin., 346 So. 2d 569, 581 (Fla. 1st Dist. Ct. App. 1977) (emphasis added), *reh'g denied*; *see also* Rolling Oaks Utils. v. Florida Pub. Serv. Comm'n, 533 So. 2d 770, 774, *modified on reh'g*, 533 So. 2d 775 (Fla. 1st Dist. Ct. App. 1988) (The facts of the case clarified. The court reaffirmed that agencies may create *de facto ad hoc* rules through the adjudicative process and held that the margin reserve policy of the Public Service Commission developed in its orders was a valid incipient rule.). Policy also maybe established through agency declaratory statements. FLA. STAT. § 120.565 (1989). However, when the legislature has directed that a policy be adopted through the rule making process, then the incipient rule making approach is foreclosed. *See* Evans Packing Co. v. Department of Agric. and Consumer Servs., 550 So. 2d 112, 120-21 (Fla. 1st Dist. Ct. App. 1989).

187. *Rolling Oaks Utils.*, 533 So. 2d at 773-74; *see also* St. Francis Hosp., Inc. v. Department of Health and Rehabilitative Servs., 553 So. 2d 1351, 1354 (Fla. 1st Dist. Ct. App. 1989); St. Joseph's Hosp. v. Department of Health and Rehabilitative Servs., 536 So. 2d 346, 347-48 (Fla. 1st Dist. Ct. App. 1988) (The court held that the denial of permission to transfer 100 acute care beds to a proposed satellite hospital was consistent with the Department of Health and Rehabilitative Services' administrative rules and incipient rule concerning such transfers and its factual findings were supported by competent substantial evidence.).

188. One distinction, which exists more in theory than practice, is that incipient

is the type of record required to support agency policy developed in an adjudicatory proceeding.[189] *Ganson v. Department of Administration*[190] is a case illustrating this distinction. In *Ganson*, the court reviewed the Department of Administration's interpretation of the pre-existing condition limitation in the state employee health insurance coverage.[191] The Department of Administration interpretation treated all mental or nervous disorders as one condition for purposes of determining if a pre-existing condition existed.[192] The Department of Administration justified this interpretation based upon its claims experience which led it to conclude that all mental or nervous disorders must be treated as one condition for purposes of the pre-existing condition exclusion.[193] The court noted that the Department of Administration never adopted this position as a rule and it does not appear on the face of the unambiguous policy language. "When . . . an agency does not choose to document its policy by rule, there must be adequate support for its decision in the *record* of the proceeding."[194] The agency in such a case must support in the record with competent substantial evidence *every* factual conclusion that is necessary to justify the agency's policy choice and

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rule making process is limited to circumstances where an agency has not yet settled on an approach to a problem and wants to preserve its freedom to experiment with possible solutions. *Rolling Oaks Utils.*, 533 So. 2d at 774. If an agency has settled on a policy then it should use the rule making process to adopt it as a formal rule.

189. Related to this distinction is the possibility that the standard of judicial review applied by the courts may be different. *See* Adam Smith Enters., Inc. v. Department of Envtl. Regulation, 553 So. 2d 1260 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*; *infra* notes 370-409 and accompanying text.

190. 554 So. 2d 516 (Fla. 1st Dist. Ct. App. 1989).

191. The pre-existing condition exclusion excludes from coverage for one year any condition for which the employee received treatment during the preceding year. *Id.* at 517. The hearing officer found that Ganson suffered from situational depression before enrolling in the state health insurance plan, and that the subsequent diagnosis of bipolar affective disorder after enrolling in a plan was a "separate and distinct condition." *Id.* at 518. The Department of Administration reversed the hearing officer's decision, because the symptoms for both conditions were basically the same as was the treatment. *Id.* at 519. The court reversed the Department of Administration factual conclusions, because it had not demonstrated that the hearing officer's factual conclusions were not supported by competent substantial evidence. *Id.* at 519-20.

192. The Department of Administration did not lump all pre-existing physical disorders in one category for purposes of the pre-existing condition exclusion. *Adam Smith Enters.*, 553 So. 2d at 520.

193. *Id.*

194. *Id.* (emphasis added)

detail the legal rationale for such policy choices.[195] The record in this case did not provide adequate factual support for the agency's policy position. The court went on to hold that as a matter of law the Department of Administration's interpretation was inconsistent with the clear and unambiguous language in the health insurance policy.

The courts have resisted attempts to expand the scope of the incipient rule making policy to cover policies developed outside of the adjudicatory process.[196] In *Public Service Commission v. Central Corporation*,[197] the Public Service Commission *sua sponte* issued an administrative order,[198] which it characterized as an interim rate order, requiring alternative operator service providers to "hold subject to refund all revenues collected by those providers which exceeded the most comparable local exchange rate."[199] The Public Service Commission was concerned that the rates being charged by alternative operator service providers were excessive and not in the public interest. Central Corporation, an alternative operator provider, claimed, in an administrative proceeding, the order was an invalid rule because it was not promulgated through the rule making process. The court held that the order was not an interim rate because the rates for alternative operator service providers were not governed by a base rate.

Under the statutory scheme interim rate orders can only apply to providers governed by a base rate.[200] The Public Service Commission was regulating alternative operator service providers under the in public interest provision of the statutory scheme concerning rate making.[201] The court held that the Public Service Commission's order was a rule. Under the APA a rule is any agency "statement of general applicabil-

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195. *Id.* (citing Anheuser-Busch, Inc. v. Department of Business Regulation, 393 So. 2d 1177, 1182-83 (Fla. 1st Dist. Ct. App. 1981)).

196. *See Florida Soc'y of Ophthalmology III*, 538 So. 2d at 888 (The court held, in part, the Board of Optometry's form for implementing its rules concerning the licensing of optometrists to administer and prescribe topical ocular drugs was a substantive rule and was invalid because it was not promulgated through the rule making process.).

197. 551 So. 2d 568 (Fla. 1st Dist. Ct. App. 1989).

198. The Public Service Commission had received numerous complaints that the alternative operator service providers were charging excessive rates. Prior to the issuance of this order the rates charged by alternative operator service providers had not been regulated by the Public Service Commission. *Id.* at 569.

199. *Id.*

200. *Id.*; *see* FLA. STAT. § 364.055(1)-(5) (1987).

201. *Central Corp.*, 551 So. 2d at 569; *see* FLA. STAT. § 364.14(1) (1987).

ity that implements, interprets, or prescribes law or policy."[202] The Public Service Commission's order met these requirements. The general applicability requirement was satisfied, because the order was applicable to all alternative operator service providers in Florida. The order also implemented, interpreted and prescribed policy by imposing a new obligation, that did not exist prior to the issuance of the order. The court found the fact the order was intended to remain in effect for only a brief period of time did not alter the result. "However, a temporarily limited agency action is properly denominated a rule if it has the consistent effect of law, that is, is consistently applicable throughout its existence to an entire group rather than to one member of that group."[203] The court rejected the claim that this order was a form of incipient rule making because the Public Service Commission had not offered the alternative operator service providers a point of entry in its decision process. The Public Service Commission did not hold a formal or informal hearing necessary for the development of a record to support incipient rule making. It just announced its order. By failing to provide a hearing the Public Service Commission acted beyond the scope of the judicially created incipient rule making doctrine. The Public Service Commission must follow one of the two courses available for developing policy, either rule making or incipient rule making. There are no other valid means for the development of policy.[204]

Not all members of the judiciary are willing to accept this limitation on the incipient rule making concept. Judge Ervin, in his dissenting opinion, in *Central Corporation* argued that the courts had no power to "invalidat[e] agency action having the characteristics of a rule, . . . but [which was] not formally adopted as such."[205] There is a long tradition in Florida of the validity of agency action not turning on whether it was made pursuant to the rule making process or by an order in the adjudication process.[206] Further, this order is not a rule, because "its only effect is to ensure that certain monies be set aside until policy can be developed and enunciated."[207] The purpose of rule making is to inform the public about intended agency action, provide a

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202. FLA. STAT. § 120.52(16) (1989).

203. *Central Corp.*, 551 So. 2d at 570 (citing Balsam v. Department of Health and Rehabilitative Servs., 452 So. 2d 976 (Fla. 1st Dist. Ct. App. 1984)).

204. *See id.* at 571. *But see* FLA. STAT. § 120.565.

205. *Id.* at 571 (Ervin, J., dissenting).

206. *Id.* at 572.

207. *Id.* at 571.

forum for a review of competing policy considerations, and limit agency discretion by articulating more specific standards.[208] The Public Service Commission's order was not concerned with any of these matters.[209] It was merely a means of protecting consumers until the Public Service Commission was ready to act by promulgating a rule, holding a hearing and issuing an order containing an incipient rule, or proceeding against the alternative operator service providers through individual adjudication. As such the order did not establish any policy, it merely preserved the interest of consumers until a policy was adopted. Further, Central Corporation has not been denied access to the agency decision process. It has had access through the formal administrative hearing upon which this appeal was based.[210] Finally, it will have an opportunity to contest the rate making issue again when the Public Service Commission finally promulgates a rate order or promulgates a rule.

B. Adjudicatory Procedures and Structure

The courts decided three cases, during the survey period, which generally concerned the structure of the adjudicatory process and the procedure used.

In *Edgar v. School Board of Calhoun County*,[211] the court noted that an APA hearing is designed to give the agency an opportunity to change its mind concerning the action it proposed. The court held this goal would be defeated if the agency had prejudged the matter. Such prejudgment is not implied from the agency merely having proposed a course of action. The burden is on the party making the allegation of prejudgment to demonstrate facts supporting its position which are beyond those arising from the aggregation of function in the administrative process.[212]

If a party has standing and timely requests a formal administrative hearing on disputed factual issues, then it is reversible error for the agency to not hold the hearing.[213] In *Inverness Convalescent Center v.*

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208. *Central Corp.*, 551 So. 2d at 572.
209. *Id.*
210. *Id.* at 574.
211. 549 So. 2d 726 (Fla. 1st Dist. Ct. App. 1989).
212. *Id.* at 728.
213. Totura v. Department of State, 553 So. 2d 272 (Fla. 1st Dist. Ct. App. 1989); Hernandez v. Department of State, 546 So. 2d 1174, 1175 (Fla. 3d Dist. Ct. App. 1989); Krueger v. School Dist. of Hernando County, 544 So. 2d 331 (Fla. 5th Dist. Ct. App. 1989).

Department of Health and Rehabilitative Services,[214] the court affirmed the denial of a petition for a formal administrative hearing, because such a petition should have been filed three years earlier. In such a case unless there are extraordinary circumstances justifying a waiver of the requirement of timely filing, the petition should be denied as untimely.[215]

In *Wilson v. Department of Administration*,[216] the court noted that if a party failed to answer a request for admission, then the matter is considered admitted unless a request to withdraw or amend is granted.[217] The court held that such a request should be granted so long as the opposing party was not able to demonstrate it was prejudiced by the withdrawal of the admission. In this case the Department of Administration knew that Wilson contested the matter which was deemed admitted.[218]

C. Licensing

In *Evans Packing Co. v. Department of Agriculture and Consumer Services*,[219] the court discussed the burden of persuasion an agency must satisfy in a license revocation proceeding. The court stated "that irrespective of whether the license is held by an individual or a corporate entity, it was incumbent upon the . . . [agency] to prove the charged violation . . . by clear and convincing evidence."[220] The

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214. 541 So. 2d 677 (Fla. 1st Dist. Ct. App. 1989).

215. *Id.* at 679-80. The court distinguished the facts in this case from those in NME Hosps., Inc. v. Department of Health and Rehabilitative Servs. where the court did approve of an untimely filing of a petition for review. 492 So. 2d 379 (Fla. 1st Dist. Ct. App. 1986); *see also* Health Quest Corp., v. Department of Health and Rehabilitative Servs., 548 So. 2d 719, 720-21 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*, (The point from which time is measured for purposes of determining if the hearing request is timely in the context of a certificate of need application is when the right to a comparative hearing is available. This attaches as soon as a certificate of need has been issued to another institution in the same area.).

216. 538 So. 2d 139 (Fla. 4th Dist. Ct. App. 1989).

217. FLA. ADMIN. CODE r. 28-5.208 (established administrative discovery rules by incorporating the FLA. R. CIV. PRO. r. 1.280-1.400).

218. *Wilson*, 538 So. 2d at 141.

219. 550 So. 2d 112 (Fla. 1st Dist. Ct. App. 1989).

220. *Id.* at 116 (citations omitted). The court noted that the clear and convincing burden of persuasion is met when "[t]he evidence . . . [is] of such weight that it produces in the mind of the trier of fact the firm belief of conviction, without hesitancy, as to the truth of the allegations sought to be established." *Id.* at 116 n.5 (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th Dist. Ct. App. 1983)). *Cf.* South

agency erred in not stating the burden of persuasion in its order, particularly when the Florida Supreme Court only recently[221] imposed this burden of persuasion in licensing cases.[222] But the court ultimately held that the agency committed reversible error in this case, because the record did not contain competent substantial evidence sufficient to establish, under the clear and convincing burden of persuasion, that Evans had violated the prohibition against selling and shipping orange juice adulterated with pulp wash solids.[223] The court also held that the statutory and administrative rules prohibition against washed pulp solids in orange juice was intended to punish only the "wrongful act of adding [such] a prohibited ingredient to orange juice."[224] The agency's interpretation of imposing strict liability for the presence of any washed pulp solids is only valid when

> (1) the dealer has complete control of the process so that adulteration cannot occur without its actual or constructive knowledge or participation, or (2) if the process is not entirely within the dealer's control, it is possible for the dealer, before permitting the product to be sold and shipped, to take other steps to prevent distribution of adulterated products, such as analyzing and testing the product for the presence of prohibited ingredients which may have been added by others without the dealer's knowledge or participation. [A] dealer should not be held responsible as a matter of law for adulteration of a product not caused by it in the absence of some available means to test for or otherwise prevent such adulteration.[225]

In this case the agency had failed to prove that Evans "sold and shipped orange juice containing pulpwash additive . . . [in which it] either caused the adulteration or failed to exercise due diligence to pre-

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Fla. Natural Gas Co. v. Florida Pub. Serv. Comm'n, 534 So. 2d 695, 697 (Fla. 1988) (per curiam) (A utility seeking a rate change bears the burden of "demonstrat[ing] that the present rates are unreasonable . . . and show[ing] by a preponderance of the evidence that the [current] rates fail to compensate the utility for its prudently incurred expenses and fail to produce a reasonable return on its investment.").

221. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

222. The court stated in this context it was "highly doubtful" the agency applied the correct burden of persuasion. *Evans Packing Co.*, 550 So. 2d at 116.

223. The record failed to establish under these standards that Evans caused or participated in the adulteration or that it did not use due diligence. *Id.* at 119.

224. *Id.* at 117-18

225. *Id.* at 118.

vent the sale or shipment of the adulterated product."[226] The statute does not permit the punishment of a dealer when the dealer "had no way of knowing that it had violated the statute, and could not have prevented or detected the violation through the exercise of due diligence."[227] Evans had no means of detecting pulp wash solids in the juice it purchased from Brazil and Florida producers[228] and there was no evidence that it added the pulp wash solids to the orange juice.[229]

The result may have been different if the agency had used its rule making authority to adopt a method for testing citrus products for the presence of pulp wash solids. The method used to defect the presence of pulp wash solids in this case was not sufficiently reliable to satisfy the clear and convincing burden of persuasion. The test used would detect even *de minimis* amounts of pulp wash solids, but had not been accepted in the scientific community as reliable. The testimony at the hearing established that the pulp wash solids detected by the test used could have a variety of sources and need not be the result of adulteration of the orange juice.[230] The agency was directed by statute to establish testing procedures by administrative rule not on the basis of case by case adjudication. The agency cannot escape this statutory requirement. Any attempt to do so is an *ultra vires* act. The cases where the courts have authorized case by case development of scientific testing standards are distinguishable because in those cases there was no statutory requirement that the agency adopt a test by administrative rule.[231]

In two cases the courts discussed what types of conduct justified an agency in denying a license application and revoking a license. In *Taylor v. Department of Professional Regulation*,[232] the court held that a physician could not be disciplined "for prelicensure misconduct where he did not falsify his application and is adjudged [otherwise] presently fit to practice."[233] In *Winkelman v. Department of Banking*

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226. *Id.*
227. *Evans Packing Co.*, 550 So. 2d at 118.
228. *Id.* at 121.
229. At best it was an inference to be drawn from the presence of the pulp wash solids. But in this case there were other explanations for the presence of the pulp wash solids so the inference is really just a speculation. Speculation does not satisfy the clear and convincing burden of persuasion. *Id.*
230. *Id.* at 120.
231. *Id.*; *see supra* notes 42-57 and accompanying text.
232. 534 So. 2d 782 (Fla. 1st Dist. Ct. App. 1988).
233. *Id.* at 784.

& Finance,[234] the court held that a conviction based upon a guilty plea to a crime involving moral turpitude was an adequate basis for revocation of registration as an associated person under the Florida Securities and Investor Act.

Under the APA a stay of an agency license suspension or revocation order is generally granted, as a matter of right, during the judicial review process.[235] However, if a court concludes that granting a stay of the agency order suspending or revoking a license would pose a probable danger to the health, safety, or welfare of the state, then it may deny the requested stay or supersedeas.[236] In *Redner v. State*,[237] the court denied a writ of *certiorari* and affirmed Redner's "convictions for selling alcoholic beverages without a license."[238] The court held that the fifteen day automatic stay of license revocation or suspension in section 561.29(6)[239] was not effective in light of the provisions found in section 120.68(3),[240] section 120.72(1)(a)[241] and section 120.722(4)[242] of the APA. Under the APA there is no automatic stay of a license revocation. The APA provides that a stay of a license revocation or suspension must be requested from the appropriate district court of appeal. The APA established the procedure for staying a license revocation which governs in this case, because section 561.29(6) did not expressly supersede, repeal or amend the provisions of the APA in this area.[243]

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234. 537 So. 2d 591 (Fla. 3d Dist. Ct. App. 1988).

235. FLA. STAT. § 120.68(3) (1989). In Terrell Oil Co. v. Department of Transp., the court held that this statutory provision was not applicable when the "order appealed . . . denie[d] renewal of an license that has expired or is about to expire." 541 So. 2d 713, 715 (Fla. 1st Dist. Ct. App. 1989) (per curiam), *reh'g denied*. It is also unlikely that a stay will be granted when an agency has acted using a facially valid emergency order suspending a license. *See* Milton v. Department of Health and Rehabilitative Servs., 542 So. 2d 1039 (Fla. 1st Dist. Ct. App. 1989).

236. In Ticktin v. Department of Professional Regulation, 532 So. 2d 47 (Fla. 1st Dist. Ct. App. 1988), *reh'g denied*. The court held that there was more than sufficient evidence to conclude that "permitting . . . [Dr. Ticktin] to continue to practice medicine during the pendency of . . . [his appeal from an order revoking his license to practice medicine] would constitute 'a probable danger to the health, safety, or welfare of the state.'" *Id.* at 48 (quoting FLA. STAT. § 120.68(3) (1989)).

237. 532 So. 2d 8 (Fla. 2d Dist. Ct. App. 1988) (per curiam).

238. *Id.* at 9.

239. FLA. STAT. § 561.29(6) (1989).

240. FLA. STAT. § 120.68(3) (1989).

241. FLA. STAT. § 120.72(1)(a) (1989).

242. FLA. STAT. § 120.722(4) (1989).

243. *Redner*, 532 So. 2d at 9.

D. Contract Bidding

There were only two decisions during the survey period which directly concerned the contract bidding process. First, in *Harris/3M v. Office System Consultants*,[244] the court reaffirmed its decision in *Satellite Television Engineering Inc. v. Department of General Services*,[245] by holding that the administrative rule requiring two or more valid competitive bids for a contract was invalid, because it was inconsistent with the statutory responsive bidder requirement.[246] Only one responsive bid is necessary under the statute for the awarding of a contract and this cannot be modified by administrative rule.[247]

Second and more significantly, in *Global Water Conditioning v. Department of Agriculture & Consumer Services*,[248] the court held that a written bid protest was properly filed even though it did not have a copy of the challenged agency decision attached to it.[249] The court noted that the administrative rules governing bid protests merely required "substantially the same form as a petition in accordance with [administrative] [r]ule 13-4.012."[250] It was rule 13-4.012 which required the attachment of a copy of the agency decision to the bid protest petition.[251] In this case the written bid protest petition referred to, described, identified and "quoted portions of the bid tabulation, which was both prepared and posted by" the agency. When this was done in the petition, and the agency cannot show it was prejudiced by the failure to attach a copy of its decision to the bid protest, when the bid protestor has substantially complied as required by the administrative rule.[252] The agency cannot dismiss the bid protest because it was not in compliance with the rules for the form such a protest must take.

It is often an impossible task for the bid protestor to get a copy of the *posted* agency decision in the narrow time frame available for filing

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244. 533 So. 2d 833, 835 (Fla. 1st Dist. Ct. App. 1988).
245. 522 So. 2d 440 (Fla. 1st Dist. Ct. App. 1988).
246. *Harris/3M*, 533 So. 2d at 835; FLA. STAT. § 287.012(12) (1985).
247. The court noted it was harmless error in this case for the Governor and cabinet to direct that negotiation of a contract take place, because Office System Consultants received the contract under both the negotiation and bidding process. *Harris/3M*, 533 So. 2d at 835.
248. 541 So. 2d 1284 (Fla. 1st Dist. Ct. App. 1989).
249. *Id.* In this case the agency decision was expressed in a bid tabulation sheet.
250. *Id.* at 1285 (quoting FLA. ADMIN. CODE r. 13A-1.006(3)).
251. FLA. ADMIN. CODE r. 13-4.012(2)(e).
252. *Global Water Conditioning*, 541 So. 2d at 1285.

1. Hearsay

While hearsay evidence is generally admissible in an administrative proceeding, the use of hearsay evidence to support agency decisions is significantly restricted under the APA. Hearsay evidence, standing alone, cannot constitute competent substantial evidence, but it can "be used for the purpose of supplementing or explaining other evidence."[258] The use of hearsay evidence in this limited manner, supplementing or explaining other evidence, is often erroneously cited by boards or commissions in reversing the decisions of referees, hearing officers or administrative law judges. *Suncoast Steel Corporation v. Florida Unemployment Appeals Commission*,[259] is typical of cases when agencies have misused this provision of the APA. In *Suncoast Steel Corporation* the court reversed the decision of the Unemployment Appeals Commission ordering Suncoast Steel Corporation to pay unemployment benefits to a former employee. The court found that the Unemployment Appeals Commission improperly reversed the decision of the referee on the ground that the referee's factual conclusions were not supported by substantial competent evidence. The Unemployment Appeals Commission had concluded that the evidence relied upon by the referee to establish excessive absenteeism by the employee was hearsay. The court found that the Unemployment Appeals Commission erred when it reached this conclusion, because one witness for the employer testified based upon personal knowledge of the employee's excessive absences. Such testimony is not hearsay. The attendance records submitted by Suncoast Steel Corporation were hearsay,[260] but these records were merely supplementary. Under the APA, hearsay evidence can be used to supplement other testimony.[261] The mere supplementary use of hearsay evidence is not grounds for holding that the factual findings made

258. FLA. STAT. § 120.58(1)(a) (1989).

259. 532 So. 2d 10 (Fla. 2d Dist. Ct. App. 1988), *reh'g denied*.

260. The court assumed the records were hearsay. It is possible the attendance records were not hearsay if a showing was made that would qualify the records for admission at a civil trial pursuant to the Evidence Code. FLA. STAT. § 90.803(6) (1989). *Cf.* Specialty Linings, Inc. v. B.F. Goodrich Co., 532 So. 2d 1121 (Fla. 2d Dist. Ct. App. 1988) (example of possible difficulties in qualifying business records for admission under FLA. STAT. § 90.803(6)).

261. FLA. STAT. § 120.53(1)(a) (1989). *See* Rosenfeld v. Criminal Justice Standards and Training Comm'n, 541 So. 2d 745, 747 (Fla. 3d Dist. Ct. App. 1989) (per curiam) (an example of hearsay evidence used to supplement non-hearsay testimony).

by the referee were not supported by competent substantial evidence.[262]

Of course hearsay evidence which can be admitted under one of the exceptions to the hearsay rule is no longer subject to this constraint. In *Southern Bakeries, Inc. v. Florida Unemployment Appeals Commission*,[263] the court held that the urinalysis test was properly qualified for admission under the business record exception to the hearsay rule. The Unemployment Appeals Commission erred in holding this evidence was hearsay and could not, standing by itself, constitute competent substantial evidence.[264] Based upon this error the court reversed the decision of the Unemployment Appeals Commission.[265] In *W.M. v. Department of Health and Rehabilitative Services*,[266] the court held that a deposition which was admissible under Florida Rules of Civil Procedure[267] was admissible in an administrative hearing and could provide the sole basis for the hearing officer's factual findings.[268]

But the courts have held that the qualification of evidence for admission under a hearsay exception should be strictly applied in administrative proceedings.[269] In *City of Fort Lauderdale v. Florida Unemployment Appeals Commission*,[270] the court properly affirmed the decision of the Unemployment Appeals Commission because the sole evidence of the alleged drug use of the employee was a laboratory report. The laboratory report was not qualified for admission as an exception to the hearsay rule. The Unemployment Appeals Commission properly concluded that such hearsay evidence cannot by itself consistitute competent substantial evidence justifying denial of unemployment compensation.[271]

F. An Agency Must Follow Its Own Rules

An agency may not take action which is inconsistent with its own rules. If an agency does so, then the reviewing court must remand the

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262. *Suncoast*, 532 So. 2d at 11.
263. 545 So. 2d 898 (Fla. 2d Dist. Ct. App. 1989), *reh'g denied*.
264. *Id.* at 899-900; *see* FLA. STAT. § 90.803(6) (1989).
265. *Southern Bakeries, Inc.*, 545 So. 2d at 900.
266. 553 So. 2d 274 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*.
267. FLA. R. CIV. P. 1.330(a)(3)(B).
268. *W.M.*, 553 So. 2d at 276.
269. *See, e.g.*, Johnson v. Department of Health and Rehabilitative Servs., 546 So. 2d 741, 743-44 (Fla. 1st Dist. Ct. App. 1989).
270. 536 So. 2d 1074 (Fla. 4th Dist. Ct. App. 1988).
271. *Id.* at 1075-76.

case to the agency for proceedings consistent with the agency rules.[272]

V. Judicial Review

A. Preservation of the Right to Review

Both the APA[273] and the Florida Constitution[274] guarantee the right to judicial review of administrative decisions. The right to judicial review of an administrative decision is not absolute,[275] and there are several ways in which a party may lose it. In *Freve v. Florida Unemployment Appeals Commission*,[276] the court refused to consider a matter which was not properly raised before the agency.[277] Failure to raise the issue during the administrative process precluded the court from considering it during the judicial review process, because it was not properly preserved for judicial review.[278] As the court noted in *Puckett Oil Company v. Department of Environmental Regulation*,[279] this includes the requirement that the issue be raised initially before a hearing officer. An agency "cannot raise and decide for the first time in the final agency order issues not previously raised or considered" before the hearing officer.[280] But as the court noted in *Dupes v. Department of*

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272. Wistedt v. Department of Health and Rehabilitative Servs., 551 So. 2d 1236 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*; Decarion v. Martinez, 537 So. 2d 1083, 1085-86 (Fla. 1st Dist. Ct. App. 1989) (The court held that the rules clearly treated an application for consent to use submerged lands as distinct from an application to lease submerged lands; the application in this case was clearly an application for consent to use, not lease, and the agency erred in treating the application as one for a lease.); *see also* FLA. STAT. § 120.68(12)(b) (1989).

273. FLA. STAT. § 120.68 (1989).

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

275. Any party seeking judicial review must satisfy the requirements for standing. The failure to do so is generally, but not always, fatal to the judicial review process. *See* City of Destin v. Department of Transp., 541 So. 2d 123, 127 (Fla. 1st Dist. Ct. App. 1989) (The court held, in part, that the Department of Transportation waived its right to question whether the City of Destin had standing to invoke a formal hearing under that APA by not raising the issue before or during the formal hearing.).

276. 535 So. 2d 649 (Fla. 1st Dist. Ct. App. 1988).

277. Freve claimed the Florida Unemployment Appeals Commission erred in not considering his alcoholism as a possible grounds justifying his receiving unemployment benefits. *Id.* at 651.

278. *Id.*; *see also* C.F. Indus. v. Nichols, 536 So. 2d 234, 238 (Fla. 1988).

279. 549 So. 2d 720 (Fla. 1st Dist. Ct. App. 1989) (on rehearing).

280. *Id.* at 722.

Heath & Rehabilitative Services,[281] a party does not waive a right to an administrative hearing where issues may be raised for the first time if the agency action did "not inform the affected party of his right to request a hearing, and the time limits for doing so."[282] In such cases issues which were not properly before the reviewing court originally can be raised at a subsequent administrative hearing and preserved for subsequent judicial review.[283]

B. Scope of Hearing Officer's Authority Over Factual Issues

The dichotomy between factual and legal issues is central to understanding how reviewing courts approach an agency overturning the recommended order of a hearing officer. The factual findings of a hearing officer

> are generally binding upon the agency, . . . and may not be disregarded unless the agency finds them to be unsupported by competent substantial evidence . . . . [A] hearing officer's legal conclusions, as opposed to factual determinations, come to the agency with no equivalent presumption of correctness. Instead the final decision as to the applicable law rests with the agency, subject . . . to judicial review.[284]

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281. 536 So. 2d 311 (Fla. 1st Dist. Ct. App. 1988), *reh'g denied*.

282. *Id.* at 316-17.

283. In *Dupes* the court indicated that in a subsequent administrative hearing the issue could be raised concerning whether the Department of Heath and Rehabilitative Services' rules concerning fee collection for the support of juvenile delinquent child was a valid exercise of authority delegated to it by the legislature. *Id.* at 317.

284. Manasota 88, Inc. v. Tremor, 545 So. 2d 439, 441 (Fla. 2d Dist. Ct. App. 1989).

> First, if the factual finding concerns "weight or credibility of testimony by witnesses, or when the factual issues are otherwise susceptible of ordinary methods of proof, or when concerning those facts the agency may not rightfully claim special insight," then the court must give greater weight to hearing officer's factual findings. Second, if the factual finding concerns matters which were "infused by policy considerations for which the agency has special responsibility," then the court must give greater weight to the agency's decision. In cases involving the first type of factual issues, an agency, just as a court, must leave the finding of facts of the hearing officer undisturbed, unless it can be demonstrated that the findings are not supported by competent substantial evidence. In cases involving the second type of factual issues, the agency, unlike the court, is generally free to substitute its judgment on these factual issues for those of the hearing officer.

If an agency overturns the factual conclusions of a hearing officer, then it must set forth findings of fact and conclusions of law justifying its contrary decision.[285] If an agency fails to do so it is reversible error,[286] because the agency has improperly substituted its judgment for that of the hearing officer.[287] *Ganson v. Department of Administration*[288] is a classic application of this constraint on agency discretion. In *Ganson* the court reviewed the Department of Administration's interpretation of the pre-existing condition limitation in the state employee health insurance coverage.[289] The hearing officer found that Ganson suffered from situational depression before enrolling in the state health insurance plan, and that the subsequent diagnosis of bipolar affective disor-

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Burris I, *supra* note 4, at 389 (footnotes deleted); *see* FLA. STAT. § 120.57(1)(b)(10) (1989).

285. This is not an impossible standard, but it may rarely be satisfied. *See* Witt v. Department of Corrections, 538 So. 2d 1280, 1282 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*. Even when the agency properly rejected a hearing officer's finding of fact the remedy is not always the substitution of the agency's contrary factual finding, rather the appropriate remedy in many cases is remand to the hearing officer for further proceedings in light of the agency's decision. Fire Defense Centers v. Department of Ins. and Treasurer, 548 So. 2d 1166, 1167 (Fla. 1st Dist. Ct. App. 1989) (per curiam), *reh'g denied*. *Cf.*, *Manasota 88*, 545 So. 2d at 442 (The court held that an agency does have the implied authority to order on remand that a hearing officer to conduct a formal evidentiary hearing in order to assure the agency has an adequate record for resolving the matters at issue; the hearing officer cannot refuse to conduct such a hearing.).

286. The appropriate remedy in almost all such cases is remand with instructions to adopt the hearing officer's decision. Department of Professional Regulation v. Bernal, 531 So. 2d 967 (Fla. 1988).

287. *E.g.*, Smith v. Metropolitan Dade County, 532 So. 2d 84, 85 (Fla. 3d Dist. Ct. App. 1988) (per curiam); *see also* Wilson v. Department of Admin., 538 So. 2d 139, 142 (Fla. 4th Dist. Ct. App. 1989); Krelj v. Florida Unemployment Appeals Comm'n, 537 So. 2d 201, 202 (Fla. 2d Dist. Ct. App. 1989); White Construc. Co., Inc. v. Department of Transp., 535 So. 2d 684, 685 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*; Department of Professional Regulation v. Baggett, 535 So. 2d 319 (Fla. 1st Dist. Ct. App. 1988); Zulauf v. Florida Unemployment Appeals Comm'n, 533 So. 2d 890 (Fla. 3d Dist. Ct. App. 1988) (per curiam); Kelly v. Criminal Justice Standards and Training Comm'n, 533 So. 2d 855 (Fla. 1st Dist. Ct. App. 1988) (error confessed by the state).

288. 554 So. 2d 516 (Fla. 1st Dist. Ct. App. 1989). *See also infra* notes 185-95 and accompanying text.

289. The pre-existing condition exclusion excludes from coverage for one year any condition for which the employee received treatment during the proceeding year. *Ganson*, 554 So. 2d at 517.

der after enrolling in a plan was a "separate and distinct condition."[290] The Department of Administration reversed the hearing officer's decision, because the symptoms for both conditions were basically the same as was the treatment.[291] The court reversed the Department of Administration's factual conclusions, because the Department had not demonstrated that the hearing officer's factual conclusions were not supported by competent substantial evidence.[292]

Recently, this constraint on the scope of agency review has been tested in the context of enhancement and reduction of penalties recommended by hearing officers. Several cases illustrate the majority approach to this issue which generally denies the agency authority to vary the penalty once it accepts the hearing officer's factual conclusions as supported by substantial competent evidence.

In *Pluto v. Department of Professional Regulation*,[293] the court held that the decision by the Real Estate Commission increasing the penalty recommended by the hearing officer was improper. The Real Estate Commission's only justification for the increase in penalty was its conclusion that the hearing officer's recommended penalty was too mild in light of the Real Estate Commission's view of the severity of the misconduct.[294] This is a classic substitution of judgment circumstance. It is exactly the sort of action prohibited by provisions of the APA.[295] The same type of approach was used in *Hanley v. Department of Professional Regulation*,[296] another licensing case. In *Hanley*, the Board of Nursing adopted the hearing officer's findings of fact and conclusions of law, but based upon its perception of the "potentially dangerous behavior" by Hanley increased the recommended penalty from a reprimand to two years probation.[297] The court reversed the Board of Nursing's order, because "the only reasons which the Board stated for increasing the penalty were factors which the [h]earing [o]fficer had already specifically considered in making his recommendation." The court held that mere disagreement with the hearing officer over the seriousness of the violations was not a sufficient basis for rejecting the

290. *Id.* at 518.
291. *Id.* at 519.
292. *Id.* at 519-20.
293. 538 So. 2d 539 (Fla. 2d Dist. Ct. App. 1989).
294. *Id.* at 540.
295. FLA. STAT. § 120.57(1)(b)(10) (1989).
296. 549 So. 2d 1164 (Fla. 4th Dist. Ct. App. 1989).
297. *Id.* at 1165.

hearing officer's recommended penalty.[298]

This type of analysis on the scope of agency discretion also was used in other contexts. In *B.B. v. Department of Health and Rehabilitative Services*,[299] a hearing officer found that an incident of child abuse was not the result of an intentional or negligent act by the teacher. It was an unfortunate accident in which the teacher did not act negligently or intentionally. In light of these factual findings and the Department of Health and Rehabilitative Services' prior decision holding such a circumstance warranted granting the expungement request, the hearing officer recommended that the expungement request be granted. The Department of Health and Rehabilitative Services accepted the factual findings of the hearing officer, but not the hearing officer's recommendation that the report of child abuse be expunged from the child abuse registry.[300] The Department of Health and Rehabilitative Services explained its rejection of the hearing officer's recommendation was based upon the failure of the hearing officer to focus on the correct issue. Expungement decisions turn on whether the actions of the teacher were reasonable given the context in which they occurred, not issues of negligence or intentional infliction of abuse.[301] In this case the Department of Health and Rehabilitative Services found that the record supported finding the child abuse occurred because the teacher clearly used excessive force.

The court held that the Department of Health and Rehabilitative Services' decision was flawed and must be reversed and remanded. The statutory prohibition[302] against the Department of Health and Rehabilitative Services reweighing the evidence and substituting its judgment for that of the hearing officer, not only prohibits the Department of Health and Rehabilitative Services from reaching a directly contrary factual conclusion, it also prohibits the Department of Health and Rehabilitative Services from "mak[ing] an entirely new factual find-

298. *Id.* Judge Gunther dissented, citing Department of Professional Regulation v. Bernal, 531 So. 2d 967 (Fla. 1988). She apparently insisted that a disagreement over the severity of the violation was a policy question and a valid basis for the Board of Nursing rejecting the recommended penalty. *Hanley*, 549 So. 2d at 1166 (Gunther, J., dissenting).

299. 542 So. 2d 1362 (Fla. 3d Dist. Ct. App. 1989).

300. *Id.* at 1363-64.

301. The court noted that the Department of Health and Rehabilitative Services erred in failing to explain its departure from its prior policy. *Id.* at 1365 n.3.

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

ing."[303] This case is an example of the latter as the hearing officer never found that the force used by the teacher was excessive. The labeling, of this aspect, of its decision as a conclusion of law does not permit the Department of Health and Rehabilitative Services to escape the statutory constraint on its powers. It is clear that excessive force is a factual issue, not a conclusion of law.[304] This result is consistent with the decision in *B.L. v. Department of Health and Rehabilitative Services*.[305] In *B.L.* the court affirmed two orders denying expungement of the names of teachers from the child abuse registry when the hearing officers found that excessive force was used in imposing corporal punishment and competent substantial evidence supported their factual findings.[306]

An alternative, and currently only a possible emerging minority approach, to the issue of recommended penalties is to view such questions, at least in some cases, as a policy question. In such cases the agency has substantial discretion to reject the hearing officer's recommended penalty. This second approach was most clearly developed and stated in *dicta* in *Department of Professional Regulation v. Bernal*.[307] In *Bernal* the court noted that an agency may disregard the hearing officer's recommended penalty in two ways. First, the agency can review the complete record and state with particularity its reasons for deviating from the hearing officer's recommended penalty.[308] Under this approach, if the agency merely disagreed with the assessment of the seriousness of the offense by the hearing officer in this particular case, then that is not an adequate justification for rejecting the hearing officer's recommended penalties.[309] Thus, the circumstances are severely limited where it is likely that an agency can satisfy a reviewing

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303. *B.B.*, 542 So. 2d at 1364.

304. *Id.* at 1364; *see* M.J.B. v. Department of Health and Rehabilitative Servs., 543 So. 2d 352 (Fla. 5th Dist. Ct. App. 1989); Burris I, *supra* note 4, at 397-98.

305. 545 So. 2d 289 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*.

306. *Id.* at 291-92. *But see id.* at 293 (Thompson, J., dissenting). The court specifically rejected the Department of Health and Rehabilitative Services' position that the facts of these cases constituted excessive force as a matter of law. Any such irrebuttable presumption would be a violation of due process. *Id.* at 292. Judge Thompson's dissenting opinion, in part, was based upon the Department of Health and Rehabilitative Services' characterizing its decisions as based upon viewing the issue as a question of law. *Id.* at 292-93 (Thompson, J., dissenting).

307. 517 So. 2d 113 (Fla. 3d Dist. Ct. App. 1987), *aff'd*, 531 So. 2d 967 (Fla. 1988).

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

309. *Bernal*, 517 So. 2d at 115-16.

court under this approach. Second, an agency can reject a hearing officer's recommended penalty when it disagrees with the hearing officer on a generalized policy level about the nature of the penalty which should be imposed in all such cases, not just this particular case.[310]

An example of the use of this second track is Judge Gunther's dissenting opinion in *Hanley*. In her dissent, she briefly argued that a disagreement over the severity of the violation was a policy question and a valid basis for the Board of Nursing to reject the recommended penalty.[311] Another example is the decision in *Grimberg v. Department of Professional Regulation*.[312] In *Grimberg*, the court held it was appropriate for the Board of Medicine to increase the sanction recommended by the hearing officer,[313] because the Board of Medicine demonstrated on the record "that the hearing officer did not appreciate the gravity of an inability to make accurate diagnoses."[314] It seems the court is using the second track developed in *Bernal* to justify upholding the agency's overturning of the hearing officer's recommended order.[315] The court viewed this policy decision by the Board of Medicine as offering a valid reason for its decision on the penalty to be imposed. The court noted that this is all that it was required to do when reviewing such administrative orders — "determin[ing] whether there are valid reasons in the record in support of the agency's order."[316] The danger posed by the second track in *Bernal* is twofold. First, it opens the door

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310. The Florida Supreme Court, in affirming the decision of the Third District Court of Appeal, did not specifically address the legitimacy of the second track. It merely disapproved of the decision in Britt v. Department of Professional Regulation, 492 So. 2d 697 (Fla. 1st Dist. Ct. App. 1986), and reaffirmed that a reviewing court should affirm an agency decision rejecting a recommended penalty if the agency provided a legally sufficient justification for the rejection. *Bernal*, 531 So. 2d at 967. It is not at all clear from the opinion whether a claim of a policy disagreement with the hearing officer would be sufficient justification for rejecting a recommended penalty.

311. *Hanley*, 549 So. 2d at 1166 (Gunther, J., dissenting).

312. 542 So. 2d 457 (Fla. 3d Dist. Ct. App. 1989) (per curiam).

313. The hearing officer recommended the sanction of license suspension until Dr. Grimberg demonstrated his competence by additional training and passage of a licensing examination. The Board of Medicine ordered Dr. Grimberg's license suspended. *Id.* at 457.

314. *Id.*

315. Admittedly, the court's explanation does not make it entirely clear that it was invoking the second track in *Bernal* to reach its conclusion. The absence of any discussion of the inadequacy of the hearing officer's recommended penalty in terms of not being supported by competent substantial evidence supports my reading of the opinion.

316. *Grimberg*, 542 So. 2d at 457-58.

for agencies to reject recommended penalties as long as they used the magic words 'general policy disagreement' to characterize why they rejected the recommended penalty of the hearing officer. This may be permitted even though the nature of the penalty to be imposed in a case is generally a fact specific determination. Second, it invites a general abuse of the law/fact dichotomy by approving of the characterization of what in most cases is a factual issue as a legal or policy matter. This ultimately will permit agencies to avoid their obligation under the APA when disagreeing with a hearing officer on a factual matter.[317]

C. Deferential Judicial Review of Factual Issues

Under the competent substantial evidence standard of judicial review for factual determinations made by administrative agencies,[318] a reviewing court is prohibited from reweighing the evidence and substituting its judgment for that of the administrative agency on factual issues.[319] "[C]ourts will not review conflicting evidence, or make any determination with respect to the weight of the evidence, as these are usually matters for administrative agency determination."[320] The bur-

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317. *See* Burris I, *supra* note 4, at 395-98; FLA. STAT. § 120.57(1)(b)(10) (1989).

318. The substantial competent evidence standard of judicial review is limited to those records developed in hearings which meet the requirements of FLA. STAT. § 120.57. FLA. STAT. § 120.68(10) (1989). If the record of the administrative hearing is destroyed, then the appropriate remedy is to vacate the order and remand to the agency for a *de novo* hearing. Gay v. Department of State, 550 So. 2d 137, 138 (Fla. 1st Dist. Ct. App. 1989) (per curiam).

319. The prohibition against reweighing of the evidence also applies when there has been no agency hearing. In such cases the reviewing court may order an agency to conduct a "factfinding proceeding under this act" in order to resolve disputed factual issues necessary to determine whether the agency action in the case was valid. FLA. STAT. § 120.68(6) (1989). After the agency's determination as to the disputed facts the reviewing court is restricted to setting aside, modifying, or ordering agency action when "the facts compel a particular action as a matter of law, or it may remand the case to the agency for further examination and action within the agency's responsibility." FLA. STAT. § 120.68(11) (1989). The reviewing court is not free in this circumstance to reject the agency's factual determinations or independently evaluate the record to reach its own factual conclusions.

320. *Rolling Oaks Utils.*, 533 So. 2d at 772. "[I]n reviewing whether the record contains competent substantial evidence to support the referee's findings, we cannot make determinations as to credibility or substitute our judgment for that of the referee." Department of Gen. Servs. v. English, 534 So. 2d 726, 728 (Fla. 1st Dist. Ct. App. 1988).

den is on the party attacking the agency's factual determinations to demonstrate that these determinations are not supported by substantial competent evidence in the record.[321] The net result is that in most cases the reviewing courts write opinions demonstrating how agency factual determinations were adequately supported by the record.[322]

But there are some circumstances when the deferential competent substantial evidence standard of judicial review permits the reviewing court to reject an agency's factual findings. When a factual determination is not properly supported in the record as a matter of law, then the reviewing court must reverse. An example of this circumstance is when an agency order is based solely upon hearsay evidence.[323] Hearsay evidence standing by itself cannot satisfy the competent substantial evidence requirement.[324] In *Andersen v. Division of Retirement*,[325] the court noted that it was free to conclude that the Commission's decision was not supported by competent substantial evidence because the Commission had overlooked important testimony demonstrating that it did not understand the factual record.[326] In *City of Palm Bay v. Department of Transportation*,[327] the court held that it could reject an agency's factual determinations when the decision appears internally inconsistent on a factual issue.[328]

Even in affirming an administrative agency's factual findings courts sometimes reveal the danger the competent substantial evidence

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321. *Rolling Oaks Utils.*, 533 So. 2d at 772. The court held that the Public Service Commission had offered a reasonable explanation for it factual determination concerning the value of the land. *Id.* at 773. *Cf.* Florida Bar v. Stafford, 542 So. 2d 1321, 1322 (Fla. 1989) (per curiam). "In disciplinary proceedings, the referee's findings should be upheld unless [they are] clearly erroneous or without support in the evidence." *Id.* at 1322.

322. *E.g.*, Rosenfeld v. Criminal Justice Standards & Training Comm'n, 541 So. 2d 745, 747 (Fla. 3d Dist. Ct. App. 1989) (per curiam); Department of General Serv. v. English, 534 So. 2d 726, 728-29 (Fla. 1st Dist. Ct. App. 1988); *Harris/3M*, 533 So. 2d at 835. This result is reached even in very close cases where the court may express doubts about the ultimate validity of the factual findings in the context of further litigation. Blackhawk Quarry Co. of Fla., Inc. v. Department of Transp., 538 So. 2d 941, 942 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*.

323. Hodges v. Therien, 549 So. 2d 1169 (Fla. 4th Dist. Ct. App. 1989) (per curiam).

324. *See supra* notes 258-71 and accompanying text.

325. 538 So. 2d 929 (Fla. 1st Dist. Ct. App. 1989).

326. *Id.* at 930-31.

327. 541 So. 2d 1295 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*.

328. *Id.* at 1297.

standard of judicial review is designed to guard against — substitution of judgment. In *Dorisma v. Florida Unemployment Appeals Commission*,[329] the court affirmed the factual findings of the Unemployment Appeals Commission by stating: "*We find* that the employer's request of [Dorisma] to work extra hours was a reasonable request under the extreme workplace situation."[330] While the conclusion may be correct, the perspective assumed by the court in justifying its conclusion was quite inappropriate. The use of the personal pronoun, "we," indicates that the court was independently evaluating the record. This is exactly what the court should not be doing. The court should not make its own findings. Under the competent substantial evidence standard of judicial review the court should focus on the Unemployment Appeals Commission's decision and the sufficiency of the record in support of its factual conclusions.[331]

D. Substitution of Judgment on Factual Issues

While normally courts will not substitute their judgment for that of agencies, there are some cases when it is clearly appropriate for the courts to abandon the deferential approach to factual issues under the competent substantial evidence standard of judicial review. During this survey period only one opinion applied a less deferential standard of judicial review. In *Zubi Advertising Services, Inc. v. Department of Labor and Unemployment Security*,[332] the court reversed an order of the director of the Division of Unemployment Compensation which held that individuals performing in radio and television commercials were employees, not independent contractors. The court's decision was based upon its rejection of the findings of fact and interpretation of the

329. 544 So. 2d 1110 (Fla. 3d Dist. Ct. App. 1989).

330. *Id.* at 1111 (emphasis added).

331. The court never stated the standard of judicial review it was applying, and this may account, in part, for why the court may have slipped into the improper personal perspective in reviewing the record in this case. While it may be a boring task to state the standard of judicial review in every opinion, such statements do tend to assure that the court does not assume an inappropriate role in reviewing an agency's decision. "It may seem like a small difference in perspective but by improperly and independently evaluating the record to determine what [factual] conclusions it may support, the courts are opening the door to engaging in substitution of judgment" on factual conclusions. Burris I, *supra* note 4, at 403.

332. 537 So. 2d 145 (Fla. 3d Dist. Ct. App. 1989).

applicable law.[333] The troubling aspect of the opinion is the court's approach to evaluating the factual findings in the director's order. The court indicated that under the competent substantial evidence standard of judicial review the degree of judicial deference owed to agency fact findings which are not based upon disputed evidence is substantially less.

> A finding of fact which rests on conclusions drawn from undisputed evidence is analogous to a legal conclusion. Such a finding does not carry the same conclusiveness for purposes of judicial review as one derived from probative disputed evidence.[334]

Using this less deferential approach to reviewing the factual findings in the director of Division of Unemployment Compensation's order, the court held that several key factual findings were not supported by competent substantial evidence.[335]

E. Deferential Judicial Review of Questions of Law

The power of an agency to interpret a statute or rule could be viewed as an invasion of a core judicial function.[336] However, such a position has not been adopted by the courts. It is well settled "that administrative agencies are necessarily called upon to interpret statutes."[337] The courts have gone even further, not only can an agency interpret statutes, "agency determinations with regard to a statute's interpretation will receive great deference [from the reviewing courts] in the absence of clear error or conflict with legislative intent."[338] This

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333. The court ultimately held as a matter of law that the individuals were independent contractors. *Id.* at 147-48.

334. *Id.* at 146.

335. *Id.* at 147.

336. "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

337. Laborers' Int'l Union of North America, Local 478 v. Burroughs, 541 So. 2d 1160, 1162 (Fla. 1989).

338. Tri-State Syss., Inc. v. Department of Transp., 491 So. 2d 1192, 1193 (Fla. 1st Dist. Ct. App. 1986); Little Munyon Island, Inc. v. Department of Envtl. Regulation, 492 So. 2d 735, 737 (Fla. 1st Dist. Ct. App. 1986); Hancock Advertising, Inc. v. Department of Transp., 549 So. 2d 1086, 1090 (Fla. 3d Dist. Ct. App. 1989) (Baskin, J., dissenting); *see also* Meridian, Inc. v. Department of Health and Rehabilitative Servs., 548 So. 2d 1169, 1170 (Fla. 1st Dist. Ct. App. 1989) (The court must affirm an agency's interpretation of agency rules unless "arbitrary, capricious, or not in compli-

approach generally results in the courts affirming agency interpretations of the statutes.[339]

In *PW Ventures, Inc. v. Nichols*,[340] the question was whether the Public Service Commission correctly concluded it could regulate, as a utility, a company which was going to generate electricity for a single customer. The power of the Public Service Commission to regulate a utility provider is limited to those which provide such a service "to or for the public within this state."[341] The Public Service Commission in holding that the single customer transaction between PW Ventures, Inc. and Pratt and Whitney for electricity was subject to regulation interpreted the requirement of public service as reaching all transactions in utility services with any member of the public, including a single member of the public. The Florida Supreme Court, with some reservation, agreed with the Public Service Commission's interpretation of the statutory requirement.[342] The court found that Public Service Commission's interpretation of the statute was entitled to great weight in the judicial review process, because it was a "contemporaneous construction of a statute by the agency charged with its enforcement and interpretation."[343] The court noted, in affirming, the Public Service Commission's decision that its interpretation of the statute was also

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ance with the [relevant statutory provisions]."); Smith v. Krugman-Kadi, 547 So. 2d 677, 680 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*, (Ervin, J., dissenting) (An agency's interpretation of the statute it administers "should not be overturned unless it is clearly erroneous.").

339. *See, e.g.*, Florida Pub. Employees Council 79 v. City of Pensacola, 550 So. 2d 132 (Fla. 1st Dist. Ct. App. 1989) (per curiam); Department of Professional Regulation v. Toledo Realty, Inc., 549 So. 2d 715, 717 (Fla. 1st Dist. Ct. App. 1989); Hatcher v. Department of Health and Rehabilitative Servs., 545 So. 2d 400 (Fla. 1st Dist. Ct. App. 1989); Gulf County School Bd. v. Washington, 544 So. 2d 288 (Fla. 1st Dist. Ct. App. 1989); Gray v. Florida Unemployment Appeals Comm'n, 541 So. 2d 1319, 1320 (Fla. 1st Dist. Ct. App. 1989).

340. 533 So. 2d 281 (Fla. 1988).

341. FLA. STAT. § 366.02(1) (1985).

342. "While the issue is not without doubt, we are inclined to the position of the PSC." *PW Ventures, Inc.*, 533 So. 2d at 283.

343. *Id.* Justice McDonald in his dissenting opinion rejected the application of this approach to resolving this interpretive problem. He concluded that the statutory language was jurisdictional. In such cases no deference is owed to the agency's interpretation and the court must give the statutory language "its plain and ordinary meaning or, if it is a legal term of art, its legal meaning." *Id.* at 284 (McDonald, J., dissenting). Using this approach it is clear that this transaction is not one concerning the providing of electricity to the public. *Id.* at 284-85 (McDonald, J., dissenting); *see also* Burris II, *supra* note 4, at 784-85.

consistent with the statutory structure[344] and public policy assumptions.[345]

Another example of how this deferential approach to agency interpretations of the statutes it administers is found in *McDonald's Corporation v. Department of Transportation*.[346] In *McDonald's Corporation*, the court applied this approach in holding that the Department of Transportation's interpretation of what constitutes on premises signs[347] was consistent with the statutory purpose.[348] The court affirmed the Department of Transportation's order requiring removal of the sign.[349]

In *B.K. v. Department of Health and Rehabilitative Services*,[350] the court noted that it will defer to any agency interpretation of a statute or rule which is within the permissible range of reasonable interpretations. But, where the agency's interpretation must also comply with the requirements of federal law, then the court must independently evaluate whether the agency interpretation is consistent with the requirements of federal law. The court held that the Department of Health and Rehabilitative Services' interpretation was inconsistent with the requirements of federal law. The court reversed the Department of Health and Rehabilitative Services' order and the case was remanded for further proceedings using the interpretation which is consistent with

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344. The legislature by express statutory language exempted this type of transaction from Public Service Commission regulation in the case of natural gas. The exclusion of electricity from this statutory exemption is consistent with the Public Service Commission's interpretation that the legislature did not intent to exempt this type of transaction in the case of sale of electricity. *PW Ventures, Inc.*, 533 So. 2d at 284-85; FLA. STAT. § 366.02(1) (1985).

345. Electricity generation involves a substantial capital outlay which justifies the granting of a monopoly. If high use one customer contracts are not subject to regulation, then there is a risk that the revenue from these customers would not be available to the electrical utility which normally would service these customers to offset the fixed costs associated with the development of the utility system's generation and delivery system. The result would be higher utility rates for the utility's remaining customers. *PW Ventures, Inc.*, 533 So. 2d 283-84.

346. 535 So. 2d 323 (Fla. 2d Dist. Ct. App. 1988).

347. The Department of Transportation interpreted this term as requiring that the sign be located on land or buildings which are an "integral part" of the business activity. *Id.* at 326.

348. *Id.* at 325-26.

349. The sign was located on land "more than 1,000 feet from . . . [the] restaurant." The land upon which the sign was located was connected to the "restaurant site by a fifteen foot strip of land." *Id.* at 326.

350. 537 So. 2d 633 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*.

the requirements of federal law.[351]

F. Nondeferential Review of Questions of Law

Generally courts have found it easier to abandon the deferential approach to agency interpretations of the law than agency findings of facts. During this survey period the courts consistently found two circumstances which justified abandoning a deferential approach to agency resolutions of questions of law.[352]

First, the failure of an agency to comply with procedural requirements can result in reversal of an otherwise valid administrative order. This problem occurs in a variety of circumstances. When the reviewing court cannot determine whether the hearing officer followed the appropriate procedure for evaluating the facts in a record in reaching a decision, the court must reverse the agency decision and remand the case to the agency for a decision based upon the correct procedures for evaluating the evidence.[353] Similarly, when a hearing officer exceeds his authority under the statute the court must reverse the decision and, when appropriate, remand the case to the hearing officer for the entry of a modified order reflecting the proper scope of the hearing officer's authority.[354] In *Full Circle Service, Inc. v. Berry Investment Group*,[355] the court reversed the Department of Agriculture and Consumer Services' order and remanded the case with directions to render a decision which addressed the exceptions to the final order which were timely filed by Full Circle Service. The administrative rules require that the final order, in this case, must contain "an explicit ruling on each exception as well as a brief statement of the grounds for denying an excep-

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351. *Id.* at 635-36.

352. There are few examples of other circumstances when the courts will not defer to an agency interpretation of the law. *See* St. Johns North Util. Corp. v. Florida Pub. Serv. Comm'n, 549 So. 2d 1066, 1069-70 (Fla. 1st Dist. Ct. App. 1989) (The court noted that an "agency bears the burden of providing a reasonable explanation for inconsistent results based upon similar facts." If the agency explanation is reasonable, then the court must affirm the agency's interpretation.); Ford Motor Credit Co. v. Department of Revenue, 537 So. 2d 1011 (Fla. 1st Dist. Ct. App. 1988), *reh'g denied*, (In reviewing a constitutional challenge to an agency decision no deference to the agency's resolution of the constitutional claims will be given.).

353. *Wistedt*, 551 So. 2d at 1236; Walker v. Department of Health and Rehabilitative Serv., 533 So. 2d 836, 839-40 (Fla. 1st Dist. Ct. App. 1988).

354. Dennis v. Redouty, 534 So. 2d 756, 757 (Fla. 1st Dist. Ct. App. 1988).

355. 535 So. 2d 634 (Fla. 2d Dist. Ct. App. 1988).

tion."[356] The court reversed the Department of Agriculture and Consumer Services' order even though it rejected all of the substantive attacks on the validity of the order.[357]

Second, reviewing courts will not defer to an agency's interpretation of a statute which is contrary to the statute's language or purpose.[358] In *Kingsley v. Department of Insurance and Treasurer*,[359] the court rejected the Department of Insurance's interpretation of the statute governing supplemental compensation for fire fighters,[360] because it was inconsistent with the plain meaning of the statutory language. "It is axiomatic that agencies, as well as courts, are charged with the duty to accord clear and unambiguous enactments their plain meaning."[361] This duty cannot be avoided by an agency referring to intent or purpose rather than the statutory language. Legislative intent and purpose become relevant only when the statutory language is unclear.[362] This approach also assures that the court can perform its constitutional duty to enforce the limits on an agency's scope of authority established by statute.[363] As the court noted in *Commercial Coating Corporation v.*

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356. *Id.* at 635.

357. *Id.*

358. *See* Black v. Department of Professional Regulation, 553 So. 2d 224, 225 (Fla. 5th Dist. Ct. App. 1989), *reh'g denied*; 1800 Atlantic Developers v. Department of Envtl. Regulation, 552 So. 2d 946, 954-55 (Fla. 1st Dist. Ct. App. 1989) (per curiam), *reh'g denied*; C.M.T. v. Department of Health and Rehabilitative Servs., 550 So. 2d 126, 127 (Fla. 1st Dist. Ct. App. 1989) (per curiam); Ladson v. Florida Unemployment Appeals Comm'n, 543 So. 2d 328, 329 (Fla. 3d Dist. Ct. App. 1989). A reviewing court will also reverse an agency interpretation of a statute which is inconsistent with a prior judicial interpretation of the same statute. *See* Smith v. Krugman-Kadi, 547 So. 2d 677, 679-80 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied* (The court found that the factual findings of the appeals referee did not justify concluding the employee had engaged in misconduct as that term had been interpreted and applied in previous judicial decisions.); Solis v. Department of Health and Rehabilitative Servs., 546 So. 2d 1073, 1074-75 (Fla. 3d Dist. Ct. App. 1989), *reh'g denied*; Gulf County School Bd. v. Washington, 544 So. 2d 288, 290-91 (Fla. 1st Dist. Ct. App. 1989) (Booth, J., dissenting). Of course the reviewing court will affirm an agency interpretation which is consistent with prior judicial interpretations of the statute. *See* Meridian, Inc. v. Department of Health and Rehabilitative Servs., 548 So. 2d 1169, 1170-71 (Fla. 1st Dist. Ct. App. 1989).

359. 535 So. 2d 604 (Fla. 2d Dist. Ct. App. 1989), *reh'g denied*.

360. FLA. STAT. § 633.382 (1987).

361. *Kingsley*, 535 So. 2d at 605.

362. *Id*; *see also* Alvarez v. Department of Professional Regulation, 546 So. 2d 726, 727 (Fla. 1989).

363. Hancock Advertising, Inc. v. Department of Transp., 549 So. 2d 1086, 1088

Department of Environmental Regulation:[364]

> In construing statutes courts may not invoke a limitation or add words to the statute not placed there by the legislature. Administrative agencies entrusted with authority to carry out statutory provisions are similarly prohibited from giving the statute an amendatory construction.[365]

The court held that the Department of Environmental Regulation's order excluding mineral spirits from the term petroleum product,[366] as used in Florida's States Underground Petroleum Environmental Response Act Inland Protection Fund,[367] was an administrative interpretation inconsistent with the plain meaning, intent and remedial purpose of the statute.[368] Courts will also reverse an agency interpretation of a statute which ignores a provision of the statute which is directly relevant to the resolution of the case.[369]

G. Judicial Review of Agency Rule Making Activity

In several cases, during the survey period, the court grabbled with the issue of the appropriate approach for judicial review of agency rule making. In *Florida Society of Ophthalmology III*,[370] the court observed that the party challenging the validity of a rule on such grounds "bears a heavy burden of showing 'that the agency . . . exceeded its authority, that the requirements of the rule are not appropriate to the ends specified in the . . . [statute], and that the requirements in the rule are not reasonably related to the purpose of the . . . [statute and] are arbitrary and capricious.' "[371] The court noted that " 'that an ad-

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n.3 (Fla. 3d Dist. Ct. App. 1989).

364. 548 So. 2d 677 (Fla. 3d Dist. Ct. App. 1989), *reh'g denied*.

365. *Id.* at 678-79.

366. FLA. STAT. § 376.301(10) (1987).

367. FLA. STAT. § 376.3071 (1987).

368. *Commercial Coating Corp.*, 548 So. 2d at 679; *see* Puckett Oil Co. v. Department of Envtl. Regulation, 549 So. 2d 720 (Fla. 1st Dist. Ct. App. 1989) (on reh'g) (whether used oil is petroleum).

369. *See* Ladson v. Florida Unemployment Appeals Comm'n, 543 So. 2d 328, 329 (Fla. 3d Dist. Ct. App. 1989) (Schwartz, J., concurring).

370. 538 So. 2d 878 (Fla. 1st Dist. Ct. App. 1988), *clarified on reh'g*, 538 So. 2d 888 (Fla. 1st Dist. Ct. App. 1989).

371. *Id.* at 884 (quoting Grove Isle, Ltd. v. Department of Envtl. Regulation, 454 So. 2d 571, 573, 575 (Fla. 1st Dist. Ct. App. 1984)).

ministrative rule cannot enlarge, modify or contravene the provisions of a statute' and that 'a rule which purports to do so constitutes an invalid exercise of delegated legislative authority.' "[372] Of course an agency has substantial discretion in choosing how to exercise its rule making authority.[373] But there are limits to how far the agency can go. Not "any conceivable [agency] construction of a statute must be approved [by a reviewing court] irrespective of how strained or ingeniously reliant on implied authority it might be; rather, . . . only a *permissible* construction by the agency that comports with and effectuates discerned legislative intent will be sustained by the court."[374] This properly maintains the role of the agencies, as the initial decision makers with a substantial degree of discretion in making policy choices, and the role of the courts, as the ultimate interpreter of the law to assure that agencies are acting only within the scope of their legislatively delegated discretion.[375]

The court applied these principles to hold, in part,[376] that the

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372. *Id.* (quoting Department of Business Regulation v. Salvation Ltd., Inc., 452 So. 2d 65, 66 (Fla. 1st Dist. Ct. App. 1984)).

373. As stated in Department of Professional Regulation v. Durrani, 455 So. 2d 515, 517 (Fla. 1st Dist. Ct. App. 1984):

> The . . . general rule is that agencies are to be accorded wide discretion in the exercise of their lawful rulemaking authority, clearly conferred or fairly implied and consistent with the agencies' general statutory duties . . . . An agency's construction of the statute it administers is entitled to great weight and is not to be overturned unless *clearly erroneous* . . . . Moreover, the agency's interpretation of a statute need not be the sole possible interpretation or even the most desirable one; it need only be within the range of *possible* interpretations.

374. *Florida Soc'y of Ophthalmology III*, 538 So. 2d at 885.

375. Burris I, *supra* note 4, at 316. These principles dictate that a reviewing court generally will affirm an agency's rule as valid. *See, e.g.*, Department of Banking & Fin. v. Evans, 540 So. 2d 884 (Fla. 1st Dist. Ct. App. 1989); *In re* Waldron, 540 So. 2d 247, 249-50 (Fla. 4th Dist. Ct. App. 1989).

376. The court also held that physicians specializing in ophthalmic medicine and their professional associations did not have standing to challenge the validity of the licensing rules promulgated by the Board of Optometry in an administrative proceeding under FLA. STAT. § 120.56(1). *Supra* notes 104-36 and accompanying text. In *Florida Soc'y of Ophthalmology II*, the court held that physicians specializing in ophthalmic medicine and their professional associations did not have standing under FLA. STAT. § 120.57 to challenge the licensing of each optometrists by the Board of Optometry to administer and prescribe topical ocular drugs as part of their treatments in a formal administrative hearing. 532 So. 2d at 1279; *see also Florida Soc'y of Ophthalmology I*, 532 So. 2d at 1278.

Board of Optometry exceeded its delegated authority and the form used by the Board of Optometry was an invalid rule because it had not been promulgated through the APA rule making process.[377] The degree of deference a court will accord an agency's interpretation of a statute is, in part, shaped by whether the interpretive question is one which calls only for common usage[378] as compared to agency expertise.[379] The statute in this case requires three things before the Board of Optometry can validly license any optometrist to administer and prescribe topical ocular drugs as part of his or her treatments: (1) an inexpensive investigation of an applicant's educational background; (2) a minimum of one year of experience in optometric training or clinical experience; and (3) successful completion by each applicant of a Board of Optometry approved examination designed to test the knowledge of topical ocular drugs which the applicant will be licensed to administer. The third statutory requirement cannot "reasonably be interpreted to allow the Board [of Optometry] to accept examinations taken incident to optometric school or post-graduate coursework as satisfying" the examination requirement.[380] The legislature intended for the third statutory requirement to be a uniform examination. This intent would be frustrated if the school examination could satisfy the third statutory requirement.[381] The first statutory requirement envisions that examinations will be taken as part of the educational requirement. Such an interpretation would render the third requirement redundant. For these reasons, the in school examinations cannot also satisfy the third statutory requirement.[382] The Board of Optometry rule authorizing the contrary result was arbitrary and beyond its delegated authority.[383] The court

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377. The hearing officer held the rule was invalid because it permitted an applicant to satisfy the statutorily required examination concerning knowledge of "general and ocular pharmacology with particular emphasis on topical application of pharmaceutical agents for the eye and side effects of such pharmaceutical agents" by showing he or she had successfully completed course work examinations at a Board of Optometry approved school or in post graduate courses in these subject matter. *Florida Soc'y of Ophthalmology III*, 538 So. 2d at 884; FLA. STAT. § 463.0055(2)(c) (1987).

378. Statutes should be read in the context of the whole statute, not a single isolated word or series of words and the legislature's intent in passing the statute. Schoettle v. Department of Admin., 513 So. 2d 1299, 1302 (Fla. 1st Dist. Ct. App. 1987).

379. *Florida Soc'y of Ophthalmology III*, 538 So. 2d at 886.

380. *Id.*

381. *Id.* at 887.

382. *Id.* at 886.

383. *Id.* at 887.

also held the Board of Optometry's form for implementing its rules in this area was a substantive rule[384] and was invalid because it was not promulgated through the rule making process.[385] Both the rule and the form were held to be prospectively invalid.[386]

In *Booker Creek Preservation, Inc. v. Southwest Florida Water Management District*,[387] the court confronted the issue of whether water management district rules concerning the dredging and filing of small wetlands areas were valid. The legislature delegated authority to the various water management districts in the state, which administer the Department of Environmental Regulation's storm water rule, the power to promulgate a rule regulating the dredging and filling of small isolated wetlands within their jurisdiction.[388] In adopting a rule regulating these activities, the legislature directed that each water management district establish size categories for such small isolated wetlands where the impact that the filling and dredging of such areas will have on "fish and wildlife and their habitats will not be considered."[389] The size categories are to be established "based upon biological and hydrological evidence that shows the fish and wildlife values of such areas to be minimal."[390] In addition, each water management district was directed to establish, by rule, criteria for: (1) reviewing fish and wildlife and their habitats in areas larger than the minimum size category;[391] (2) the protection of endangered species in all wetlands areas regardless of their size;[392] and (3) assessment of cumulative and offsite impact of dredging and filling projects in the minimum category.[393] The Southwest Florida Water Management District promulgated a rule creating twelve exemptions from the permit requirement based upon the statute concerning small isolated wetlands.[394] In *Booker Creek Preservation,*

384. FLA. STAT. § 120.52(16) (1989).

385. *Florida Soc'y of Ophthalmology III*, 538 So. 2d at 888; FLA. STAT. § 120.54 (1989). This result is potential inconsistent with decisions concerning incipient rule making. *See supra* notes 185-210 and accompanying text.

386. *Florida Soc'y of Ophthalmology III*, 538 So. 2d at 889-90.

387. 534 So. 2d 419 (Fla. 5th Dist. Ct. App. 1988), *reh'g denied*.

388. FLA. STAT. § 373.414(1) (1987). The water management districts were required to adopt a rule concerning this matter by March 31, 1987. *Id.*

389. FLA. STAT. § 373.414(1)(a) (1987).

390. *Id.*

391. FLA. STAT. § 373.414(1)(b) (1987).

392. FLA. STAT. § 373.414(1)(c) (1987).

393. FLA. STAT. § 373.414(1)(d) (1987).

394. FLA. ADMIN. CODE r. 40D-4.051.

Inc.,[395] the validity of all the exemptions contained in the rule was challenged. The standard of judicial review for agency rule making does not focus on whether competent substantial evidence exists because no factual findings have been made by the agency. Rather judicial review is concerned with whether the rule is "reasonably related to the purposes of the . . . [statute], and are not arbitrary or capricious."[396] This is a very deferential standard of judicial review which leaves substantial latitude to the agency in its policy choices. However, there are limits on what the agency can do. An agency "rule cannot substantively modify or amend the empowering statute by adding additional requirements [to the statutorily established requirements] . . . [or] vary the impact of a statute by restricting or limiting its operation, through creating waivers or exemptions."[397] The court held that in this case the twelve exemptions established by the rule were all invalid, because none of them are concerned with or limited to dredging and filling operations. The statute only authorized exemptions for such operations, not the list of activities exempted by the Southwest Florida Water Management District's rule. The court noted that other statutory provisions did not offer a basis for these exemptions. All of the exemptions contained in the rule are unreasonable and arbitrary and capricious and invalid.[398]

In perhaps the most significant case decided during this survey period, the court in *Adam Smith Enterprises, Inc. v. Department of Environmental Regulation*,[399] may have signaled a fundamental change in how courts should review the facts when the validity of an agency rule is challenged. The court indicated that the standard of judicial review applied in evaluating the validity of a rule depends on how the issue reached the courts. If judicial review is conducted pursuant to a direct appeal from an adopted agency rule using the informal rule making procedures,[400] then the standard of judicial review is arbitrary and capricious.[401] This is a less stringent standard of judicial review of the factual record than the competent substantial evidence standard which is applied in the review of adjudicatory decisions.[402]

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395. *Booker Creek Preservation, Inc.*, 534 So. 2d at 419.
396. *Id.* at 422.
397. *Id.* at 423 (citations omitted).
398. *Id.* 423-25.
399. 553 So. 2d 1260 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied.*
400. FLA. STAT. § 120.54(3) (1989).
401. *Adam Smith Enters., Inc.*, 553 So. 2d at 1271.
402. *Id.* at 1271-72.

> Under th[e] arbitrary and capricious standard . . . an agency is . . . subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether a rulemaker's empirical conclusions have support in substantial evidence. Rather, the arbitrary and capricious standard requires an inquiry into the basic orderliness of the rulemaking process, and authorizes the courts to scrutinize the actual making of the rule for signs of blind prejudice or inattention to crucial facts. [This requires] the reviewing court . . . [to] consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision.[403]

However, if judicial review of an administrative rule arises out of the context of adjudicatory proceedings used during the rule making process,[404] then the agency's quasi-legislative rule making process is converted to an adjudicatory process and the standard of judicial review for factual conclusions supporting the rule is the competent substantial evidence standard.[405] This occurs because the hearing officer's factual conclusions become the basic record for the court to review.[406] Applying this paradigm, the court concluded that the appropriate standard of judicial review in this case was the competent substantial evidence standard, because this case reached the court on appeal for an adjudicatory proceeding arising during the rule making process.[407] The court found that the record satisfied the substantial competent evidence standard of judicial review.

Whether the two tier approach outlined in *Adam Smith Enterprises* is followed by other courts will be determined in the coming months. However, one thing is certain, it has called into question the continuing validity[408] of the approach to this issue first stated in *Agrico Chemical Company v. Department of Environmental Regulation*.[409]

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403. *Id.* at 1273.
404. FLA. STAT. §§ 120.54(4), 120.56 (1989).
405. *Adam Smith Enters., Inc.*, 553 So. 2d at 1273-74; *see* FLA. STAT. § 120.68(10) (1989).
406. *Adam Smith Enters., Inc.*, 553 So. 2d at 1274.
407. *Id.* at 1262, 1275; *see* FLA. STAT. § 120.54(4) (1989).
408. *Adam Smith Enters., Inc.*, 553 So. 2d at 1274 n.24.
409. 365 So. 2d 759 (Fla. 1st Dist. Ct. App. 1979), *reh'g denied*.

H. Unenlightening Judicial Review[410]

During this survey period the courts continued, on occasion, to render opinions which (1) provide little, or no, guidance on the nature of the issue decided and (2) provide little, or no, explanation of why the court reached its decision.[411] During the survey period these opinions were of two types. First, were opinions where the courts provided only a brief cursory discussion of a case and summarily concluded that an agency's factual findings either did or did not satisfy the competent substantial evidence standard of judicial review. *Shackleton v. Florida Unemployment Appeals Commission*,[412] is typical of the opinions where the court used this methodology in affirming an agency's factual findings.

> In the instant case there is amply competent substantial evidence in the record to support the appeals referee's finding that claimant was not guilty of misconduct connected with her work and was entitled to unemployment compensation. There was no showing that the proceedings on which the findings were based did not comply with the essential requirements of law.[413]

Department of Professional Regulation v. Baggett,[414] is typical of opinions where the court used this methodology in reversing an agency's factual findings.

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410. Burris I, *supra* note 4, at 407-10; Burris II, *supra* note 4, at 779-81.

411. A similar problem are those opinions where the courts never mention the standard of judicial review they are applying, but yet they affirm or reverse based upon factual issues. *See* Schueler v. RCA Corp., 536 So. 2d 1055, 1056 (Fla. 4th Dist. Ct. App. 1988); Krueger v. School Dist. of Hernando County, 540 So. 2d 180 (Fla. 5th Dist. Ct. App. 1989).

412. 534 So. 2d 753 (Fla. 1st Dist. Ct. App. 1988).

413. *Id.* at 753-54. There are numerous examples of similar cursory discussions in support of affirming the agency's decision. *See Fire Defense Centers*, 548 So. 2d at 1167; United Tel. Long Distance, Inc. v. Nichols, 546 So. 2d 717, 720 (Fla. 1989); Shaffer v. School Bd. of Martin County, 543 So. 2d 335, 337 (Fla. 4th Dist. Ct. App. 1989) (The court summarized the factual findings, but offered no explanation for why they were sufficient under the competent substantial evidence standard of judicial review.); City of Fort Lauderdale v. Fraternal Order of Police, Ft. Lauderdale, Lodge 31, 543 So. 2d 320, 321 (Fla. 1st Dist. Ct. App. 1989) (per curiam); Department of Highway Safety and Motor Vehicles v. Allen, 539 So. 2d 20, 21 (Fla. 5th Dist. Ct. App. 1989); Lombillo v. Department of Professional Regulation, 537 So. 2d 1079 (Fla. 1st Dist. Ct. App. 1989), *reh'g denied*.

414. 535 So. 2d 319 (Fla. 1st Dist. Ct. App. 1988).

> We reverse the Board's final order because the record adequately supports the hearing officer's findings. We hold that the Board improperly substituted its own judgment for that of the hearing officer's contrary to section 120.57(1)(b)(10) [of the] Florida Statutes (1987).[415]

Second, are those opinions in which the courts affirmed and occasionally reversed an agency decision in *per curiam* opinions[416] which offered little,[417] or no,[418] explanation of the court's decision. Where the

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415. *Id.* The court also cited without explanation several cases to support this conclusion. *See, e.g.*, Lovett v. Florida Unemployment Appeals Comm'n, 547 So. 2d 1253 (Fla. 1st Dist. Ct. App. 1989) (per curiam); G.L. v. Department of Health and Rehabilitative Servs., 547 So. 2d 1001 (Fla. 1st Dist. Ct. App. 1989) (per curiam).

416. The Florida practice of issuing decisions without opinion is a substitute for a selective opinion publication rule. "Florida courts dispose of cases with no precedential value by issuing *per curiam* affirmances without opinion . . . . Since these decisions have no accompanying written opinion, no reason exists to limit their publication." Anstead, *Selective Publication: An Alternative to the PCA?*, 34 U. FLA. L. REV. 189, 201 (1982). But not all *per curiam* opinions are published with no explanation. Often a court will cite one or more cases in support of its decision. *See, e.g.*, Owens v. Department of Health and Rehabilitative Servs., 543 So. 2d 858 (Fla. 1st Dist. Ct. App. 1989) (per curiam) (citing one case as the sole explanation for its decision to reverse the administrative order). The problem with these cases is that the citations contained in these opinions create confusion because the cited cases often stand for more than one proposition. In the *Owens* opinion the case cited, Juste v. Department of Health and Rehabilitative Servs., 520 So. 2d 69 (Fla. 1st Dist. Ct. App. 1988), decided two issues. As a result the *Owens* case may have involved one or both of these issues.

417. *E.g.*, Minkes v. Department of Professional Regulation, 550 So. 2d 1175 (Fla. 1st Dist. Ct. App. 1989) (per curiam) (citing a statutory provision as the sole explanation for its decision to affirm); Weathers v. Department of Admin., 548 So. 2d 705 (Fla. 3d Dist. Ct. App. 1989) (per curiam), *reh'g denied*, (citing several cases as the sole explanation for its decision to affirm); Parkwood Invs., Inc. v. Board of Trustees of the Internal Improvement Trust Fund, 544 So. 2d 349 (Fla. 2d Dist. Ct. App. 1989) (per curiam) (citing one case as the sole explanation for its decision to reverse the administrative order and remand for an evidentiary hearing); Rodriguez v. Florida Unemployment Appeals Comm'n, 543 So. 2d 384 (Fla. 3d Dist. Ct. App. 1989) (per curiam) (citing several cases as the sole explanation for its decision to affirm); Martin County Liquors, Inc. v. Department of Business Regulation, 539 So. 2d 8 (Fla. 1st Dist. Ct. App. 1989) (per curiam) (citing one case as the sole explanation for its decision to quash the administrative order); Fuente v. Department of Health and Rehabilitative Serv., 537 So. 2d 675 (Fla. 1st Dist. Ct. App. 1989) (per curiam) (citing several cases as the sole explanation for its decision to affirm.);Hanna v. Department of Health and Rehabilitative Serv., 537 So. 2d 675 (Fla. 1st Dist. Ct. App. 1989) (per curiam) (citing several cases as the sole explanation for its decision to affirm); Department of Highway Safety v. Wilson, 535 So. 2d 613 (Fla. 1st Dist. Ct. App. 1988) (per curiam)

courts decide the case without a published opinion no light is shed on the rationale the court used in reaching the result.[419] The only way to determine even what the issue was in the case is by examining the briefs filed.[420] The harshness of this burden is in part diminished by the

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(citing one case as the sole explanation for its decision to affirm); Leroy v. Department of Health and Human Serv., 535 So. 2d 338 (Fla. 1st Dist. Ct. App. 1988) (per curiam) (citing several cases as the sole explanation for its decision to affirm); Department of Labor and Employment Sec. v. Florida Unemployment Appeals Comm'n, 535 So. 2d 334 (Fla. 1st Dist. Ct. App. 1988) (per curiam) (citing several cases as the sole explanation for its decision to affirm).

418. *E.g.*, Concerned Shrimpers v. Marine Fisheries Comm'n, 549 So. 2d 1111 (Fla. 1st Dist. Ct. App. 1989) (per curiam); Bidlofsky v. Department of Professional Regulation, 548 So. 2d 780 (Fla. 1st Dist. Ct. App. 1989) (per curiam); Cathcart v. Florida Unemployment Appeals Comm'n, 542 So. 2d 1041 (Fla. 1st Dist. Ct. App. 1989) (per curiam); Farrell v. Florida Unemployment Appeals Comm'n, 533 So. 2d 1211 (Fla. 4th Dist. Ct. App. 1988) (per curiam).

Although not labeled as *per curiam* decisions a similar problem exists for decisions announced without a published opinion in citation tables. *E.g.*, Gallagher v. Florida Unemployment Appeals Comm'n, 553 So. 2d 173 (Fla. 2d Dist. Ct. App. 1989); Forum Group, Inc. v. Department of Health and Rehabilitative Servs., 553 So. 2d 171 (Fla. 1st Dist. Ct. App. 1989); Hillsborough County Police Benevolent Ass'n, Inc. v. City of Tampa, 552 So. 2d 919 (Fla. 2d Dist. Ct. App. 1989); Department of Natural Resources v. McLaughlin, 552 So. 2d 917 (Fla. 1st Dist. Ct. App. 1989); City of Starke Police Dep't v. Alachua County Police Benevolent Ass'n, 551 So. 2d 1216 (Fla. 1st Dist. Ct. App. 1989); Pelton v. Florida Unemployment Appeals Comm'n, 549 So. 2d 1021 (Fla. 5th Dist. Ct. App. 1989); Perrin v. Colorado Prime Sales Corp., 549 So. 2d 1019 (Fla. 3d Dist. Ct. App. 1989); Parry v. Department of Professional Regulation, 547 So. 2d 655 (Fla. 5th Dist. Ct. App. 1989); Rader v. Pafford, 547 So. 2d 652 (Fla. 4th Dist. Ct. App. 1989); Sunshine Auto Sales, Inc. v. Department of Highway Safety and Motor Vehicles, 547 So. 2d 649 (Fla. 3d Dist. Ct. App. 1989); Freiberg v. Lifetime Water Treatment, Inc., 547 So. 2d 640 (Fla. 2d Dist. Ct. App. 1989); Federation of Mobile Home Owners of Fla., Inc. v. Florida Mfg. Housing Ass'n, 547 So. 2d 636 (Fla. 1st Dist. Ct. App. 1989); Decker v. Department of Envtl. Regulation, 545 So. 2d 882 (Fla. 5th Dist. Ct. App. 1989); Turnberry Isle Ass'n v. Department of Envtl. Regulation, 545 So. 2d 871 (Fla. 1st Dist. Ct. App. 1989). Concern over the precedential value of these decisions is not as severe because these cases are often just a denial of a writ of *certiorari* of non-final orders which are not even a binding decision in the instant case let alone a future case. *See, e.g.*, Bing v. A.G. Edwards & Sons, Inc., 498 So. 2d 1279, 1280 (Fla. 4th Dist. Ct. App. 1987), *reh'g denied*.

419. "While the court from which the decision emanated has a record of that case and may possess some unique knowledge underlying the decision, the court to which it is being cited can only speculate as to the rationale of such a decision and is not in a position to agree or disagree with the reason for the decision." Department of Legal Affairs v. District Ct. App., 434 So. 2d 310, 312-13 (Fla. 1983).

420. Not all the decisions are totally without an explanation sometimes a court will cite one or more cases to support the disposition of a case. *See supra* note 417.

fact that such cases cannot be cited as precedent in other cases.[421] The downside to this rule is that it leaves hidden the justification for the decision and may tempt courts to decide hard cases in this manner in order to avoid possible consequences in subsequent cases.

The shortcoming of both these types of opinions is "that the courts have not engaged in any articulation of the reasons why these records are sufficient or insufficient to support an agency's factual findings."[422] Such a failure is inconsistent with the vision of how a reviewing court would determine the adequacy of the factual record under the APA.[423] Under the APA an appellate court is required to "deal separately with disputed issues of agency procedure, interpretations of law, determinations of fact, or policy within the agency's exercise of delegated authority."[424] The function of appellate courts is limited in each of these categories. The only way to know if an appellate court has remained true to its limited role is by reviewing its explanation. Where there is no explanation or it is an unenlightening explanation, one merely stating a conclusion, then there is no basis for making this judgment. These types of opinions are also inconsistent with the general role appellate court opinions are designed to play in our legal system: providing "a reasoned justification for the result . . . [by] testing the decision against experience and against acceptability, buttressing it and making it persuasive to self and others."[425] Such "justification and elaboration are expected in . . . [any] mature legal system."[426] This requirement guards against judicial fiat[427] and assures that the law is known and knowable rather

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421. *Id.* at 311-12.

422. Burris II, *supra* note 4, at 781.

423. A. ENGLAND & L.H. LEVINSON, FLORIDA ADMINISTRATIVE PRACTICE MANUAL § 15.13 (1979).

424. FLA. STAT. § 120.68(7) (1989).

425. K. LLEWELLYN, THE COMMON LAW TRADITION DECIDING APPEALS 11 (1960). Principled judicial opinions provide "a reason for the disposition of the case . . . [which is an explanation of why it was] proper to decide cases of its type in this way." Golding, *Principled Decision-Making and the Supreme Court*, 63 COLUM. L. REV. 35, 41 (1963).

426. Lewis, *Is the Supreme Court Creating Unknown and Unknowable Law? The Insubstantial Federal Question Dismissal*, 5 NOVA L.J. 11, 12 (1980).

427. When a judicial opinion provides a principled and reasoned explanation for the result in a case, then "we are assured that rules of law *do* play a role in the judicial process" and that it is not controlled solely by the policy preferences of the judges. *Id.* *See* R. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 31-32 (1976).

than a body of hidden principles.[428]

There are a few circumstances when it is not necessary, or for policy reasons it is impractical, for the court to provide a full explanation of why it reached a decision. When the parties have agreed that the agency's order was in error, then it is appropriate for the court to reverse and remand the case in a very brief opinion.[429] *Wells v. Sarasota Herald Tribune Company, Inc.*,[430] is an example of another circumstance where it may be appropriate for the court to write an opinion in which it summarily stated its conclusions concerning the adequacy of the factual record. In *Wells*, the facts were established during an *in camera* inspection of records designed to preserve the confidentiality of the information.[431] A full discussion of the factual record in the opinion would have defeated the confidentiality claim the agency was, as the court concluded, rightfully trying to preserve.

I. Extraordinarily Deferential Judicial Review

In some circumstances the circuit court is the court which reviews administrative decisions. The power of the circuit court to review administrative decisions is generally invoked by filing a petition for a writ of *certiorari*.[432] This is a very limited form of judicial review. When a circuit court reviews an administrative decision, in its appellate capacity, its task is "to determine whether procedural due process . . . [was] accorded the parties, whether the essential requirements of law . . . [were] observed, and whether the administrative findings and judgment . . . [were] supported by competent substantial evidence."[433] The rem-

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428. *See* B. CARDOZO, THE GROWTH OF THE LAW 2-3 (1924).

429. Department of Health and Rehabilitative Servs. v. Atkinson, 547 So. 2d 1262 (Fla. 1st Dist. Ct. App. 1989) (per curiam), *reh'g denied*; Stacey v. Department of Professional Regulation, 547 So. 2d 241 (Fla. 1st Dist. Ct. App. 1989) (per curiam). *Cf.* Glenn v. Adm'r of Veterans' Affairs, 547 So. 2d 676 (Fla. 3d Dist. Ct. App. 1989) (per curiam), *reh'g denied* (example of this type of opinion in reviewing a circuit court's decision).

430. 546 So. 2d 1105 (Fla. 2d Dist. Ct. App. 1989) (per curiam), *reh'g denied*.

431. *Id.*

432. *Cf.* Jones v. Office of the Sheriff, 541 So. 2d 1149 (Fla. 1989) (The court held a notice of appeal filed with the circuit court in seeking appellate review of a nonappealable order was sufficient to establish jurisdiction in the district court of appeal to treat the petition as a writ of *certiorari*; the filing of a notice of appeal was not necessary in the district court of appeal.).

433. Hollywood Firemen's Pension Fund v. Terlizzese, 538 So. 2d 934, 935 (Fla. 4th Dist. Ct. App. 1989), *reh'g denied*. This definition of the standard of judicial re-

edy a circuit court may grant "is limited to denying the writ of *certiorari* or quashing the order reviewed."[434] The circuit court cannot direct "that any particular action be taken" by the administrative agency.[435]

In *Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals*,[436] the Supreme Court reaffirmed that a district court of appeal review of a circuit court's application of this standard of judicial review is very limited. The district court of appeal is restricted to determining " 'whether the circuit court afforded procedural due process and applied the correct law.' "[437] The district court of appeal is prohibited from overtly reviewing the circuit court's evaluation of the record under the competent substantial evidence standard of judicial review.[438] The Supreme Court held that the Fourth District Court of Appeal erred in doing so in this case.[439] But the reason for quashing the decision of the Fourth District Court of Appeal is not an objection to the substance of its decision, but to the form of the decision, because the Supreme Court clearly recognized that there may be circumstances when a district court of appeal can reject the circuit court's evaluation of the record under the substantial competent evidence standard of judicial review.[440] But under the standard of judicial

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view under a writ of *certiorari* was first stated by the Florida Supreme Court in 1982. City of Deerfield Beach v. Valiant, 419 So. 2d 624, 626 (Fla. 1982). Under this standard of judicial review the circuit court is prohibited from reweighing the evidence in order to justify overturning an administrative decision. Department of Highway Safety and Motor Vehicles v. Allen, 539 So. 2d 20, 21 (Fla. 5th Dist. Ct. App. 1989). It must affirm the validity of an ordinance if it is fairly debatable. City of Comm'n of the City of Miami v. Woodlawn Park Cemetery Co., 553 So. 2d 1227, 1239 (Fla. 3d Dist. Ct. App. 1989), *reh'g denied*. Prior to the *Valiant* decision even a more limited standard of judicial review was applied by the circuit courts. Metropolitan Dade County v. Rudoff, 544 So. 2d 1118, 1119-20 (Fla. 3d Dist. Ct. App. 1989) (per curiam) (Cope, J., concurring).

434. National Advertising Co v. Broward County, 491 So. 2d 1262, 1263 (Fla. 4th Dist. Ct. App. 1986).

435. *Id.* In Hollywood Firemen's Pension Fund v. Terlizzese, the court held that the circuit court exceeded its authority under writ of *certiorari* review by awarding a disability pension in addition to quashing the administrative decision to the contrary. 538 So. 2d 934, 935 (Fla. 4th Dist. Ct. App. 1989), *reh'g denied*.

436. 541 So. 2d 106, 108 (Fla. 1989).

437. *Id.* at 108 (quoting City of Deerfield Beach v. Valiant, 419 So. 2d 624, 626 (Fla. 1982)).

438. *Id. Accord* Gomez v. City of St. Petersberg, 550 So. 2d 7, 7-8 (Fla. 2d Dist. Ct. App. 1989).

439. *Id.*

440. *Id.* (brief discussion of Skagga-Alberstson's v. ABC Liquors, Inc., 363 So.

review established in *Valiant*[441] the reason offered for such a decision must be that the circuit court failed to *apply* the correct law.[442] Any other approach would vest the circuit court with final and unreviewable authority over the sufficiency of the record as long as it used the appropriate magic words.[443]

2d 1082 (Fla. 1978)).

441. A. ENGLAND & L.H. LEVINSON, *supra* note 423.

442. *See Education Dev. Center, Inc.*, 541 So. 2d at 109 (McDonald, J., dissenting).

443. *Id.*