FINAL REPORT OF THE GOVERNOR'S ADMINISTRATIVE PROCEDURE ACT REVIEW COMMISSION

FEBRUARY 20, 1996

GOVERNOR'S APA REVIEW COMMISSION

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PREFACE

This report presents the recommendations of the Governor's Administrative Procedure Act Review Commission. The 15-member Commission held six meetings between October 12, 1995, and February 8, 1996.

The Appendix to this report includes minutes of all Commission meetings, as well as memoranda and other background materials prepared by the Commission staff and reviewed as commissioners developed their recommendations. The Appendix also includes background materials on issues the Commission discussed but that are not the subject of formal recommendations.

EXECUTIVE SUMMARY

The Governor's Administrative Procedure Act Review Commission concentrated its efforts in three broad areas: simplifying the APA, increasing flexibility in the application of administrative rules and procedures, and increasing agency accountability to the Legislature and the general public.

The APA was enacted in 1974 and has been amended every year since then. It has become poorly organized and is difficult to read, understand, and apply. The Commission recommends adoption of a "simplified" draft of the APA with the express understanding that it makes no substantive changes to the APA.

Recognizing that the rigid adherence to rules sometimes can result in unintended and nonsensical results, the Commission also recommends the creation of a new section in chapter 120 authorizing agencies to grant variances and waivers to their own rules.

The Commission's proposed variance and waiver statute emphasizes that the Legislature continues to establish fundamental policy in Florida and provides standards to guide agencies as they consider requests for variances and waivers. In all cases in which a variance or waiver to a rule is granted, an applicant must demonstrate that the goals of the underlying statute have been or can be achieved by some other means.

Several recommendations are designed to improve agency accountability to the Legislature and the public. Specifically, staff analyses of bills prepared by legislative committees should identify sections of proposed legislation that require agency rulemaking and discuss whether the bill provides adequate and appropriate standards and guidelines to direct the agency's implementation of the proposal. Agencies should be asked to provide comments for inclusion in the staff analyses.

Section 120.535, Florida Statutes, which provides that rulemaking is not a matter of agency discretion and that rules should be adopted as soon as feasible and practicable, should be retained. Published rules help provide certainty to the regulated community and help inform the general public of an agency's policies. The rulemaking process affords interested persons the opportunity to comment on proposed rules and give necessary input to an agency as it develops its policies.

The Commission also finds that a more level playing field for the regulated public is needed in some administrative proceedings. Current case law provides that proposed and existing agency rules are entitled to a presumption of validity. The Commission recommends that no presumption of validity attach to proposed agency rules. Existing rules, which have been adopted pursuant to the procedural requirements in chapter 120, should continue to enjoy the presumption of validity. However, unadopted agency rules should not enjoy a presumption of validity in either

section 120.535 proceedings or in adjudicatory proceedings pursuant to section 120.57(1)(b)15. In such adjudicatory proceedings, a hearing officer's conclusions with respect to unadopted rules should not be rejected by an agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such conclusions are clearly erroneous or do not comply with essential requirements of law.

Additionally, costs and attorney fees should be awarded against state agencies if the agencies lose certain types of administrative proceedings. In rule challenge proceedings pursuant to sections 120.54(4) and 120.56, hearing officers should be required to award attorney fees and costs against an agency that does not prevail unless the agency's actions are "substantially justified" as defined in the Equal Access to Justice Act. Attorney fees should be capped in such proceedings at \$15,000.

In section 120.535 proceedings, upon entry of a final order against an agency, the hearing officer should award costs and attorney fees to the challenger with no monetary limitation. Finally, in proceedings pursuant to section 120.57(1)(b)15., when an agency is attempting to apply an unadopted rule to a person, attorney fees should be awarded by an appellate court upon review of the proceeding if the court finds that the agency's rejection of the hearing officer's conclusions regarding the unadopted rule do not comply with the requirements of that section. The fee and cost

award would cover both the administrative and appellate proceedings with no monetary limitation.

With respect to the costs of proposed regulations, the Commission recommends that the economic impact statement concept in current law be replaced with a simpler and more meaningful Statement of Regulatory Costs (SERC). Commission recommendations also address agency choice of regulatory alternatives, circumstances in which SERCs would be required, and potential consequences for failure to prepare a SERC.

The Commission believes that administrative proceedings can be less expensive, less time-consuming, and less adversarial. To test the application of informal dispute resolution techniques in representative APA proceedings, the Legislature should establish and provide an appropriation for ten informal dispute resolution pilot projects in the eight executive branch departments identified by the Governor's Office. The pilot projects should be structured with various alternative dispute resolution components, and they should be monitored for their effectiveness. The Commission also recommends that hearing officers at the Division of Administrative Hearings be authorized to direct or encourage parties to mediation or other means of alternative dispute resolution.

With respect to specific types of administrative cases, the Commission finds that the evidentiary standard and timeframes used in bid protest proceedings should be modified. The current evidentiary standard is too stringent, and current statutory requirements do not allow enough time to prepare for hearing.

Finally, the Commission recommends that the Legislature change the title of "hearing officer" at DOAH to "administrative law judge." This title is less confusing and more accurately reflects the role that DOAH hearing officers play in resolving administrative disputes.

A "SIMPLIFIED" APA

The Florida Administrative Procedure Act is not logically organized or easily understood. A number of duplicative provisions exist, and its paragraphs and subsections are too long. A committee of government and nongovernment lawyers organized by the Governor's office prepared a "simplified draft" of the APA that is intended to make it easier to read and understand. The "simplified" draft is not intended to make substantive changes.

The Commission reviewed the proposed draft, but did not undertake a line-byline analysis of it. However, the Executive Council of the Administrative Law Section of the Florida Bar performed an in-depth analysis and provided the Commission with recommendations. In short, the Commission endorses the concept of the simplified APA with the express understanding that it makes no substantive changes. A onepage summary listing the problems with the APA as identified by the drafting committee and the solutions proposed through the simplified draft can be found at Appendix G.

The draft prepared by the committee and presented to the Commission rearranges existing language in a more logical fashion. Duplicative provisions are deleted, and other provisions are moved into sections where they more logically belong. For example, sections 120.54 and 120.535, both of which relate to

rulemaking, are combined into a single section 120.54 entitled "Rulemaking." Additionally, the rule challenge provisions of sections 120.535, 120.54, and 120.56 are combined into a single section 120.56 entitled "Challenges to rules." This new section 120.56 first addresses provisions common to all rule challenges, and then lists special provisions relating to particular types of challenges.

Similarly, common procedures for hearings are listed in a new section 120.569, which combines provisions from sections 120.57, 120.58, and 120.59. Sections 120.57(1) and (2) are retained, but are limited to special provisions relating to formal hearings and informal hearings, respectively.

All attorney fees provisions, which now are found in sections 120.59, 120.535, 120.56, and 120.57, are combined into a new section 120.595. Obsolete provisions in sections 120.63, 120.65(6), 120.72, 120.721, and 120.722 are deleted.

The draft prepared by the committee also creates Part II of chapter 120, which lists each agency exception alphabetically by agency, as well as exceptions that cover more than a single agency (i.e., "educational units" and "prisoners"). These broader exceptions also are organized alphabetically.

The draft adds more subsection and paragraph headings, replaces "legalese," and reduces unnecessary wording in an effort to be more user-friendly for nonlawyers. Additionally, gender references are neutralized.

Recommendation: The Commission recommends adoption of the simplified draft with the express understanding that it makes no substantive changes to the APA. The Commission also recommends that the simplified draft serve as the basis for future substantive changes that may be considered by the Legislature, including those identified in this report.

VARIANCES AND WAIVERS TO AGENCY RULES

The Commission began its discussion of the need for variances and waivers by considering a general premise that was drafted after several Commissioners shared their own and citizens' experiences with agencies who insisted upon strict adherence to rules, even when the results were nonsensical. The premise states:

More flexibility is needed in the administrative process, particularly in the ways agencies apply their rules to the public. Agencies must write rules specific enough to be meaningful, yet general enough to fit a variety of situations. The broader the regulatory task, the greater the likelihood that unforeseen situations will arise, thus creating the need for "adjustments" to rules of general applicability. Consequently, to achieve an appropriate result for the public and private citizens, agencies often need flexibility to vary from literal requirements of rules. Procedural mechanisms are needed to consider individual requests for variances and exceptions to administrative rules of general applicability.

This premise was developed after research into the law of administrative variances and waivers. <u>See</u> Appendix H (Flexibility Issues Memorandum).

In accepting this premise, Commissioners recognize that flexibility is only one part of a comprehensive administrative process that is based on a known set of regulations and procedures. Commissioners understand that the Florida Administrative Procedure Act was adopted in 1974 in large measure because of concerns about "phantom government" and to rein in unbridled agency flexibility. <u>See</u> Appendix A (Minutes of October 12, 1995 meeting). Thus, Commissioners want to strike a balance between rigid adherence to rules and unpredictable application of them to the public.

Before any proposal on variances and waivers was drafted, Commissioners reviewed constitutional issues unique to Florida that could have an impact on the Legislature's ability to include a general variance and waiver provision in chapter 120. Specifically, Commissioners evaluated and discussed the separation of powers provision in article II, section 3 of the Florida Constitution and the "nondelegation doctrine" that state courts have developed when construing that provision. <u>See</u> Appendix I (Memorandum to Commissioners on Nondelegation Doctrine). The Commission concluded that a general waiver and variance provision could be drafted that satisfies constitutional requirements so long as the Legislature does not give administrative agencies the authority to establish fundamental policy and provides adequate standards to agencies in the exercise of their discretion.

The proposed statute was drafted with these considerations in mind. <u>See</u> Appendix J (Final Draft of Proposed Variance and Waiver Statute). For example, the proposal makes clear that it is the policy of the <u>Legislature</u> (not executive branch agencies) that variances and waivers to rules are appropriate in certain circumstances. The proposal also states that it does not authorize agencies to grant variances or waivers to statutes. Additionally, the central consideration in an agency's decision whether to grant a variance or waiver is whether "the purpose of the underlying statute" can be or has been achieved by other means.

The proposed statute defines both "variance" and "waiver." A variance is a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. A waiver is a decision by an agency not to apply all or part of a rule to a person who is subject to the rule.

The proposal states that variances and waivers are to be granted as a matter of right when a person subject to a particular rule demonstrates that the purpose of the underlying statute can be or has been achieved by other means <u>and</u> that application of a rule would create a substantial hardship <u>or</u> would violate principles of fairness. A "substantial hardship" is defined as a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. "Principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. These criteria were chosen after research and discussion into administrative exceptions both at the federal level and in other states. <u>See</u> Appendix H (Flexibility Issues Memorandum).

Florida has a number of variance provisions within substantive statutes. Section 403.201, for example, authorizes the Department of Environmental Protection to grant variances to the provisions of the Florida Air and Water Pollution Control Act and to rules and regulations that implement it. Some Florida statutes only permit variances to be granted when alternative means can be shown to protect public health and safety. <u>See, e.g., § 381.086(3)</u>, Fla. Stat. (relating to migrant housing). In other cases, variances may be granted if a particular project provides a significant regional benefit for wildlife and the environment. § 378.212(1)(f), Fla. Stat. (phosphate reclamation).

Commissioners considered the possibility of recommending the incorporation of variance or waiver provisions in all relevant substantive statutes with particular standards crafted to each statute. Several Commissioners expressed the view that combing though the statutes for each appropriate place for such a provision would be difficult. Additionally, the view was expressed that embarking on such a project would be unnecessary if the general policy concerning variances and waivers could be incorporated into chapter 120 with an assurance that granting a waiver or variance would achieve the purpose of the underlying statute. The proposed variance and waiver statute makes clear that it does not supersede, and is in addition to, the variance and waiver provisions in substantive statutes.

Commissioners also considered other means of amending chapter 120 to introduce flexibility. One provision in Florida's APA that once afforded more flexibility to agencies has been eliminated by the Legislature. The APA formerly contained a provision that was interpreted by Florida courts as authorizing agencies to grant exceptions to their rules so long as they explained those deviations. Section 120.68(12), Florida Statutes (1983), provided that a court should remand a case to an agency if it found the agency's exercise of discretion to be "inconsistent with an agency rule, an officially stated agency policy, or a prior agency practice if deviation therefrom is not explained by the agency" (Emphasis supplied). Florida courts began to develop an "explication" doctrine allowing an agency to deviate from its own rule so long as it explained the deviation. See Appendix H. The court cases discussing section 120.68(12) did not elaborate on what kind of explanation an agency must provide or under what standard the agency's explanation would be reviewed. In 1984, the Legislature amended section 120.68(12) to direct the remand of all cases in which a court finds that an agency's exercise of discretion is inconsistent with an agency rule. Thus, the opportunity to deviate from an existing rule and explain that deviation was eliminated.

Commissioners considered the possibility of returning to the approach in section 120.68(12), but decided that a more detailed variance and waiver provision,

including procedural safeguards for both the applicant and other parties, was preferable.

The proposal states that a person subject to regulation by an agency rule may file a petition with that agency requesting a variance or waiver. Agencies may not initiate variances or waivers on their own motion. In addition to any requirements that may be mandated by model rules to be adopted by the Administration Commission, each petition must specify the rule for which the variance or waiver is requested; the type of action requested; the specific facts that would justify a waiver or variance for the petitioner; and the reason why the variance or waiver requested would serve the purposes of the underlying statute.

Notice of variance or waiver petitions must be published in the Florida Administrative Weekly, and the model rules must provide a means for interested persons to comment on the petition. Agencies must grant or deny the petition within 90 days of its receipt or the petition is deemed approved. This provision is consistent with other applications for a "license" under the APA.

An order granting or denying the petition must be in writing and contain a statement of the relevant facts and reasons supporting the agency's action. The agency's decision to grant or deny the petition is required to be supported by competent substantial evidence and is subject to section 120.57 adjudication.

Orders granting or denying variance or waiver petitions are subject to the indexing requirements of section 120.53(2). Additionally, the proposal specifically requires each agency to maintain a record of the type and disposition of each variance or waiver petition that is filed. Annual reports to the Governor and Legislature listing the number and disposition of petitions filed are required by the draft.

Through its proposal, the Commission has sought to introduce more flexibility into the application of agency rules while at the same time preserve the original goals of the Administrative Procedure Act. The Commission believes it would be useful for the Legislature to evaluate the variance and waiver proposal to determine if it has any fiscal impact.

Recommendation: The Commission recommends that the Legislature enact the general variance and waiver provision proposed in Appendix J.

ACCOUNTABILITY ISSUES

The perception exists that state agencies sometimes adopt rules and policies that misinterpret legislative intent or go beyond specific statutory authorization. The response to such criticism often is that laws passed by legislators are so general that agencies have little choice but to develop their own implementation schemes. The Commission evaluated both viewpoints, as well as a number of other perspectives and proposals relating to agency accountability to the Legislature and the public. <u>See</u> Appendix K (Accountability Issues Memorandum).

The Commission focused particularly on the "accountability" issues that were sticking points between the Governor and the Legislature during the 1995 legislative session. Various provisions of CS/CS/SB 536 ("1995 APA Act"), which was vetoed by the Governor, were analyzed and discussed. The Governor's alternatives to those various provisions also were discussed and analyzed. Additionally, the Commission evaluated the problems that the 1995 APA Act attempted to address and considered a variety of solutions to those problems. <u>See</u> Appendices K - R.

Legislative Staff Analyses

At the Commission's first meeting on October 12, former Senator Curt Kiser stated that the Legislature has the tools it needs to monitor agency implementation of statutes. <u>See</u> Appendix A. Among his suggestions was that legislative staff analyses of bills address the rulemaking that proposed legislation would require.

The Commission embraced Kiser's idea after determining that laws passed by the Legislature often are so general that state agencies must divine legislative intent and "fill in the blanks" to implement them. <u>See</u> Appendices K (Accountability Issues Memorandum) and E (Minutes of January 25, 1995 meeting). The Commission concluded that the Legislature could better direct agencies if legislators, early in the legislative process, considered any rulemaking that would be required if a law is enacted and whether the proposal provides sufficient and appropriate policy direction to agencies.

Recommendation: Staff analyses of bills prepared by legislative committees should identify sections of proposed legislation that require agency rulemaking and discuss whether the bill provides adequate and appropriate standards and guidelines to direct the agency's implementation of the proposal. Agencies should be asked to provide comments for inclusion in the staff analyses.

Section 120.535

Adopted by the Legislature in 1991, this section states that agency rulemaking is not a matter of discretion. Each agency statement defined as a rule must be adopted by the rulemaking process as soon as feasible and practicable, subject to identified statutory exceptions. This "feasible and practicable" concept was adapted from the 1981 Model State Administrative Procedure Act, although the specific feasibility and practicability criteria are unique to Florida.

Commentators generally hailed the adoption of section 120.535 as a necessary correction to judicial interpretations that gave agencies great leeway in deciding when their policies must be adopted as rules. <u>See</u> Appendix L. Supporters of section 120.535 frequently emphasize that it was adopted to restore Florida administrative practice to what lawmakers originally intended in 1974 when the APA was adopted, to reverse a trend in the case law that threatened to make agency rulemaking the exception rather than the general rule. <u>See</u> Appendix L. As speakers to the Commission stated on October 12, 1995, the APA was enacted in large measure to combat "phantom government," the idea that agency policies were neither generally known nor consistently applied. <u>See</u> Appendix A. Predictability in government decision-making was a key goal of the original APA and one that supporters of section 120.535 say the statute is designed to accomplish.

The Commission considered the view that section 120.535 has resulted in the creation of too many agency rules. The Commission believes, however, that rules in and of themselves are not the problem; rather, problems surround the overly rigid rules adopted by some agencies. The adoption of a general variance and waiver provision in chapter 120 as proposed elsewhere in this report would help remedy that problem.

Recommendation: The Commission recommends that the Legislature retain the rulemaking requirement in section 120.535. The Commission believes that published rules help provide certainty to the regulated community and also help inform the general public of an agency's policies. The rulemaking process provides interested persons the opportunity to comment on proposed rules and give necessary input to an agency as it develops its policies.

Presumptions and Costs and Attorney Fees

The Commission proposal addresses various burdens of proof and evidentiary standards for four separate chapter 120 proceedings: proposed rule challenges; existing rule challenges; unadopted agency statements challenged under section 120.535; and application of unadopted agency statements challenged under section 120.57(1)(b)15. Additionally, the proposal includes provisions for the award of costs and attorney fees under each of those four proceedings. The Commission recommends that its proposals in this area be analyzed for any potential fiscal impact. See Appendix M. Before the proposals are discussed, existing law is briefly summarized.

Existing Law

Under current law, when a proposed rule or an existing rule is challenged, the burden is on the challenger to prove the invalidity of the rule by a preponderance of the evidence. Generally, courts defer to the agency's construction of a statute the agency is charged with enforcing, or state that the agency's interpretation is entitled to "great weight." Occasionally, courts clothe the rule with a "presumption" of correctness or validity. This presumption does not apply to most adjudicatory decisions by state agencies, which may be challenged under section 120.57; rather, it applies to rule challenges under sections 120.54 or 120.56. This presumption

developed through case law shortly after the APA was adopted and has been repeatedly emphasized by the courts. <u>See</u> Appendix N. Under current law, there is no presumption of validity for an agency statement challenged pursuant to section 120.535. Additionally, there is no presumption of validity in section 120.57(1)(b)15. proceedings when an agency attempts to apply an unadopted statement.

Several provisions of chapter 120 currently authorize the award of attorney fees and costs. <u>See</u> Appendix O. For example, fees and costs may be awarded against either private parties or the government in section 120.57 proceedings if papers are filed for an improper purpose, which means "to harass or to cause unnecessary delay or for frivolous purpose or needless increase in the cost of litigation." § 120.57(1)(b)5., Fla. Stat. (1995). Additionally, the Florida Equal Access to Justice Act authorizes fee and cost awards to small business parties prevailing in administrative proceedings initiated by state agencies when the agency's action is not "substantially justified." An action is "substantially justified" when it has a reasonable basis in law and fact at the time it is initiated by a state agency. § 57.111, Fla. Stat. (1995).

Chapter 120 currently does not include provisions for the award of attorney fees and costs in proceedings challenging either proposed rules or existing rules. Courts, however, do have the general discretionary authority to award attorney fees

and costs in rule challenge proceedings on appeal if the challenged agency action is

a "gross abuse of the agency's discretion." See Appendix O.

Section 120.57(1)(b)15., the section that agencies can use to apply unadopted statements to persons, was created by the Legislature in 1991 at the same time section 120.535 was adopted. The section provides as follows:

Each agency statement defined as a rule under s. 120.52 and not adopted by the rulemaking procedure provided by s. 120.54 which is relied upon by an agency to determine the substantial interests of a party shall be subject to de novo review by a hearing officer. A statement shall not enlarge, modify, or contravene the specific provision of law implemented or otherwise exceed delegated legislative authority. The statement applied as a result of a proceeding pursuant to this subsection shall be demonstrated to be within the scope of delegated legislative authority. Recommended and final orders pursuant to this subsection shall provide an explanation of the statement that includes the evidentiary basis which supports the statement applied and a general discussion of the justification for the statement applied.

Section 120.57(1)(b)15. allows an agency to use an unadopted statement against a party in a section 120.57 context, even if that party has won a section 120.535 proceeding that required the statement to be promulgated, so long as the agency has begun rulemaking.

For example, assume that a person substantially affected by an unadopted agency statement files a section 120.535 proceeding against a state agency. At issue in the 120.535 proceeding is whether the statement should have been adopted as a rule. Assume that the person wins the 120.535 case and the agency begins rulemaking

proceedings. Pursuant to section 120.535(5), the agency is allowed to begin applying its statement under such circumstances. Suppose that the agency applies the statement to the person who originally filed the 120.535 challenge. That person then files a 120.57 proceeding, stating that his or her substantial interests have been determined by the agency. At that point section 120.57(1)(b)15. becomes applicable, and the agency may apply the unadopted statement to the person, even though that person in an earlier proceeding secured a determination that the statement should have been adopted as a rule.

Proposals

The Commission's proposal addresses all four of these administrative proceedings in the context of whether the agency action is entitled to a presumption of validity and whether costs and attorney fees should be awarded against an agency that loses a proceeding. The goal of the Commission is to create a more level playing field in administrative proceedings.

In general, it is easier under the proposal to secure an award of attorney fees and costs against an agency if the agency statement at issue has not been subjected to the formal rulemaking requirements of chapter 120. Additionally, agency statements that have not been adopted pursuant to the rulemaking process are not entitled to any presumption of validity. Specifically, proposed rules challenged pursuant to section 120.54(4), which under current law are presumed to be valid, would not receive such a presumption under the Commission recommendation.

However, existing rules, adopted pursuant to chapter 120, continue to enjoy the presumption of validity. Unadopted agency statements continue not to receive a presumption of validity in either section 120.535 proceedings or in adjudicatory proceedings pursuant to section 120.57(1)(b)15.

A proposed amendment to section 120.57(1)(b)15. involves the agency's burden of proof. Once a petitioner establishes standing to bring a proceeding under section 120.57, the agency must prove that the statement is within the powers, functions, and duties delegated by the Legislature; that the statement does not enlarge, modify, or contravene the specific provisions of law implemented; that the statement is not arbitrary or capricious; and that the statement is not being applied to the substantially affected party retroactively without due notice.

Additionally, in proceedings under section 120.57(1)(b)15., a hearing officer's conclusions with respect to the unadopted rule may not be rejected by an agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such conclusions are clearly erroneous or do not comply with essential requirements of law.

The proposal provides that costs and attorney fees are awarded against state agencies if the agencies lose certain types of administrative proceedings. In rule challenge proceedings pursuant to sections 120.54(4) and 120.56, hearing officers must award attorney fees and costs against an agency that does not prevail unless the agency's actions are "substantially justified" as defined in the Equal Access to Justice Act. Attorney fees are capped in such proceedings at \$15,000, but costs are not capped.

In section 120.535 proceedings, upon entry of a final order against an agency, the hearing officer must award costs and attorney fees to the challenger with no monetary limitation. The statutory language drafted to accomplish this recommendation should ensure that parties to a section 120.535 proceeding may settle at any time before the entry of a final order without an award of attorney fees or costs. An agency thus could avoid the entry of a final order and resulting award of attorney fees and costs by beginning rulemaking.

Finally, in proceedings pursuant to section 120.57(1)(b)15., when an agency is attempting to apply an unadopted statement to a person, attorney fees must be awarded by an appellate court upon review of the proceeding if the court finds that the agency's rejection of the hearing officer's conclusions with respect to the unadopted

statement do not comply with the requirements of that section. The fee and cost award covers both the administrative and appellate proceedings with no monetary limitation.

RECOMMENDATION CONCERNING PRESUMPTIONS, COSTS AND ATTORNEY FEES IN PROCEEDINGS UNDER SECTIONS 120.54(4), 120.56, 120.535 AND 120.57(1)(b)15.

Agency Action	Burden	Evidentiary Standard	Attorney Fees	Costs
1. Proposed rule § 120.54(4)	No presumption of validity in favor of the proposed rule.	Preponderance of the evidence.	Hearing officers shall award attorney fees against an agency	Hearing officers shall award reasonable
	Burden is on challenger to prove		that does not prevail unless the agency's actions were	agency that does not prevail unless the agency's actions
	invalidity.		"substantially justified" as defined in	were "substantially justified" as defined
			the Equal Access to Justice Act. Attorney	in the Equal Access to Justice Act.
			fees are capped at \$15,000.	
			On appeal, courts have coneral	On appeal, courts have general
	· · · · · · · · · · · · · · · · · · ·		discretionary authority to award if there is	authority to award if
			gross abuse of agency discretion.	utere is gross abuse of agency discretion.

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Agency Action	Burden	Evidentiary Standard	Attorney Fees	Costs
2. Existing rule § 120.56	There is a presumption of presumption of validity in favor of the agency rule. Burden is on challenger to prove invalidity.	Preponderance of the evidence.	Hearing officers shall award attorney fees against an agency that does not prevail unless the agency's actions were "substantially justified" as defined in the Equal Access to Justice Act. Attorney fees are capped at \$15,000. On appeal, courts have general discretionary authority to award if there is gross abuse of	Hearing officers shall award reasonable costs against an agency that does not prevail unless the agency's actions were "substantially justified" as defined in the Equal Access to Justice Act. On appeal, courts have general discretionary authority to award if there is gross abuse of agency discretion.
			agency discretion.	

Agency Action	Burden	Evidentiary Standard	Attorney Fees	Costs
 Agency statement not adopted as a rule. 120.535 	No presumption of validity in favor of the agency statement. Petitioner must prove that agency statement constitutes a rule that has not been adopted in accordance with section 120.54 rulemaking procedures.	Preponderance of the evidence.	If the agency loses, the hearing officer shall award reasonable attorney fees without monetary limitation.	If the agency loses, the hearing officer shall award reasonable costs without monetary limitation.
	Burden then is on agency to prove rulemaking is not feasible and practicable pursuant to criteria in section 120.535.	Preponderance of the evidence. (Hearing officer enters final order).		

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Agency Action	Burden	Evidentiary Standard	Attorney Fees	Costs
 4. Application of an agency statement not adopted as a rule and relied on by an agency to determine the substantial interests of a party. § 120.57(1)(b)15. 	No presumption of validity in favor of the agency statement. Petitioner must prove that its substantial interests are being determined by the agency statement. The agency must prove that the statement is within the powers, functions, and duties delegated by the Legislature; does not enlarge, modify, or contravene the specific provisions of law implemented; is not arbitrary or capricious; and is not being applied to the substantially affected party retroactively without due notice.	Preponderance of the evidence. Preponderance of the evidence. Preponderance of the evidence. Preponderance of the evidence. Hearing officer enters a recommended order. Conclusions may not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such conclusions are clearly erroneous or do not comply with essential requirements of law.	In any proceeding for review under section 120.68, if the court finds that the agency's rejection of the hearing officer's conclusions regarding the unpromulgated statement do not comport with provisions of this subparagraph, the agency action shall be set aside and the court shall award to the challenger a reasonable attorney's fee for the initial proceeding for review.	In any proceeding for review under section 120.68, if the court finds that the agency's rejection of the hearing officer's conclusions regarding the unpromulgated statement do not comport with provisions of this subparagraph, the agency action shall be set aside and the court shall award to the challenger the reasonable costs for the initial proceeding and the proceeding for review.

Regulatory Costs

Until 1992, the Florida APA required preparation of an economic impact statement before the adoption, amendment, or repeal of any rule. <u>See Appendix P.</u> Failure to prepare the statement constituted grounds for finding a rule invalid. The statute's economic impact statement provisions were criticized as burdensome and meaningless, and the Legislature in 1992 adopted amendments designed to address these problems. <u>See Appendix P.</u>

Despite the changes in 1992, criticism of the economic impact statement process has continued. A number of changes were proposed during the 1995 legislative session, and the Governor proposed his own recommendations. All were evaluated by the Commission. <u>See</u> Appendix P.

The Commission believes that it is important for both government and the regulated public to understand the expected financial impacts of a proposed rule before it is adopted. The quality of economic analyses of proposed rules prepared by state agencies is not adequate, and existing law requirements concerning preparation of economic impact statements are ineffective. Additionally, current law requires agencies to choose the regulatory alternative that imposes the lowest net cost to "society," a vague concept that is difficult to quantify. A simpler and more effective

means of evaluating costs would be through use of a Statement of Regulatory Costs (SERC) including the following elements:

- a good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of what types of individuals the rule is likely to affect;
- a good faith estimate of the cost to the agency of implementing and enforcing the proposed rule and any anticipated effect on state or local revenues;
- a good faith estimate of the transactional costs likely to be incurred by individuals and entities required to comply with the rule;
- 4) an analysis of the impact on small business;
- 5) any additional information that the agency determines may be useful in informing the public of the costs or benefits of complying with the proposed rule; and
- 6) a good faith description of any reasonable alternative methods.

Recommendation: In adopting rules, agencies should choose the regulatory alternative "that does not impose excessive regulatory costs on the regulated person, county, or municipality which could be reduced by less costly alternatives that substantially accomplish the statutory objectives." Agencies should be <u>encouraged</u>
to prepare SERCs including the elements identified in this report. Agencies should be <u>required</u> to prepare SERCs with these elements when a substantially affected person has submitted to the agency a bona fide written proposal for a lower cost regulatory alternative. The SERC then could be used to declare a rule invalid if the issue is raised within one year of the rule's effective date, if the agency has failed to prepare or revise its SERC or has invalidly rejected the lower cost regulatory alternative, and the substantial interests of the person challenging the agency's rejection of the lower cost alternative are materially affected by the rejection.

Other Agency Statements

This issue of "other agency statements" was discussed in detail by the Commission at several meetings. See Appendices D-F (Minutes of January 11, January 25, and February 8 meetings); see also Appendix Q. Agencies that issue permits or licenses often solicit and rely on information from other agencies when imposing conditions on those permits or licenses. For example, the Department of Environmental Protection and the regional water management districts may rely on policies or guidelines of the Game and Freshwater Fish Commission in placing conditions within DEP Environmental Resource Permits (ERPs). Similarly, regional planning councils or the Department of Community Affairs may rely on comments from another agency in recommending or encouraging conditions within a DRI development order, even though the permit conditions imposed are not necessarily contained within the permitting agency's rules or specifically authorized by statute. This practice has raised concerns because of the difficulty of challenging policies of commenting agencies that may be imposed through the permitting agency's "general" statutory authority, but not formally adopted as rules by either agency.

Recommendation: The "other agency statements" issue is important and needs to be resolved. Legislators and the Governor's office should continue to work with

individuals particularly interested in this issue to reach agreement on a specific proposal.

Other Issues

Finally, although Commissioners agreed on a number of specific recommendations concerning accountability, several issues discussed in this general category did not result in recommendations. One relates to final order authority for hearing officers in section 120.57 proceedings. Under current law, hearing officers enter recommended orders in most proceedings under section 120.57, and agency heads enter final orders. Commissioners heard a pro/con presentation on this issue from former Senator Curt Kiser, R-Dunedin, and former First District Court of Appeal Judge Robert P. Smith. Kiser advocates giving hearing officers final order authority in all section 120.57 proceedings, just as they have in rule challenge proceedings under sections 120.54, 120.56, and 120.535. Smith supports retention of the current statutory scheme for section 120.57 proceedings. Commissioners decided not to recommend any changes in current law on this issue, although the issue was considered in some depth. See Appendix R.

INFORMAL DISPUTE RESOLUTION

Several Commissioners expressed interest at the first Commission meeting on October 12, 1995, in exploring the use of informal dispute resolution in the administrative process. <u>See</u> Appendix A. The Commission chair established an Informal Dispute Resolution working group, with Senator Rick Dantzler serving as chair, and Commissioners Clay Henderson, Wade Hopping, Eleanor Hunter, and Jon Moyle serving as members. A group of private practitioners with expertise in alternative dispute resolution served as advisors to the working group. <u>See</u> Appendix S. The advisors made the following observations that were distributed to the working group at its meeting on December 6:

- * The mediation program that was tried at DOAH between 1989-1991 should not be taken as evidence that alternative dispute resolution procedures cannot work in the administrative process. There are other approaches to dispute resolution that could be used.
- * The best opportunity for informal dispute resolution is early in the process at the agency level, before conflicts reach DOAH.
- * The proposals for informal dispute resolution in the APA that were considered during the 1995 and 1994 legislative sessions represent a good start and should be considered for possible inclusion in any Commission recommendations.

- * A detailed "one size fits all" approach to informal dispute resolution in the APA is not advisable. Agencies in state government are different, and an approach that works in one agency may not work in another. Similarly, an approach that works for one type of dispute in an agency may not be appropriate for another dispute. Flexibility in designing the approach to the resolution of the conflict is important.
- * Adequate resources are necessary to implement any informal dispute resolution program. Although these programs save money in the long run, they require an initial commitment of resources if they are to be successful.
- * A pilot program in one large agency is one possible way to proceed. Such a program could involve a requirement that the agency contact a neutral group (such as the Conflict Resolution Consortium) when faced with a dispute. The neutral group then would recommend an informal procedure for resolving the dispute. The agency would be required to offer this informal procedure to the party whose interests are adverse to the agency's. If the agency did not offer the informal procedure, the agency would be obligated to pay costs and attorney fees for resolution of the dispute through regular procedures. It was suggested that the Department of Transportation may be the appropriate agency for the pilot program.

* The type of approach discussed above would work best with major disputes; a different pilot program could be developed for small disputes involving individual citizens and agencies. For smaller disputes, a neutral ombudsman program could be considered.

The working group agreed that informal dispute resolution procedures could be valuable in the administrative process. However, members also agreed that the need for and use of such procedures would vary greatly from agency to agency, and a mandatory "one size fits all" approach to informal administrative dispute resolution is considered inadvisable. The group agreed it would be useful to identify agencies where various types of mandatory informal dispute resolution could be used as pilot projects, and Dan Stengle of the Governor's Office was asked to do so. See Appendix R. A majority of the working group also agreed that hearing officers at the Division of Administrative Hearings (DOAH) should be authorized to direct or encourage parties to seek mediation or other means of alternative dispute resolution.

A list of 10 departments in eight state agencies that would be appropriate for pilot projects was developed by Dan Stengle and presented to the Commission at its January 11 meeting. See Appendices D and T.

Recommendation: The Commission recommends that the Legislature establish and provide an appropriation for informal dispute resolution pilot projects in the executive branch departments identified by the Governor's Office. The pilot projects should be structured with various alternative dispute resolution components, and they should be monitored for their effectiveness. The Commission also recommends that hearing officers at DOAH be authorized to direct or encourage parties to seek mediation or other means of alternative dispute resolution.

BID PROTESTS

In most administrative proceedings under section 120.57, proposed agency action enjoys no presumption of correctness. This is because proceedings under section 120.57 provide a forum for <u>development</u> of agency policy, and the hearing officer issues a recommended order to the agency for final action. <u>See</u> Appendix U. The party asserting the affirmative of a factual issue generally has the burden of proof, and the usual standard of proof for fact questions in section 120.57 hearings is a preponderance of the evidence.

An exception to these general rules was created by the Florida Supreme Court in <u>Department of Transportation v. Groves-Watkins Constructors</u>, 530 So. 2d 912 (Fla. 1988), for bid award protest proceedings. In this case, the court held:

[A]lthough the APA provides the procedural mechanism for challenging an agency's decision to award or reject all bids, the scope of the inquiry is limited to whether the purpose of competitive bidding has been subverted. In short, the hearing officer's sole responsibility is to ascertain whether the agency acted fraudulently, arbitrarily, illegally or dishonestly.

Id. at 914 (emphasis supplied).

The limit on the scope of the inquiry in a bid protest is not established by statute; it is judicially created. Thus, <u>Groves-Watkins</u> is a departure from the general rule that an administrative hearing is a de novo review of agency action with no

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presumption that the agency's decision is correct. A petitioner in a bid protest proceeding must demonstrate improper or arbitrary conduct on the part of the agency. See Appendix U.

The <u>Groves-Watkins</u> decision has been criticized by the Executive Council of the Administrative Law Section of The Florida Bar, which recommended that the Legislature overrule the case. Although the section has not drafted proposed legislation, its view is that the same standards that apply in other section 120.57 proceedings (i.e., preponderance of the evidence standard of proof) should apply in bid protest proceedings. <u>See</u> Appendix U.

A key criticism of <u>Groves-Watkins</u> is that the supreme court relied on a previous bid protest case involving a county, rather than a state agency. Counties are constitutional entities and are not subject to the APA, and bid protest cases involving counties are heard in circuit court, not at DOAH. The court did not discuss this difference at all, but reasoned that an agency's decision based upon an honest exercise of its discretion cannot be overturned absent a finding of "illegality, fraud, oppression, or misconduct."

The standard from <u>Groves-Watkins</u> has created a number of practical problems, including:

- * A petitioner in a bid protest case must allege that the agency acted illegally, fraudulently, arbitrarily, or dishonestly. Such allegations engender immediate ill-will with the agency and doom prospects of settlement. See Appendix U.
- * Hearing officers sometimes enter recommended orders stating that an agency acted fraudulently or illegally. When this order goes back to an agency head for preparation of a final order, it is extremely difficult for an agency head to make such a finding about his or her own agency. <u>See</u> Appendix U.
- Hearing officers frequently decline to say which bidder should prevail in bid protest proceedings. Instead, they simply enter a finding that the agency acted illegally or fraudulently and remand to the agency. <u>See</u>
 Appendix U. Thus, the hearing is not productive in ultimately resolving the dispute.

The Executive Council of the Administrative Law Section also recommends that the time-frames for resolution of bid protests in section 120.53(5) be changed. In particular, the section objects to the requirement in subsection 120.53(5)(e) that a hearing officer "conduct" a hearing within 15 days of the receipt of a formal written protest. Arguments have been made that the word "conduct" means that a hearing must be completed within 15 days, which is extremely difficult in complicated cases. The section recommends that the word "conduct" be changed to "commence" and that the 15 days be changed to 30 days. Following the entry of a recommended order, exceptions would have to be filed within 10 days, and a final order would be entered within 30 days.

The Commission heard a presentation from Bill Williams, incoming chair of the section, on bid protest issues. <u>See</u> Appendix E (Minutes of January 25 meeting). The Commission agreed with the section's concerns and recommended that <u>Groves-Watkins</u> be overruled. However, the Commission stopped short of endorsing any particular evidentiary standard in bid protest proceedings, noting that it may be appropriate to employ a different standard than in other section 120.57 proceedings.

Recommendation: The Commission recommends that the <u>Groves-Watkins</u> decision should be overruled, and a standard appropriate to bid protest administrative hearings should be established. Additionally, section 120.53(5)(e) should be revised to state that a hearing officer must commence a hearing within 30 days of the receipt of a formal written protest. Section 120.53(5) also should be revised to state that following entry of a recommended order, exceptions must be filed within 10 days of the entry of that order and that a final order should be entered within 30 days.

TITLE OF HEARING OFFICERS

The Executive Council of the Administrative Law Section informed the Commission that Florida is the only state using independent central panels to adjudicate disputes between agencies and citizens that does not call its adjudicatory personnel "administrative law judges." See Appendix E (Minutes of January 25 meeting). In Florida, these employees of DOAH are called "hearing officers." This is confusing because there are many different uses of the term "hearing officer" within both the judicial and executive branches of government. The general public and *pro se* litigants at DOAH are confused as to the independence and legal background of persons known as hearing officers. DOAH hearing officers routinely are asked by litigants if they are attorneys.

More importantly, some *pro se* litigants and attorneys with little experience in the formal hearing process available at DOAH appear at hearings expecting that they will be simply meeting with an employee of the agency to attempt to "work things out." They are dismayed to learn at the formal hearing that the expected meeting is, in reality, an adjudication of important legal rights for which they are ill-prepared.

Recommendation: The Commission recommends that the Legislature change the title of "hearing officer" at the Division of Administrative Hearings to "administrative law judge" and that the Division of Statutory Revision be authorized to make the necessary changes throughout the Florida Statutes.

Appendix

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Appendix

- A. Minutes of October 12, 1995, Meeting
- B. Minutes of November 12, 1995, Meeting
- C. Minutes of December 13, 1995, Meeting
- D. Minutes of January 11, 1996, Meeting
- E. Minutes of January 25, 1996, Meeting
- F. Minutes of February 8, 1996, Meeting
- G. APA Simplified Draft Summary Sheet
- H. Flexibility Issues Memorandum
- I. Nondelegation Doctrine Memorandum
- J. Final Draft of Proposed Variance and Waiver Statute
- K. Accountability Issues Memorandum
- L. Section 120.535 Memorandum
- M. Correspondence on Potential Fiscal Impact
- N. Presumptions Memorandum
- **O.** Costs and Attorney Fees Memorandum
- P. Regulatory Costs Memorandum
- Q. Other Agency Statements Memorandum
- **R.** Hearing Officer Final Order Authority Memorandum
- S. IDR Working Group Memorandum
- T. ADR Pilot Projects Memorandum
- U. Bid Protests Memorandum

Appendix A

Minutes of October 12, 1995, Meeting

MINUTES

GOVERNOR'S APA REVIEW COMMISSION OCTOBER 12, 1995 1 P.M. - 4 P.M. GOVERNOR'S LARGE CONFERENCE ROOM PLAZA LEVEL, THE CAPITOL TALLAHASSEE, FLORIDA

Chairman Bob Rhodes convened the meeting and outlined the Commission's agenda. All members were in attendance except for Senator Dantzler, Representative Pruitt, and Clay Henderson. Senator Dantzler participated in the meeting by conference call. The chairman explained that the purpose of the Commission is to develop consensus, fully air and discuss issues concerning the Administrative Procedure Act, and to serve as a focal point for ideas. The chairman noted the Governor's interest in making the APA simpler, more user-friendly, less costly, and less adversarial. The Commission will (1) consider the issues raised by the Governor; (2) review sticking points concerning the current APA and existing proposals for change, thereby providing a forum to build common ground; and (3) consider any other ideas and proposals to improve administrative procedure in Florida.

Chairman Rhodes introduced the Commission members and the Commission's executive director, Donna Blanton. Ms. Blanton is an attorney with Katz, Kutter, Haigler, Alderman, Marks, Bryant & Yon in Tallahassee, and will be devoting approximately half of her time in the next few months to the Commission's work.

The Commission agreed to hold future meetings in the Governor's Conference Room. Meetings will be held in conjunction with legislative committee meetings.

Greg Smith of the Governor's legal staff provided a brief overview of Florida's open government laws and their applicability to the Commission. He emphasized that the Commission meetings should be noticed and that Commission correspondence will be a matter of public record.

Teresa Tinker of the Governor's Office of Planning and Budgeting briefly discussed requirements for travel reimbursement.

Wade Hopping, Curt Kiser, and Mary Smallwood each made presentations concerning the aims and purposes of the Administrative Procedure Act.

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Commissioner Hopping discussed the Law Revision Council's involvement in development of the Act. Commissioner Hopping read from and distributed the Reporter's Comments on Proposed Administrative Procedure Act, March 9, 1974. The Commission staff agreed to send a copy of this document to all Commission members. Commissioner Hopping also discussed the impressions of those most involved in the development of the Act and what they intended to accomplish. He generally described the intent as to establish ground rules and the relative rights of agencies and citizens. In an era of suspicion of government, it is important to ensure that the Act is something people are comfortable with, Commissioner Hopping said.

Senator Kiser discussed his role and the role of the Legislature in the development of the Act. He explained the problems with the old administrative procedure act and the reasons for developing a new one. Primary goals were to establish one set of rules for every agency and to ensure that the public knew what the rules were and to make sure agencies had constitutional or statutory authority for development of rules, he said. Senator Kiser noted that the APA passed both houses unanimously and has served as a model for other states. Senator Kiser said too many legislators do not understand the APA and noted the important role of JAPC. Senator Kiser said the executive branch of government should allow the Legislature to be a partner in the administrative process. He told legislators that they have the tools they need in current law to ensure that the process works well. He suggested beginning each legislative session with consideration of a list of rules that could be repealed. He talked about the importance of hearing officers and suggested that the Commission hear extensively from Sharyn Smith of DOAH. He also suggested that hearing officers be given final authority on orders, an idea he has advocated for many years. Senator Kiser said the Commission should consider an APA for local governments.

Ms. Smallwood recalled the bitter battles concerning implementation of the APA in the years following its adoption. She worked as an agency attorney beginning in 1979 and now is in private practice. Ms. Smallwood said the APA works well and wholesale changes are not needed. The act does what it was intended to do: afford minimum due process, provide a means for public knowledge of agency policies, and ensure impartial decisionmaking, she said. Ms. Smallwood said flexibility should be removed from government decisionmaking as much as possible, and she indicated improving flexibility is not something the APA should be designed to accomplish. Noting concerns about the number of rules, Ms. Smallwood said the number of rules is in direct relation to the number of statutes. If reductions in government are needed, legislators should start with statutes, she said. Ms. Smallwood said the administrative process still is too complicated and can be simplified. However, she noted that due process can be adversely impacted if it is simplified too much. She said that agencies should have ultimate responsibility for their rules and policies, and she said hearing officers shouldn't be able ultimately to tell agencies how to construe their own rules.

In the discussion after the presentations, Senator Dantzler said that strict adherence to rules sometimes dictates nonsensical results. Commissioner Hopping noted that Minnesota has a variance procedure for agency rules. It was agreed that the Commission staff would distribute the Minnesota statute to Commission members. There was general discussion about the perception that is created when agency heads are allowed to change the conclusions of hearing officers.

Dan Stengle, general counsel of the Department of Community Affairs, discussed CS/CS/SB 536 and the provisions of that bill that prompted the Governor to veto it. He outlined the Governor's current position on issues that were raised in the legislation. Mr. Stengle agreed to provide his comments in writing to the Commission staff, and the staff will distribute those comments to Commissioners by the next meeting.

Deborah Kearney, the Governor's deputy general counsel, discussed a project designed to simplify the APA without changing its substance. With the help of a committee of private practitioners and agency lawyers, Kearney has almost completed a rewrite of the APA. The intent is to make it readable and comprehensible. When asked if staff members of the House and Senate served on the committee, Kearney said they were invited but chose not to participate. Kearney agreed to provide a copy of the rewrite to the Commission staff. The staff will distribute the rewrite to Commissioners by the next meeting.

Commissioners discussed their general agenda. Chairman Rhodes reiterated the scope of the Commission's work as he outlined it at the beginning of the meeting. Senator Dantzler said he would like Sharyn Smith to discuss how mediation could be used before parties get involved in full-blown administrative proceedings. Representative Saunders said the Governor's concerns should be considered in a broader context. He outlined the primary areas of interest as (1) simplification, (2) accountability in rulemaking, (3) rule reduction, and (4) flexibility. Commissioner Hopping said he wanted to ensure that, given Sunshine Law concerns, Commission members could continue to discuss whether an override of CS/CS/SB 536 would be appropriate. The Commission staff agreed to review that question. Senator Dantzler said he believes an override would not be appropriate because CS/CS/SB 536 does not represent the Legislature's best effort. He said the Legislature can come up with a better product. Commissioner Mills said the Commission should consider a long list of proposals for improving the APA, some of which were in CS/CS/SB 536 and some of which were not. Commissioner Moyle said he would like more information on the role of the Law Revision Council and on JAPC. He expressed interest in how the role of JAPC might be improved upon. It was requested that the staff outline the Governor's veto message in "bullet" form in time for the next meeting. Senator Burt said Commissioners should begin their work by considering the "non-substantive" changes identified by Ms. Kearney's committee and then move on to "substantive changes. Commissioner Mills warned that if agencies are given too much flexibility, a constitutional separation of powers problem could arise. Commissioner Hopping said he is particularly interested in requiring agencies to implement policies involving the lowest regulatory costs. Commissioner Rhodes said the Commission would consider the simplified APA as prepared by Ms. Kearney's committee at its next meeting. He also said he hopes the Florida Bar's Administrative Law section will review the draft and provide comments in time for consideration at the next meeting.

The meeting was then adjourned.

Respectfully submitted,

Donna E. Blanton Commission Executive Director 10/17/95

Appendix B

Minutes of November 12, 1995, Meeting

GOVERNOR'S APA REVIEW COMMISSION NOVEMBER 16, 1995 ROOM 428, SENATE OFFICE BUILDING MINUTES

The meeting was convened at 1:10 p.m. The minutes of the October 12, 1995, meeting were approved.

Commission Chair Bob Rhodes discussed application of Florida's open government laws to the Commission, explaining that members should not talk among themselves about matters that are scheduled for consideration by the Commission. Members may, however, discuss CS/CS/SB 536 with each other if those discussions are in the context of action the Legislature may take on a veto override, as the Commission has no authority to act on a veto override.

Commission Chair Rhodes announced the creation of a Commission working group to consider issues related to Informal Dispute Resolution in the administrative process. Commissioner Rick Dantzler has agreed to chair the group, and a number of private practitioners have agreed to serve as resources to the group. Commissioners Clay Henderson, Wade Hopping, Eleanor Hunter, and Jon Moyle advised at various points during the meeting that they would like to participate in the working group. Commission Executive Director Donna Blanton will contact working group members shortly about a meeting.

Deborah Kearney, the Governor's deputy general counsel, presented a draft of the "simplified" APA that was prepared by a committee of government and nongovernment lawyers. She explained that she deals with people every day who read the APA but who can't find what they're looking for or can't understand it. The intent of the draft is to make no substantive changes, but to make the act clearer and better organized. She explained that the draft reorganizes the act, deletes obsolete language, creates a Part II of chapter 120 for all of the exceptions and exemptions, and neutralizes gender terms.

Ms. Kearney also passed out substitute pages for several pages of the original draft, noting that the substitutes were prepared after the Administrative Law Section of the Florida Bar offered comments on the original draft.

Commissioner Burt expressed concern that the draft may have unintended consequences and asked that it be carefully reviewed to avoid that potential problem.

Bill Williams, chair elect of the Administrative Law Section, offered comments about the "simplified" draft, as well as about the APA in general. He noted that the section consists of between 800 and 900 lawyers, equally divided between government lawyers and private practitioners. He expressed the view that the APA in general works well and that problems generally relate to an underlying substantive statute rather than to chapter 120. For example, the Legislature sometimes delegates authority too broadly, he said. Williams described Florida's APA as a model for the nation that still works extremely well after 20 years. Fundamental changes to the act are not warranted, he said.

Williams explained that the section had not taken positions on most proposals to change the APA, including the need to simplify the act. However, he noted that the section does favor a summary procedure provision.

Individual Commissioners asked that the section provide information on its position concerning the following issues: whether there is a need to simplify the APA; the value of the appendix to a Recommended Order; the merits of section 120.535^{1;} whether it is possible to make Florida's administrative process less costly and less "judicial"; the merits of CS/CS/SB 536, which was vetoed by the Governor; the advisability of a variance or waiver provision in the Florida APA and other approaches to increasing flexibility in agency application of rules; the substantive changes recommended by Deborah Kearney's committee; and the advisability of more mediation or other means of informal dispute resolution in the administrative process. Several Commissioners indicated that the section's views on these issues would be particularly useful as they decide what changes to Florida administrative procedure should be considered.

Commissioner Dantzler asked Williams whether allowing persons to opt out of chapter 120 and go directly to circuit court would be advisable. Williams said that the 120 procedure is quicker than circuit court and that moving administrative disputes into circuit court could overburden circuit judges.

Commissioner Hopping expressed the view that the Governor's position of eliminating section 120.535 and the Legislature's view that agencies exceed their delegated authority are inconsistent. Solutions to both problems go in different directions, he said. He expressed the view that in the 1970s and 1980s the Legislature deferred tough policy decisions, effectively delegating them to the agencies.

Commissioner Mills agreed that the Legislature has avoided making policy decisions because getting consensus is too difficult. That results in tough decisions being relegated to the agencies.

Commissioner Dantzler asked whether administrative hearing officers allow intervenors to participate more fully than necessary. Commissioner Hunter responded that hearing officers only permit the standing for intervenors that the Legislature has authorized.

¹ Williams indicated that the section supports 120.535, but does not yet have authority from the Bar's Board of Governors to advocate that position.

Commissioner Shelley asked whether the "simplified" APA could be used as a new base for substantive changes. Several Commissioners said that substantive changes should be considered first, and then simplification should be considered. It was agreed that, for the time being, all substantive changes would be kept out of the "simplified" APA draft.

Commissioners indicated that simplification issues in a broad context should be kept on the agenda for future meetings. Commissioner Shelley said simplification includes matters other than just the simplified draft, such as a summary procedure. Commissioner Burt agreed that substantive changes can result in a simplified APA. The Commission informally agreed to consider substantive changes one at a time and consider public comments on a "simplified" APA at a later time.

Commission Executive Director Donna Blanton opened the discussion on flexibility issues and discussed a memo she had prepared on that topic. She introduced Jim Rossi, a new member of the faculty at the Florida State University College of Law, who has written about waiver of administrative rules.

Rossi discussed approaches to flexibility in the Minnesota APA and in the proposed new Iowa APA. Commissioner Mills questioned whether Florida could include a general waiver or variance provision in its APA, given the state constitutional requirements for separation of powers. He noted that Florida courts have strictly interpreted the separation of powers provision and the nondelegation doctrine, and that the Legislature cannot delegate authority to other branches of government without substantive standards. It was agreed that Donna Blanton would research the case law concerning the constitutional requirements and report back to Commissioners by the next meeting.

Commissioners engaged in general discussion about flexibility in the administrative process. Commissioner Edenfield said her clients value certainty in the process more than anything else. Commissioner Henderson expressed concern about the role of third parties in agency decisions to grant variances or waivers. Commissioner Shelley reminded the Commission that while agencies may be able to grant variances or waivers to rules, they cannot grant variances or waivers to statutory requirements.

Commission Chair Rhodes opened discussion about the December meeting and the general topic of accountability. He asked if Commissioners would like to focus on the five major areas of controversy that Dan Stengle identified in a chart that was included in the agenda packet. Several Commissioners said that those topics should be discussed, but that other issues also should remain on the table. For example, Commissioner Hopping said the Commission needs to look at innovative ways of reducing costs and government red tape.

Several Commissioners said they would like to see a point/counterpoint on the subject of hearing officers having final order authority in adjudicatory matters, as well

as rule challenges. Donna Blanton agreed to prepare a memo on that topic.

Commission Chair Rhodes said the staff would advise Commissioners of the date of the December meeting after checking various meeting schedules. The meeting was then adjourned.

Respectfully submitted,

Donna E. Blanton Commission Executive Director

Appendix C

Minutes of December 13, 1995, Meeting

MINUTES

GOVERNOR'S APA REVIEW COMMISSION DECEMBER 13, 1995 1 P.M. - 4:30 P.M. GOVERNOR'S LARGE CONFERENCE ROOM PLAZA LEVEL, THE CAPITOL TALLAHASSEE, FLORIDA

Commission Chair Robert M. Rhodes convened the meeting, and minutes of the November 16 meeting were approved. At the chair's request, the Commission agreed to schedule an additional meeting the week of January 22 when legislators are in Tallahassee for committee meetings.

Senator Dantzler presented the report of his working group on informal dispute resolution in the APA. He said the group generally agreed that informal dispute resolution procedures could be valuable in the administrative process. The group believes that the procedures in CS/CS/SB 536 represent a good start and should be used as a starting point for additional recommendations. One change the group agreed should be made to the 1995 proposals is to the provision of proposed section 120.573, which states that agencies must inform parties "whether" mediation is available. The group believes that agencies should not be allowed to selectively withhold mediation for a particular dispute if the agency generally uses it. Additionally, group members believe that proposed legislation should be more specific about who pays for informal dispute resolution and more specific about the time frames involved, Senator Dantzler reported. Other issues include the application of open government laws to mediation and other methods of alternative dispute resolution.

Commissioner Hopping, a member of the working group, noted that the group also agreed that a mandatory "one size fits all" approach to informal administrative dispute resolution is not a good idea.

Senator Dantzler reported that the group agreed it would be useful to identify agencies (and specific programs within agencies) where various types of mandatory informal dispute resolution could be used as pilot projects. He said he has talked with Dan Stengle from the Governor's Office about identifying these programs and agencies.

The group also agreed that hearing officers at the Division of Administrative Hearings should be authorized to direct or encourage parties to mediation or other means of alternative dispute resolution, Senator Dantzler said.

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Commissioner Hunter, a working group member, said she has some misgivings about authorizing hearing officers to send parties to mediation. The parties requesting it are likely to be those that will benefit from delay and who can afford the cost of the mediator, she said.

Commissioner Shelley wondered how informal dispute resolution would work in areas involving multi-party competitive disputes. Commissioner Hopping said the working group talked some about bid disputes. He noted that all APA proceedings may not lend themselves to alternative dispute resolution.

Senator Dantzler said the working group will meet again after he receives information from Dan Stengle.

Donna Blanton discussed a memo she prepared on the "nondelegation doctrine" and its potential impact on a general waiver or variance provision in the Florida APA. Based on her research, she concluded that a general provision probably could be drafted if it included adequate standards and guidelines from the Legislature to agencies.

Several Commissioners indicated that they believe Florida law does not allow agencies to waive their rules without statutory authority. However, Jim Rhea from the Senate staff distributed a memo he prepared listing numerous agency rules authorizing variances or waivers. He said he does not know if these rules are used. Senator Dantzler said he liked some of the language in the agency waiver rules. Donna Blanton agreed to distribute Rhea's memo to Commissioners.

Commissioner Mills noted that there is a difference between waiver and variance. Commissioner Hopping described the difference between a special exception and a variance in the land use context. He noted that a special exception is granted as a matter of right if the applicant meets the criteria, and that variances are discretionary. Commissioner Hopping expressed interest in a general waiver or variance statute in the APA, noting a major weakness of the Growth Management Act is the loss of flexibility created by the consistency requirement. Commissioner Henderson noted that the APA is significantly different from land use law and advised against drawing too many analogies.

Commissioner Starling advocated increasing flexibility in the APA. Commissioner Moyle said he also favors flexibility, but said drafting the standards will be difficult. He said he is concerned about similar fact situations producing different results. Other commissioners expressed the view that the standards would be the key to the success or failure of any general provision. They advocated inclusion of notice and hearing rights and an expressed standard

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of review.

Commission Chair Rhodes reminded the Commission that section 120.68(12) previously allowed agencies to vary their own rules if they explained the reason in writing. That authority was removed by the Legislature in 1984.

Commissioner Shelley said a general variance or waiver provision should include a robust reporting requirement. She also said exceptions should be granted only when citizens request them, not on the agency's own motion.

The Commission agreed that Donna Blanton would prepare a first draft of a general statute introducing flexibility into the APA.

The Commission heard a point/counterpoint discussion from Curt Kiser and Robert P. Smith, Jr. concerning giving hearing officers final order authority in section 120.57 proceedings.

Kiser, a former state senator involved in the original drafting of the APA, said allowing agencies to prepare the final order in proceedings in which the agency is a participant offends notions of fairness.

Smith, a former First District Court of Appeal judge who authored many of the early APA opinions, said it would be unconstitutional to give hearing officers final order authority in all section 120.57 proceedings.

Senator Dantzler said that he does not favor giving hearing officers final order authority in all 120.57 proceedings, but he thinks it should be harder for agencies to overturn hearing officers' findings. Currently, an agency may change conclusions of law, but cannot overturn a hearing officers' findings of fact unless after a complete review of the record it is determined that they are not supported by competent substantial evidence or the proceedings on which the findings were based did not comply with the essential requirements of law. Senator Dantzler said it might be appropriate to make it more difficult for agencies to overturn hearing officers by giving more weight to hearing officers' conclusions of law.

Commissioner Hopping said in the last few years the First District Court of Appeal has increasingly upheld agencies' factual findings at the expense of hearing officers' findings.

Responding to Commission Chair Rhodes' request for input, Kiser said the Legislature

should look for additional types of proceedings where it might be appropriate to give hearing officers final order authority. As new statutes are passed, the Legislature could consider the question on a case-by-case basis, Kiser said. Smith said he would support codifying in section 120.68 the standard of review enunciated by courts concerning the weight to give a hearing officer's findings. Generally, great weight is given to a hearing officer's findings when the factual issues are susceptible of proof or the question involves the credibility of evidence. Less weight is given to the hearing officer's findings when the facts are matters of opinion infused with policy considerations for which the agency has special responsibility. The substantiality of the evidence supporting the hearing officer's findings reflects on the substantiality of the agency's substituted findings.

Commissioner Hunter, a hearing officer, said many factual findings involve the credibility of evidence. She said agencies sometimes reject her factual findings by saying there was also competent substantial evidence in the record to support a different factual finding.

Commissioner Shelley said her understanding of the law is that if any competent substantial evidence supports the hearing officer's factual findings, the agency head may not overturn those findings.

Commissioner Hopping, however, said some agencies have found ways around that general rule. He asked that Sharyn Smith and the hearing officers provide information to the Commission about their views on the adequacy of current law.

Commissioner Shelley said she does not want to vest general final order authority in hearing officers. She said one of the advantages of the current system is accountability. Commissioner Shelley said she would be interested in the possibility of a pilot project giving hearing officers final order authority in fact-intensive cases, as opposed to policy intensive cases.

Commission Chair Rhodes said that commissioners who are interested in making recommendations about issues relating to final order authority should contact Donna Blanton with their ideas, and she would prepare something for consideration by the full Commission.

The Commission then discussed a list of "accountability" issues prepared by Donna Blanton. Commission Chair Rhodes asked the Commission if the issues could be reduced or prioritized.

Commissioner Shelley said she believes accountability issues are part of all of the issues

the Commission is considering.

Commissioner Edenfield said she is interested in exploring the possibility of tying in an APA variance provision with section 120.535. She also said she is interested in the issues of presumptions, costs, and attorney fees.

Commissioner Moyle said it is clear that almost all of the Commission is interested in section 120.535, and discussion of it should be a priority.

Commissioner Hopping said he is least interested in JAPC review and limits on rulemaking authority. He is most interested in the issues of presumptions, regulatory costs, and what happens if section 120.535 is repealed.

Commissioner Hunter said she has no particular favorites on the list, but believes that rules provide certainty. She also expressed interest in presumptions and the possibility of differing tests if a case involves a proposed rule or an existing rule.

Commissioner Shelley wondered if the "simplified" APA could be used as the base for the Commission's substantive recommendations. The Commission generally agreed to do so. A "clean" version of the simplified draft will be used rather than one with strike-throughs and underlines.

Commissioner Edenfield said a recommendation that the simplified APA be adopted is one of the most important recommendations the Commission could make.

It was agreed that Donna Blanton would prepare short pro/con papers on each of the major "accountability" issues.

The meeting was then adjourned.

Respectfully submitted.

Donna E. Blanton

Commission Executive Director 12/14/95

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Appendix D

Minutes of January 11, 1996, Meeting

MINUTES

GOVERNOR'S APA REVIEW COMMISSION JANUARY 11, 1996 1 P.M. - 4:30 P.M. ROOM 428, SENATE OFFICE BUILDING TALLAHASSEE, FLORIDA

Commission Chair Robert M. Rhodes convened the meeting, and minutes of the December 13 meeting were approved with a correction to page 3 by Senator Dantzler stating that he remains undecided about whether hearing officers should be given final order authority. The chair noted that the Commission has meetings scheduled on January 25 and February 8 and that the Commission's work needs to be completed within that time frame. A representative of the Administrative Law Section of the Florida Bar will speak to the Commission at the January 25 meeting, Commissioner Rhodes said.

Donna Blanton briefly discussed a draft of a proposed amendment to chapter 120 that would authorize agencies to grant variances and waivers to their own rules. She explained that the draft was based on direction from the Commission at previous meetings and that portions of the draft were borrowed from provisions in the Minnesota APA and in the proposed new Iowa APA.

Commissioner Saunders wondered if the draft would accommodate regulated citizens who may want to comply with a rule in a way the agency has not envisioned. Commissioner Dantzler expressed a similar concern by asking if the "hardship" and "fairness" requirements would accommodate the problems citizens actually face. Ms. Blanton explained that so-called "policy" exceptions are more controversial than "hardship" or "fairness" exceptions, but that they could be included in subsection (2) of the draft if that is the desire of the Commission. It was agreed that Ms. Blanton would work on drafting language that would cover the situations discussed. Commissioner Shelley said she thought the broad definitions of variance and waiver would cover situations such as those raised by Commissioners Saunders and Dantzler. There was discussion about including language stating that a variance or waiver is appropriate if application of the rule "would lead to an absurd result."

Commissioner Pruitt said the variance and waiver provision should be as user-friendly as possible and that agencies should be authorized to tell citizens about the availability of a variance or waiver from rule requirements. Commissioner Edenfield said the draft should be modified to make clear that its purpose is to grant relief. She said it should be made clear that variances and waivers cannot be used to impose requirements beyond those detailed in a particular rule.

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Commissioner Hopping suggested that the standing requirement in paragraph (4) of the draft be revised. The intent, he said, is that only those subject to a regulation could request a variance or waiver. It was agreed that this section would be reworded. Several commissioners expressed concern with the "public interest" test in paragraph (4)(d) of the draft. It was agreed that Ms. Blanton would revise this provision.

There was general discussion about whether every agency should be required to draft separate rules creating standards and procedures for granting variances and waivers. Several Commissioners suggested that a better approach would be to create standards and procedures in the model rules that would apply to every agency unless an exception to those rules is granted by the Governor and Cabinet.

Commissioner Shelley said the reporting requirement in paragraph (7) is important and should be retained in the next draft.

In response to questions raised by Commissioners Hunter and Moyle, it was agreed that the next draft should make clear that a 120.57 proceeding following an agency's decision on a variance or waiver request would be limited to the issues raised by the request and the agency's action on the request.

Commissioners generally agreed that the next draft of the provision should continue to address both variances and waivers.

The Commission then discussed several issues relating to accountability. Ms. Blanton presented short overviews of memos she prepared on section 120.535, costs and attorney fees, presumptions, regulatory costs, and other agency statements.

In discussion of section 120.535, which requires that agencies adopt their policies as rules, Commissioners agreed that they support it in concept and that it should be retained in the APA. Commissioner Pruitt noted that as long as a waiver and variance provision is added to the APA, then the needed flexibility is present and section 120.535 is not overly burdensome. Several other commissioners echoed this sentiment. Commissioner Pruitt also said a statement of regulatory costs (SERC) would make agencies more conscious of the impact of their rules. Commissioner Shelley said that while a waiver and variance provision is useful, it is still necessary to encourage flexibility within individual rules. Commissioner Hopping noted that the provision in CS/CS/SB 536 concerning rules applying to small businesses, small counties, and small cities helps provide flexibility by tailoring rules to smaller entities.

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There was general agreement that legislative staff analyses of bills should discuss the rulemaking that would be required to implement the bills. Additionally, those analyses could state whether the proposed bills give adequate direction to agencies to carry out legislative intent. Commissioner Shelley said it would useful if the Legislature would identify specifically which parts of new legislation should be implemented by rules. It was agreed that the staff would draft a recommendation on legislative staff analyses.

Commissioners Moyle and Hopping expressed the view that the remedy in section 120.535 is somewhat weak. They agreed that there should be more stringent consequences when agencies do not adopt policies through the rulemaking process. It was agreed that any proposals to revise the remedy in section 120.535 would be submitted to Ms. Blanton, who would prepare a draft for review by the full Commission.

Commissioners then discussed costs and attorney fees and presumptions. Although these topics originally were presented separately, the group agreed with the suggestions of Commissioners Hopping and Burt that it makes sense to combine costs and attorney fees with presumptions in a matrix format. The idea would be to list the type of agency statement (i.e., adopted rule, proposed rule, or nonrule policy) and couple that with the type of presumption to which the action would be entitled, if any, and identify the consequences, if any, an agency would face if it lost a challenge to the particular agency statement. There was general agreement that a proposed rule should not be entitled to any presumption of correctness. It was agreed that Ms. Blanton would prepare the matrix for review at the next Commission meeting. Commission Chair Rhodes said he would contact a representative of the state courts system, probably with the First District Court of Appeal, to inquire about any position the courts might have on changing presumptions in the APA.

Concerning the Governor's proposal that attorney fees awarded against agencies be limited to \$15,000, Commissioner Hopping said that cap is too low. Commissioner Shelley noted that the Legislature does not appropriate money for agencies to spend on attorney fees and that \$15,000 in such circumstances amounts to a lot of money. Commission Dantzler said he generally does not like attorney fees and generally supports maintaining current law on this issue. Commissioner Hunter said she likes the provision in current law that authorizes hearing officers to impose attorney fees when pleadings are filed for improper purposes.

There was discussion about requiring agencies to report annually to the Legislature the number of rule challenges filed, the costs to the agency of defending those cases, and the disposition of the cases.
The group then discussed regulatory costs. There was general agreement that the Governor's alternative to the language of CS/CS/SB 536 is preferable. The Governor has proposed that agencies be required to choose the regulatory alternative "that does not impose excessive regulatory costs on the regulated person, county, or municipality which could be reduced by less costly alternatives that substantially accomplish the statutory objectives." The Governor would encourage agencies to prepare a SERC, but would not require it unless a substantially affected person submitted to the agency a bona fide written proposal for a lower cost regulatory alternative. The Governor would allow the SERC to be used to declare a rule invalid if the issue is raised within one year of the rule's effective date, if the agency has failed to prepare or revise its SERC or has invalidly rejected the lower cost regulatory alternative, and the substantial interests of the person challenging the agency's rejection of the lower cost alternative are materially affected by the rejection.

Commission Chair Rhodes relinquished the chair to Commissioner Hunter during the discussion of other agency statements. Commissioner Rhodes explained that there is a problem with some "commenting" agencies offering comments to permitting agencies when the comments are not adopted as rules, but the permitting agency uses the comments to impose a condition on the permit. The conditions then are difficult to challenge.

Commissioners Dantzler and Shelley said there is a need for permitting agencies to rely on the expertise of other agencies and that the proposal in CS/CS/SB 536 would have eliminated communication between agencies. Commissioner Hopping said the real problem arises when commenting agencies attempt to "push the edge of regulatory envelope" through their comments. Commissioner Shelley said one solution is to require the commenting agency to commit to defending its comment in any potential challenge proceedings if the comment is included by the permitting agency as a condition of the permit. It was agreed that this issue would be discussed again at the January 25 meeting, and Commissioner Rhodes resumed his role as chair.

Commissioner Dantzler recognized Dan Stengle of the Governor's Office to give a status report on the Informal Dispute Resolution Working Group. Mr. Stengle distributed a list of 10 programs in eight agencies where pilot projects using various forms of informal dispute resolution would be conducted. It has not yet been determined which types of dispute resolution would be conducted in which agencies. Commission Chair Rhodes accepted the list and said it would be included in the Commission's final recommendations.

Commissioner Shelley noted that the bill filing deadline in the House is January 26. She said she wants to use the simplified version of the APA as a basis for legislative changes

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to the APA during the 1996 session. She noted that the Administrative Law Section has endorsed the concept of the simplified APA and that the Commission has indicated support of the simplified concept. It was agreed that the simplified version would be filed as an "agreed placeholder" bill in the House, with the understanding that the Commission's final recommendations could be amended to the bill later. Commissioner Burt said he likes the simplified APA because it is easy to explain and it has been endorsed by the Administrative Law Section.

The Commission agreed that other suggested changes to the APA will be considered by the Commission if they are submitted in writing. The Commission staff will then summarize the proposals for the Commission's review.

The meeting was then adjourned.

Respectfully submitted,

Denna E. Blanton

Commission Executive Director 1/12/96

Appendix E

Minutes of January 25, 1996, Meeting

MINUTES

GOVERNOR'S APA REVIEW COMMISSION JANUARY 25, 1996 1:00 P.M. - 4:30 P.M. ROOM 428, SENATE OFFICE BUILDING TALLAHASSEE, FLORIDA

Commission Chair Robert M. Rhodes convened the meeting, and minutes of the January 11 meeting were approved. The chair gave a status report on the Commission's work, noting that the Commission has reached initial agreement on recommending adoption of a simplified draft of the APA, the use of informal dispute resolution in the APA, and the use of a statement of regulatory costs in certain circumstances. Additionally, the Commission has initially agreed to recommend retention of section 120.535 and has reached agreement on some issues concerning a waiver and variance provision. Those recommendations, as well as the ones reached at today's meeting, will be packaged in a draft report for consideration at the February 8 meeting, Rhodes said. He emphasized that all votes are preliminary, and that revisions of any recommendation can be made up until the final vote on the Commission's report is taken. Rhodes said he expects the Commission will not need to meet again after February 8.

The Commission then unanimously adopted a recommendation stating that legislative staff analyses should include an analysis of rulemaking required by proposed bills and comments on the adequacy of bills' rulemaking direction to agencies. Commissioners also unanimously approved a recommendation that the "simplified" APA be adopted and used as the base for any additional amendments to the APA. The recommendation is based on the understanding that the "simplified" draft makes no substantive changes to the APA. It was agreed that Dan Stengle and Debby Kearney of the Governor's office and Bill Williams of the Bar's Administrative Law Section would work with the House bill drafting office to resolve technical issues relating to the simplified draft.

Donna Blanton discussed a second draft of a proposed amendment to chapter 120 that would authorize agencies to grant variances and waivers to their own rules upon request by a regulated person. She explained that changes from the first draft were based on direction from the Commission at previous meetings. The Commission agreed that paragraphs (2) and (3) of the new section should be combined and that language should be included stating that the variance or waiver should serve the purposes of the underlying statute. It was agreed that the Administration Commission would be the body that would develop model rules for variances and waivers. Additionally, it was agreed that the Administration Commission's model rules

should deal only with procedures, not standards. Finally, it was agreed that paragraph (5) would be revised to state that agencies must advise persons of the opportunity to request variances and waivers and that paragraph (8) would be revised to state that a variance or waiver request, like other requests for licenses under the APA, would be deemed approved if the agency fails to act within the timetable outlined in that paragraph.

Bill Williams of the Administrative Law Section said the section believes variances and waivers should be authorized in specific regulatory statutes, rather than in chapter 120, following legislative review of these statutes. He raised questions about how the variance and waiver timetable would affect the permitting timetable. He also raised questions concerning the "deemed approved" issue in paragraph (8) and the issue in paragraph (5) of agencies advising persons of the variance and waiver opportunity.

The Commission unanimously voted to adopt the principles in the second draft with the changes identified in the discussion. It was agreed a third draft would be presented to Commissioners on February 8.

Chairman Rhodes advised the Commission that he received a letter from Judge Zehmer of the First District Court of Appeal concerning the Commission's discussion of changing the presumptions of validity concerning proposed and adopted agency rules. Judge Zehmer expressed the view that changing presumptions would increase the workload on the state's appellate courts. The judge's letter was distributed to Commissioners.

Donna Blanton then explained a matrix concerning presumptions, costs, and attorney fees. The first matrix lists existing provisions in the law for section 120.54(4) proceedings, 120.56 proceedings, and 120.535 proceedings. The second matrix is a worksheet for use by the Commission. The final relevant document is a proposal by Commissioners Hopping and Pruitt to amend section 120.57(1)(b)15 regarding application of unadopted rules. The proposed amendments relate to presumptions, costs, and attorney fees.

Commissioner Hopping expressed the view that courts are misapplying the legislative definition of "invalid exercise of delegated legislative authority," in section 120.52 and are simply using one of the criteria listed: whether a rule is arbitrary or capricious. He suggested that it might be appropriate to clarify that any of the listed criteria serves as grounds for declaring a rule invalid or to replace the arbitrary and capricious test with different language.

There was general discussion about presumptions of validity, with several Commissioners

expressing the view that a proposed rule should enjoy no presumption. Rather, a rule challenge proceeding under section 120.54(4) should be on a level playing field. Dan Stengle of the Governor's office also expressed that viewpoint, but made clear that an existing rule should continue to enjoy a presumption of validity in section 120.56 proceedings. Commissioner Dantzler said he is not convinced that presumptions should be changed.

There was general agreement that unadopted agency policies should not have a presumption of validity, and several Commissioners said existing rules should continue to have a presumption of validity.

Bill Williams expressed the view that the presumption of validity issue is meaningless in the context of a rule challenge. He said a rule challenge is an extension of the rulemaking process and that as a practical matter hearing officers do not presume the agency is correct. Rather, the presumption attaches to the hearing officer's order, he said, and is relevant for purposes of review by an appellate court.

Several Commissioners disagreed with Williams, stating that they believe presumptions of validity are relevant in the context of rule challenge proceedings. Commissioner Edenfield expressed the view that it might be appropriate to amend section 120.68 to make clear to appellate courts the presumptions the Legislature intends and when they should be applied. Commissioner Hunter discussed the <u>Framat Realty</u> case and noted that the court gave a presumption of validity to the agency's rule, rather than to the hearing officer's order.

There was general agreement that there is a need to reduce the advantage agencies have under current law in rule challenge proceedings. It was agreed that the issue would be carried over to the February 8 meeting.

The Commission then discussed the issue of agencies making comments to permitting agencies and the difficulty of challenging those comments because they are not adopted as rules. There was general agreement that this issue is important. Dan Stengle said the Governor's Office is working on language that will be available for the Commission's consideration at the February 8 meeting.

Several Commissioners noted that a number of issues in CS/CS/SB 536 were noncontroversial and are a good idea, although the Commission has not discussed them. Dan Stengle agreed, and said the Governor's proposed bill would include the noncontroversial aspects of the bill. Stengle agreed to provide the Commission with a list of those issues at the

February 8 meeting.

Bill Williams then discussed bid protest issues and the difficulty of winning a bid protest because of a 1988 Florida Supreme Court decision. The Commission agreed that the supreme court decision should be overruled, and unanimously voted to adopt the recommendations of the Administrative Law Section concerning bid protests. The Commission also voted to recommend changing the name of hearing officers to administrative law judges, a change that also was recommended by the Administrative Law Section.

The meeting was then adjourned.

Respectfully submitted, onna E. Blanton

Commission Executive Director 1/26/96

Appendix F

Minutes of February 8, 1996, Meeting

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MINUTES

GOVERNOR'S APA REVIEW COMMISSION FEBRUARY 8, 1996 1:00 P.M. - 4:30 P.M. ROOM 428, SENATE OFFICE BUILDING TALLAHASSEE, FLORIDA

Commission Chair Robert M. Rhodes convened the meeting, and minutes of the January 25 meeting were approved. The chair gave a status report on the Commission's work, explaining that a draft final report would be prepared as soon as possible after the meeting and distributed to Commissioners for comments. He emphasized that a quick turnaround time on the report will be important because the Legislature convenes on March 5. It was agreed that the Commission will not have more meetings unless questions are raised concerning the draft final report that necessitate a meeting.

The Commission then formally adopted a series of recommendations that were prepared as a result of Commission agreement at previous meetings. The Commission unanimously adopted a recommendation stating that section 120.535 should be retained. Commissioner Hopping said that he hopes that amendments are proposed during the legislative process that provide that section 120.535 is not a party's exclusive remedy to challenge existing agency policies.

The Commission also adopted recommendations concerning regulatory costs, informal dispute resolution, and changing the titles of hearing officers to administrative law judges. All were adopted unanimously except the title change for hearing officers. Commissioner Dantzler voted against that recommendation, stating that the title change implies a more formal process than really exists.

The Commission adopted a recommendation concerning bid protest proceedings with one modification. Originally, the recommendation called for overruling a state supreme court opinion and treating bid protests like any other section 120.57 proceeding. The Commission agreed that the court opinion should be overruled, but did not make a recommendation concerning whether bid protests should have an evidentiary standard that is different from other section 120.57 proceedings.

Donna Blanton discussed a third draft of a proposed amendment to chapter 120 that would authorize agencies to grant variances and waivers to their own rules upon request by a regulated person. She explained that changes from the second draft were based on direction from the Commission at previous meetings. The Commission agreed on two amendments to the third draft. The first would clarify that the general variance and waiver provision does not supersede, and is in addition to, variance and waiver provisions in substantive statutes. The second amendment makes clear that "principles of fairness" are violated when the <u>literal application of</u>

a rule affects similarly situated persons in significantly different ways.

Commissioner Mills said that he expects the waiver and variance provision will be challenged on constitutional separation of powers grounds, and he encouraged the staff to work during the legislative process to ensure that the guidelines for the exercise of agency discretion are as specific as possible. Commissioners generally agreed that the provision was drafted with separation of powers requirements in mind, and Commission Chair Rhodes noted that a person seeking a variance or waiver must demonstrate that the purpose of the underlying statute has been met.

Commissioner Shelley expressed the view that she is very comfortable that the proposal meets constitutional requirements and that it is a necessary and helpful addition to the state's administrative law.

A final vote on the variance and waiver recommendation then was taken. All Commissioners voted yes except Commissioners Hunter and Henderson, who voted no. The Commission also agreed to include in its final report that a fiscal analysis of the proposed variance and waiver provision should be performed.

Commissioner Hopping said that a few other questions concerning the proposal should be explored during the legislative process. Specifically, he said research is needed to determine whether variances and waivers can be granted when programs are federally mandated, and it should be determined how the proposal could affect the state's ability to issue orders during an emergency.

Commissioners then discussed a matrix outlining the burdens of proof, evidentiary standards, and provisions for costs and attorney fees concerning challenges to proposed rules, existing rules, nonrule policies, and the application of nonrule policies. The matrix proposed eliminating the presumption of validity for a proposed rule, and making changes in cost and attorney fee provisions in all proceedings. Commissioners agreed that the cost and attorney fee provisions on the matrix concerning section 120.535 need to clearly attach to a final order adverse to an agency so that they do not discourage settlement. Commissioners also endorsed a substitute proposal for row 4 of the matrix concerning application of nonrule policy. The substitute, proposed by Commissioner Shelley and Dan Stengle of the Governor's Office, was drafted as an amendment to section 120.57(1)(b)15. The proposal retains final order authority with the agency head, but allows an appellate court to award costs and attorneys fees against an agency if a court finds that an agency's rejection of the conclusions regarding the policy do not comport with stated requirements. Commissioner Edenfield proposed that costs and attorney fees be awarded against an agency in section 120.54 and 120.56 proceedings if the agency's actions are not "substantially justified." Attorney fees would be limited to \$15,000. This amendment was based on an earlier proposal by the Governor's Office.

The proposed matrix then was adopted unanimously, with the amendments noted in the previous paragraph.

The Commission then discussed the issue of agencies making comments to permitting agencies and the difficulty of challenging those comments because they are not adopted as rules. There was general agreement that this issue is important, but that no full resolution of the problem had been found. However, Commissioner Shelley said the Governor's Office is working with interested persons to find a solution to the problem. It was agreed that discussions among the parties interested in the issue should continue. The Commission agreed to include a statement in the final report reflecting the Commission's interest in the issue and recognizing its importance.

The Commission then took a final vote on the entire package of the Commission's recommendations. The package passed unanimously.

Finally, Commission Chair Rhodes distributed a memorandum from Dan Stengle to Donna Blanton identifying a number of noncontroversial items from CS/CS/SB 536 that the Governor does not oppose. There was general discussion that these issues would be included in the proposed legislation, along with the provision in CS/CS/SB 536 deleting the requirement that a hearing officer's order include a ruling upon each proposed finding of fact.

The Commission Chair and Commissioner Shelley then thanked the Commissioners and the staff for their work. The meeting was then adjourned.

Respectfully submitted Donna E. Blanton

Commission Executive Director 2/9/96

Appendix G

APA Simplified Draft Summary Sheet

ADMINISTRATIVE PROCEDURE ACT "Simplified Draft"

Prepared by Deborah Kearney, the Governor's Deputy General Counsel, and a committee of government and nongovernment lawyers

- 1. Problem: Enacted in 1974 and amended every year since then, the Florida Administrative Procedure Act no longer is logically organized.
 - Response: The draft rearranges existing language in a more logical fashion. Duplicative provisions are deleted, and other provisions are moved into sections where they more logically belong.

For example, sections 120.54 and 120.535, both of which relate to rulemaking, are combined into a single section 120.54 entitled "Rulemaking." Additionally, the rule challenge provisions of sections 120.535, 120.54, and 120.56 are combined into a single section 120.56 entitled "Challenges to rules." This new section 120.56 first addresses provisions common to all rule challenges, and then lists special provisions relating to particular types of challenges.

Similarly, common procedures for hearings are listed in a new section 120.569, which combines provisions from sections 120.57, 120.58, and 120.59. Sections 120.57(1) and (2) are retained, but are limited to special provisions relating to formal hearings and informal hearings, respectively.

All attorney fees provisions, which now are found in sections 120.59, 120.535, 120.56, and 120.57, are combined into a new section 120.595.

Obsolete provisions in sections 120.63, 120.65(6), 120.72, 120.721, and 120.722 are deleted.

- 2. Problem: Provisions relating to a particular agency or specific subject now are mixed in with general procedures. This makes the general procedures harder to read.
 - Response: This draft creates Part II of chapter 120. Section 120.80 lists each agency exception alphabetically by agency. Section 120.81 lists exceptions that cover more than a single agency (i.e., "educational units" and "prisoners"). These broader exceptions also are organized alphabetically.
- 3. Problem: Chapter 120 is wordy, uses too much "legalese," and is difficult to read because of excessively long paragraphs and subsections.
 - Response: The draft adds more subsection and paragraph headings, replaces "legalese," and reduces unnecessary verbiage in an effort to be more user-friendly for nonlawyers. Additionally, gender references are neutralized.

Appendix H

Flexibility Issues Memorandum

FLEXIBILITY ISSUES

PREMISE FOR DISCUSSION: More flexibility is needed in the administrative process, particularly in the ways agencies apply their rules to the public. Agencies must write rules specific enough to be meaningful, yet general enough to fit a variety of situations. The broader the regulatory task, the greater the likelihood that unforeseen situations will arise, thus creating the need for "adjustments" to rules of general applicability. Consequently, to achieve an appropriate result for the public and private citizens, agencies often need flexibility to vary from literal requirements of rules. Procedural mechanisms are needed to consider individual requests for variances and exceptions to administrative rules of general applicability.¹

The premise stated above is intended to respond to concerns expressed at the October 12 meeting about problems that can be created by strict adherence to rules. Senator Dantzler, for example, expressed the view that applying rules literally can lead to nonsensical results. Commissioner Hopping mentioned a provision in Minnesota law that allows agencies to grant variances to rules. Other Commissioners expressed interest in exploring the Minnesota model.

The view that more flexibility is needed in the administrative process, however, is not universally held. Consider the comments of Mary Smallwood, who told Commissioners that she believes flexibility should be removed from government decisionmaking as much as possible. Senator Kiser also reminded Commissioners that the Florida Administrative Procedure Act was adopted in 1974 in large measure because of concerns about "phantom government" and to rein in unbridled agency flexibility.

Thus, there appears to be a need to strike a balance between rigid adherence to rules and unpredictable application of them to the public.

Flexibility can be built into an administrative process in a number of ways. One approach may be that taken in Minnesota. That state's Administrative Procedure Act includes a general provision authorizing agencies to grant variances

to rules. The statute provides:

Unless otherwise provided by law, an agency may grant a variance to a rule. Before an agency grants a variance, it shall adopt rules setting forth procedures and standards by which variances shall be granted and denied. An agency receiving a request for a variance shall set forth in writing its reasons for granting or denying the variance. This subdivision shall not constitute authority for an agency to grant variances to statutory standards.

Minn. St. Ann. § 14.05.

Our research indicates that Minnesota is the only state that <u>authorizes</u> agencies to grant variances in this manner. While some other states permit agencies to develop standards and guidelines for variances through rulemaking, the statutory directives usually are phrased as <u>prohibiting</u> variances unless such rules are adopted.² We found no court cases interpreting the Minnesota provision. Although the provision has been in Minnesota law for more than 20 years, officials in both the executive and legislative branches of Minnesota's government say they cannot recall it ever being used.

"That's an old provision that's been in there from the beginning," said George McCormick, counsel to the Minnesota Senate. "I really don't think anybody uses it."

Elaine Hanson, commissioner of the Minnesota Department of Administration, agreed with McCormick. She said most agencies do not want to develop procedures and standards for granting variances because of concerns about undermining their rules.

The Public Utilities Commission of Minnesota is one agency that has established variance procedures pursuant to section 14.05. Minn. R. 7830.4400 (1994). These procedures state that the Commission may grant a variance if: (1) the rule enforcement would excessively burden the applicant; (2) the variance would not adversely affect the public interest; and (3) the variance would not conflict with existing legal standards. The agency must grant or deny the variance request within 30 days of receipt of an application.

A recent study of the Minnesota APA recommends that agencies make better use of the statutory variance provision.³ McCormick said legislators in Minnesota a few years ago attempted to develop some general variance standards for agencies to follow, but the proposal was dropped because of strong agency objections.

Although section 14.05 is rarely used, Minnesota has found another means of adding some flexibility to its rules. In 1993, the Minnesota Legislature created the Board of Government Innovation and Cooperation, which is authorized to grant waivers to local governments both from administrative rules and from procedural requirements of state statutes.⁴ In 1995, the Board also was given authority to grant waivers from certain rules and policies to state agencies.⁵ Copies of these statutes are attached to this memorandum.

The Board consists of three members of the Senate, three members of the House, two administrative law judges, the commissioner of finance, the commissioner of administration, and the state auditor. The legislators are nonvoting members. According to Hanson, who serves as vice-chair of the Board, requests for waivers are heard by the Board about every six weeks. All of the requests so far have come from local governments, with most waiver requests relating to human service rule requirements.

It is important to note that the Board has authority only to consider waiver requests from local governments and state agencies, not from any other regulated businesses or professions.

A task force created by the Iowa State Bar Association currently is considering a new state Administrative Procedure Act that may include a waiver provision. An October 24, 1995, draft of the proposed Iowa APA includes a provision that would authorize a person to petition an agency for an exemption from a rule. A copy of the proposed Iowa waiver language is attached to this memo. If adopted, it would require agencies to adopt rules governing the form, contents, and filing of waiver petitions; specifying the procedural rights of persons in relation to such petitions; and providing for the disposition of those petitions. The proposed waiver provision states that an agency must grant a petition for an exemption from a rule "if application of the rule to petitioner on the basis of the facts specified in the petitioner would be consistent with the public interest." The proposed statute also would allow an agency to waive application of one or

more of its rules on its own motion if it found that the statutory criteria for waiver existed. The task force drafting the proposed new Iowa APA is scheduled to meet again in December and consider additional comments. The proposed act then will be submitted to the Board of Governors of the Iowa State Bar Association for additional review before submission to state lawmakers.

While Minnesota so far appears to be the only state with a general variance provision in its APA, many states authorize variances to particular statutes or rules. Florida has several examples of such variance provisions.⁶ Section 403.201, for example, authorizes the Department of Environmental Protection to grant variances to the provisions of the Florida Air and Water Pollution Control Act and to rules and regulations that implement it. The statute allows variances to be granted for any one of the following reasons:

(a) There is no practicable means known or available for the adequate control of the pollution involved.

(b) Compliance with the particular requirement or requirements from which a variance is sought will necessitate the taking of measures, which, because of their extent or cost, must be spread over a considerable period of time. A variance granted for this reason shall prescribe a timetable for the taking of the measures required.

(c) To relieve or prevent hardship of a kind other than those provided for in paragraphs (a) and (b). . . .

<u>Id.</u> § 403.201(1).

Section 403.201 also provides for notice of the variance request and the opportunity for a hearing. Additionally, the Department of Environmental Protection is authorized to adopt rules imposing other conditions for the granting of variances. Id. § 403.201(3)-(4).⁷

Some Florida statutes only permit variances to be granted when alternative means can be shown to protect public health and safety. See, e.g., id. § 381.086(3) (relating to migrant housing). In other cases, variances may be granted if a particular project provides a significant regional benefit for wildlife and the environment. Id. § 378.212(1)(f) (phosphate reclamation). The requirements in

Florida's specific variance provisions appear to be similar to those in many states.*

One provision in Florida's APA that once afforded more flexibility to agencies has been eliminated by the Legislature. The APA formerly contained a provision that was interpreted by Florida courts as authorizing agencies to grant exceptions to their rules so long as they explained those deviations. Section 120.68(12), Florida Statutes (1983), provided that a court should remand a case to an agency if it found the agency's exercise of discretion to be "inconsistent with an agency rule, an officially stated agency policy, or a prior agency practice if deviation therefrom is not explained by the agency " (Emphasis supplied). Florida courts began to develop an "explication" doctrine allowing an agency to deviate from its own rule so long as it explained the deviation.⁹ The court cases discussing section 120.68(12) did not elaborate on what kind of explanation an agency must provide or under what standard the agency's explanation would be reviewed. In 1984, the Legislature amended section 120.68(12) to direct the remand of all cases in which a court finds that an agency's exercise of discretion is inconsistent with an agency rule.¹⁰ Thus, the opportunity to deviate from an existing rule and explain that deviation was eliminated.

One way of infusing more flexibility into Florida's APA would be to revive the former version of section 120.68(12). If this is desirable, it may also be useful to consider the standard for review of the agency's explanation. For example, must it be supported by competent substantial evidence?

Recent attempts in Florida law to build flexibility into the APA have directed agencies to find the means of providing that flexibility. For example, CS/CS/SB 536 included the following provisions:

* "Before July 1, 1996, each agency must review its rules and file a written report with the President of the Senate, the Speaker of the House of Representatives, and the Governor. The report must identify ways to simplify and clarify rules and regulatory schemes by combining redundant and overlapping rules and by deleting obsolete rules. The report must identify rules that are appropriate for variances, waivers, or special circumstances consistent with the directives of the Legislature.^{*11}

* "Each agency is encouraged to accomplish its statutory duties and objectives using sound judgment and flexibility so that agency action in

implementing legislative enactments and in adopting agency rules is accomplished in a manner that meets individual needs and circumstances while at the same time carrying out the legislative requirements.^{#12}

* "Agencies are encouraged to adopt rules that can be flexibly applied."¹³

Variances and other "exception" provisions also are common in federal regulatory schemes. Although the authority to grant exemptions or waivers usually is found in an agency's enabling act or in its own regulations, the D.C. Circuit has suggested that the authority to grant exceptions may be implied by Congress's directive to agencies to regulate in the public interest.¹⁴ One example of an elaborate exceptions program is the federal Department of Transportation's program for relieving a person from hazardous materials regulations. The Department recently has proposed a rule amendment to streamline the exemption process, which would establish procedures for granting routine, priority, and emergency exceptions. 60 Fed. Reg. 47723 (September 14, 1995). The proposed rule allows for priority or emergency processing when routine processing would result in significant economic loss to the applicant. In a report to Congress, the Department of Transportation explained the need for flexibility in the hazardous materials area as follows: "The need for exemptions from the regulations arises from the changing nature of HM and the methods by which they are transported. Since the regulations are relatively static in nature, exemptions are vital to industry, allowing it to implement new technology and to evaluate new operational techniques which often increase productivity and enhance safety."¹⁵

Exceptions to administrative rules are so common that a number of scholarly articles have been written about them.¹⁶ The various types¹⁷ of exceptions to administrative rules are categorized as follows:

1. Hardship exceptions. These are based on the premise that exceptions may be granted because compliance with the rule in question would create a substantial hardship. There are several subcategories of hardship exceptions, including economic hardship and technological hardship. The idea behind these exceptions is that a regulated entity or person should not be penalized or prejudiced when complying with a rule is too expensive or too technologically difficult unless the social benefits of compliance with the rule outweigh the costs to the

particular entity or person.

- 2. Fairness exceptions. These are used when application of a rule would cost one entity or person substantially more than those similarly situated, when application of a rule would unintentionally penalize an entity's or person's recent good-faith activities, or when regulatory costs to an entity or person are simply not worth the minimal social benefits that compliance with the rule would produce.
- 3. Policy exceptions. These are geared to the overall goals of a regulatory program. For example, an exception to a rule may be granted if its desired results can be achieved by another means. Policy exceptions can allow an agency to implement a new or refined policy on an experimental basis.

DISCUSSION POINTS:

1. Does the Commission accept the general premise at the beginning of this memorandum? If not, can this premise be improved, or should it be abandoned?

2. Assuming increased flexibility is a goal of the Commission, should Florida consider a general variance provision in the Administrative Procedure Act such as in the Minnesota act?

3. If so, should general standards for granting variances be placed in the statute, or should each agency adopt standards by rule? Should agencies be required to allow variances, or should agency use of variances be optional, as under the Minnesota statute?

4. Instead of a general variance provision, the Florida Legislature could continue to authorize variances to statutes and rules within specific statutory schemes, such as those in chapter 403. Does this approach allow adequate flexibility?

5. Is there any desire to amend the Florida APA to allow an agency to deviate from its own rules if the deviation does not conflict with general law and is explained? Section 120.68(12) previously included language that permitted this. Should there be standards for when a deviation can be granted, and must the

explanation state how those standards have been satisfied? Should the agency's explanation of the deviation be required to be based on competent substantial evidence?

1. <u>See Alfred C. Aman, Jr., Administrative Equity: An Analysis of Exceptions to</u> <u>Administrative Rules</u>, 1982 Duke L.J. 277.

2. New Hampshire in 1994 adopted a provision that prohibits agencies from granting variances unless they provide by rule for a waiver or variance procedure. Thus, New Hampshire's new statute could be broadly interpreted as allowing agencies authority to grant variances so long as they adopt a procedure for variances by rule. This provision states:

No agency shall grant waivers of, or variances from, any provisions of its rules without either amending the rules, or providing by rule for a waiver or variance procedure. The duration of the waiver or variance may be temporary if the rule so provides.

N.H. Rev. Stat. Ann. § 541-A:22 (1994 Supp.) (emphasis supplied).

Similarly, North Carolina has a statute that prohibits agencies from waiving or modifying a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement. N.C. Gen. Stat. § 150B-19 (1994). Vermont also has a statute stating that agencies may not grant routine waivers of or variances from any provision of their rules without either amending the rules or providing by rule for a waiver or variance procedure.. Vt. Stat. Ann. tit. 3, § 845 (1994).

All of these statutes are cast in terms of prohibiting variances, yet all appear to allow them so long as agencies establish guidelines or procedures by rule. There are no cases reported interpreting these provisions.

3. Minnesota Comm. on Reform and Efficiency, Reforming Minnesota's Administrative Rulemaking System, Summary Report 15 (1993). This report states:

Agencies should make better use of rule variances or waivers to facilitate the use of outcome measures. Rule waivers encourage regulated parties to design alternative approaches, enhancing compliance with state policies. Agencies should develop processes that specify when a rule can be waived, such as when the legislature has set a broad standard. Authority to do so already exists in the APA. Frequent use of waivers can indicate a need for reviewing and perhaps updating a particular rule. 4. Minn. Stat. Ann. §§ 465.795-.797.

5. Ch. 248, Art. 16, 1995 Minnesota Laws.

6. <u>See. e.g.</u> §§ 403.201 (pollution control), 403.854 (drinking water), 381.0086 (migrant housing), 378.212 (phosphate land reclamation), Fla. Stat. (1993).

7. <u>See</u> Fla. Admin. Code R. 62-103.100 (1995). This rule requires the petitioner or applicant to address six factors when requesting a variance, including the steps or measures the petitioner is taking to meet the requirement from which the variance is sought; the social, economic, and environmental impacts on the applicant, residents of the area, and the state if the variance is granted; and the social, economic, and environmental impacts on the applicant, residents of the area, and the state if the variance is denied.

8. State statutes frequently include procedures that provide petitioners with an opportunity to request a hearing either upon petitioning for a variance or upon the agency's denial of a variance request. See, e.g., Cal. Health Code § 25233 (West 1994) (hazardous waste control); Del. Code Ann. tit. 7, § 6011 (1994) (environmental conservation). Statutes also frequently include requirements that the variance pose no adverse effects to the health, well being, or safety of the public. See, e.g., Mo. Rev. Stat. § 260.405 (1994) (environmental control); Wyo. Stat. § 27-11-111 (1994) (OSHA). Sometimes variances may be issued only when the petitioner can demonstrate a particular hardship in complying with the regulation. See, e.g., Ky. Rev. Stat. Ann. § 224.30.130 (Baldwin 1994) (public health); Mich. Comp. Laws § 125.1515 (1994) (zoning).

9. <u>E.g.</u>, <u>General Tel. Co. v. Florida Pub. Serv. Comm'n</u>, 446 So. 2d 1063 (Fla. 1984); <u>Best Western Tivoli Inn v. Department of Transportation</u>, 435 So. 2d 321 (Fla. 1st DCA 1983). These cases and the development of this doctrine are discussed in detail in F. Scott Boyd, <u>How</u> the Exception Makes the Rule: Agency Waiver of Statutes, Rules, and Precedent in Florida, 7 St. Thomas L. Rev. 287 (1995).

10. Ch. 84-173, § 4, at 524-25, Laws of Fla.

11. Fla. CS for CS for SB 536, § 8(2) (1995) (vetoed by the Governor) (emphasis supplied).

12. Id. § 10(1) (proposed § 120.547(1)).

13. Id. § 10(2) (proposed § 120.547(2)).

14. <u>WAIT Radio v. FCC.</u> 418 F.2d 1153, 1157 (D.C. Cir. 1969), <u>cert. denied</u>, 409 U.S. 1027 (1972). For a general discussion of waiver of federal regulations, see Jim Rossi, <u>Making Policy Through the Waiver of Regulations at the Federal Energy Regulatory Commission</u>, 47 Admin. L. Rev. 255 (1995).

15. U.S. Department of Transportation, Research and Special Programs Administration, 1992-93 Biennial Report to Congress on Transportation of Hazardous Materials 5-6.

16. <u>See, e.g.</u> Poter H. Schuck, <u>When the Exception Becomes the Rule: Regulatory Equity</u> and the Formulation of Energy Policy Through an Exceptions Process, 1984 Duke L.J. 163; Aman <u>supra</u> note 1; Rossi, <u>supra</u> note 14.

17. Aman, <u>supra</u> note 1, at 291-322.

MN ST § 14.05 M.S.A. § 14.05

This document has been amended. Use UPDATE to retrieve the amending document(s). See SCOPE for more information.

see

MINNESOTA STATUTES ANNOTATED STATE AGENCIES CHAPTER 14. ADMINISTRATIVE PROCEDURE RULEMAKING; PROCEDURE APPLICABLE TO ALL RULES

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Current through End of 1994 1st Sp. Sess.

14.05. General authority

Subdivision 1. Authority to adopt original rules restricted. Each agency shall adopt, amend, suspend, or repeal its rules in accordance with the procedures specified in sections 14.001 to 14.69, and only pursuant to authority delegated by law and in full compliance with its duties and obligations. If a law authorizing rules is repealed, the rules adopted pursuant to that law are automatically repealed on the effective date of the law's repeal unless there is another law authorizing the rules. Except as provided in section 14.06, sections 14.001 to 14.69 shall not be authority for an agency to adopt, amend, suspend, or repeal rules.

Subd. 2. Authority to modify proposed rule. An agency may modify a proposed rule in accordance with the procedures of the administrative procedure act. However, an agency may not modify a proposed rule so that it is substantially different from the proposed rule in the notice of intent to adopt rules.

Subd. 3. Authority to withdraw proposed rule. An agency may withdraw a proposed rule any time prior to filing it with the secretary of state. It shall publish notice that the proposed rule has been withdrawn in the State Register. If a rule is withdrawn, the agency may again propose it for adoption, either in the original or modified form, but the agency shall comply with all procedures of sections 14.05 to 14.36.

Subd. 4. Authority to grant variance to rule. Unless otherwise provided by law, an agency may grant a variance to a rule. Before an agency grants a variance, it shall adopt rules setting forth procedures and standards by which variances shall be granted and denied. An agency receiving a request for a variance shall set forth in writing its reasons for granting or denying the variance. This subdivision shall not constitute authority for an agency to grant variances to statutory standards.

CREDIT(S)

1995 Interim Update ---

Amended by Laws 1987, c. 384, art. 2, § 1; Laws 1990, c. 422, § 10.

< General Materials (GM) - References, Annotations, or Tables >

HISTORICAL AND STATUTORY NOTES

1995 Interim Update

1987 Legislation

Laws 1987, c. 384, art. 2, § 1, directed the revisor of statutes to substitute "14.69" for "14.70" in subd. 1.

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MN LEGIS 233 (1995)

< < MN ST § 14.04 > >

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14.04 AGENCY ORGANIZATION; GUIDEBOOK

To assist interested persons dealing with it, each agency shall, in a manner prescribed by the commissioner of administration, prepare a description of its organization, stating the <<- process whereby ->> <<+ general course and method of its operations and where and how +>> the public may obtain information or make submissions or requests. The commissioner of administration shall publish these descriptions at least once every four years commencing in 1981 in a guidebook of state agencies. Notice of the publication of the guidebook shall be published in the State Register <<+ and given in newsletters, newspapers, or other publications, or through other means of communication +>>.

Sec. 6. Minnesota Statutes 1994, section 14.05, subdivision 2, is amended to read:

< < MN ST § 14.05 > >

Subd. 2. AUTHORITY TO MODIFY PROPOSED RULE. < <+ (a) +>> An agency may modify a proposed rule in accordance with the procedures of the administrative procedure act. However, an agency may not modify a proposed rule so that it is substantially different from the proposed rule in the notice of intent to adopt rules <<+ or notice of hearing +>>.

< < + (b) A modification does not make a proposed rule substantially different if: + > >

<<+ (1) the differences are within the scope of the matter announced in the notice of intent to adopt or notice of hearing and are in character with the issues raised in that notice; +>>

< < + (2) the differences are a logical outgrowth of the contents of the notice of intent to adopt or notice of hearing and the comments submitted in response to the notice; and + > >

< < + (3) the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question. + > >

<<+ (c) In determining whether the notice of intent to adopt or notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question the following factors must be considered: +>>

< < + (1) the extent to which persons who will be affected by the rule should have understood that the rulemaking proceeding on which it is based could affect their interests; + > >

< < + (2) the extent to which the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the notice of intent to adopt or notice of hearing; and + > >

< < + (3) the extent to which the effects of the rule differ from the effects of the proposed rule contained in the notice of intent to adopt or notice of hearing. + > >

Sec. 7. Minnesota Statutes 1994, section 14.05, is amended by adding a subdivision to read:

< < MN ST § 14.05 > >

<<+ Subd. 5. +>> REVIEW AND REPEAL OF RULES. <<+ By December 1 of each year, an agency shall submit a list of all the rules of the agency to the governor, the legislative commission to review administrative rules, and the revisor of statutes. The list must identify any rules that are obsolete and should be repealed. The list must also include an explanation of why the rule is obsolete and the agency's timetable for

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repeal. +>>

Sec. 8. Minnesota Statutes 1994, section 14.06, is amended to read:

< < MN ST § 14.06 > >

14.06 REQUIRED RULES

<<+ (a) +>> Each agency shall adopt rules, in the form prescribed by the revisor of statutes, setting forth the nature and requirements of all formal and informal procedures related to the administration of official agency duties to the extent that those procedures directly affect the rights of or procedures available to the public.

<<+ (b) Upon the request of any person, and as soon as feasible and to the extent practicable, each agency shall adopt rules to supersede those principles of law or policy lawfully declared by the agency as the basis for its decisions in particular cases it intends to rely on as precedents in future cases. This paragraph does not apply to the public utilities commission. +>>

Sec. 9. Minnesota Statutes 1994, section 14.08, is amended to read:

< < MN ST § 14.08 > >

14.08 < <- REVISOR OF STATUTES ->> APPROVAL OF RULE <<+ AND RULE +>> FORM <<+ ; COSTS +>>

(a) Two copies of a rule adopted pursuant to <<- the provisions of ->> section 14.26 <<- or 14.32 ->> shall be submitted by the agency to the <<-attorney general ->> <<+ chief administrative law judge +>> shall send one copy of the rule to the revisor on the same day <<- as ->> it is submitted by the agency under section 14.26 <<- or 14.32 ->>. Within five days after receipt of the rule, excluding weekends and holidays, the revisor shall either return the rule with a certificate of approval of the form of the rule to the <<- attorney general ->> <<+ chief administrative law judge +>> or notify the <<- attorney general ->> <<+ chief administrative law judge +>> or notify the <<- attorney general ->> <<+ chief administrative law judge +>> and the agency that the form of the rule will not be approved.

If the <<- attorney general ->> <<+ chief administrative law judge +>> disapproves a rule, the agency may modify it and the agency shall submit two copies of the modified rule to the <<- attorney general ->> <<+ chief administrative law judge +>> who shall send a copy to the revisor for approval as to form as described in this paragraph.

(b) One copy of a rule adopted after a public hearing shall be submitted by the agency to the revisor for approval of the form of the rule. Within five working days after receipt of the rule, the revisor shall either return the rule with a certificate of approval to the agency or notify the agency that the form of the rule will not be approved.

(c) If the revisor refuses to approve the form of the rule, the revisor's notice shall revise the rule so it is in the correct form.

(d) The <<- attorney general ->> << + chief administrative law judge +>> shall assess an agency for the <<- attorney general's ->> actual cost of processing rules under this section. <<- The agency shall pay the attorney general's assessments using the procedures of section 8.15. ->> Each agency shall include in its budget money to pay the <<- attorney general's ->> assessments. Receipts from the assessment must be deposited in the <<- state treasury and credited to the general fund ->> << + administrative hearings account created in section 14.54 +>>.

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BOARD OF GOVERNMENT INNOVATION AND COOPERATION

465.795 DEFINITIONS.

Subclivision 1. Agency. "Agency" means a department, agency, board, or other Subcivision 1. Agency. Agency investigation over an administrative other instrumentality of state government that has jurisdiction over an administrative me instrumentality or state government under section 465.797. If no specific active me or law from which a waiver is sought under section 465.797. If no specific active me

Subd. 2. Beard. "Board" means the board of government innovation and coopera tion catablished by section 465,796.

Subd. 3. Council or metropolitan council. "Council" or "metropolitan council means the metropolitan council established by section 473.123.

Subd. 4. Local government unit. "Local government unit" means a county, how rule charter or statutory city, school district, town, or special taxing district, shore for purposes of sections 465.81 to 465.87.

Subd. 5. Metropolitan agency. "Metropolitan agency" has the meaning given in section 473.121, subdivision Se.

Subd. 6. Metropolitan area" has the meaning given in techen 473.121, subdivision 2.

Sund. 7. Scope. As used in sections 465.795 to 465.799 and sections 465.801 465.87, the terms defined in this section have the meanings given them

History: 1993 c 375 art 15 s 1; 1994 c 587 art 8 s 1

465.796 BOARD OF GOVERNMENT INNOVATION AND COOPERATION

Subdivision 1. Membership. The board of government innovation and cooperation consists of three members of the senate appointed by the subcommittee on committee of the senste committee on rules and administration, three members of the bane of representatives appointed by the speaker of the house, two administrative isw jadas appointed by the chief administrative law judge, the commissioner of finance, the can missioner of administration, and the state auditor. The commissioners of future and administration and the state auditor may each designate one staff member to una h the commissioner's or auditor's place. The members of the senate and house of man sentatives serve as nonvoting members.

Subd. 2. Duties of beard. The board shall:

(1) accent applications from local government units for waivers of administration rules and temporary, limited exemptions from enforcement of procedural requirement in state law as provided in section 465.797, and determine whether to approve, make or reject the application;

(2) accept applications for grants to local government units and related grant tions proposing to design models or plans for innovative service delivery and many ment as provided in soction 465.798 and determine whether to approve, motify, a reject the application;

(3) accept applications from local government units for fragacial animazes enable them to plan for cooperative efforts as provided in section 465.799, and demmine whether to approve, modify, or rejact the application;

(4) accept applications from cligible local government units for service-during grants as provided in section 465.801, and determine whether to approve, motify, # reject the application;

(5) accept applications from counties, cities, and towas proposing to continu under sections 465.81 to 465.87, and determine whether to approve or disapprove at application; and

(6) make recommendations to the legislature regarding the elimination of set mandates that inhibit local government efficiency, innovation, and cooperation.

The board may purchase services from the metropolitan council in reviewing representation for waivers and grant applications.

Subd. 3. Staff. The board may hire staff or consultants as necessary to perform its during.

History: 1993 c 375 art 15 s 2; 1994 c 587 art 8 s 2

15.797 BULE AND LAW WAIVER REQUESTS.

Subdivision 1. Generally. (a) Except as provided in paragraph (b), a local governstent unit may request the board of government innovation and cooperation to grant a waiver from one or more administrative rules or a temporary, limited exemption from enforcement of state procedural laws governing delivery of services by the local government unit. Two or more local government units may submit a joint application for a waiver or exemption under this section if they propose to cooperate in providing a service or program that is subject to the rule or law. Before submitting an application to the board, the governing body of the local government unit must approve, in concept, the proposed waiver or exemption at a meeting required to be public under section 471.705. A local government unit or two or more units acting jointly may apply for a waiver or exemption on behalf of a nonprofit organization providing services to clients whose costs are paid by the unit or units. A waiver or exemption granted to a nonprofit organization under this section applies to services provided to all the organization's clients.

(b) A school district that is granted a variance from rules of the state board of education under section 121.11, subdivision 12, need not apply to the board for a waiver of those rules under this section. A school district may not seek a waiver of rules under this section if the state board of education has authority to grant a variance to the rules under section 121.11, subdivision 12. This paragraph does not preclude a school district from being included in a cooperative effort with another local government unit under this section.

Subd. 2. Application. A local government unit requesting a waiver of a rule or exemption from enforcement of a law under this section shall present a writion application to the board. The application must include:

(1) identification of the service or program at issue;

(2) identification of the administrative rule or the law imposing a procedural requirement with respect to which the waiver or exemption is sought; and

(3) a description of the improved service outcome sought, including an explanation of the effect of the waiver or exemption in accomplishing that outcome.

A copy of the application must be provided by the requesting local government unit to the exclusive representative cartified under section 179A.12 to represent employees who provide the service or program affected by the requested waiver or exemption.

Subd. 3. Review presses. (a) Upon receipt of an application from a local government unit, the board shall review the application. The board shall dismiss an application if it finds that the application proposes a waiver of rules or examption from enforcement of laws that would result in due process violations, violations of federal law or the state or federal constitution, or the loss of services to people who are entitled to them.

(b) The board shall determine whether a law from which an exemption for enforcement is sought is a procedural law, specifying how a local government unit is to achieve an outcome, rather than a substantive law prescribing the outcome or otherwise establishing policy. In making its determination, the board shall consider whether the law specifies such requirements as:

(1) who must deliver a service;

(2) where the service must be delivered;

(3) to whom and in what form reports regarding the service must be mader and

(4) how long or how often the service must be made available to a given recipient.

(c) If the commissioner of finance, the commissioner of administration, or the

46.797 BEDRIS, POWERS AND DUTTER MUNICIPALITIES

state auditor has jurisdiction over a rule or law affected by an application, the chief administrative law judge, as soon as practicable after receipt of the application, shall designate a third administrative law judge to serve as a member of the board in place of that official while the board is deciding whether to grant the waiver or exemption

(d) If the application is submitted by a local government unit in the metropolitan area or the unit requests a waiver of a rule or temporary, limited exemptions from enforcement of a procedural law over which the metropolitan council or a metropolitan agency has jurisdiction, the board shall also transmit a copy of the application to the council for review and comment. The council shall report its comments to the board within 60 days of the date the application was transmitted to the council. The council may point out any resources or technical assistance it may be able to provide a local government submitting a request under this section.

(e) Within 15 days after receipt of the application, the board shall transmit a copy of it to the commissioner of each agency having jurisdiction over a rule or law from which a waiver or exemption is sought. The agency may mail a notice that it has received as application for a waiver or exemption to all persons who have regimered with the agency under section 14.14, subdivision 1a, identifying the rule or law from which a waiver or exemption is requested. If no agency has jurisdiction over the reor law, the board shall transmit a copy of the application to the attorney general. The anency shall inform the board of its agreement with or objection to and grounds for objection to the waiver or exemption request within 60 days of the date when the application was transmitted to it. An agency's failure to do so is considered agreement a the waiver or exemption. The board shall decide whether to grant a waiver or exemption at its next regularly scheduled meeting following its receipt of an agency's response or the end of the 60-day response period. If consideration of an application is not concluded at that meeting, the matter may be carried over to the next meeting of the band Interested persons may submit written comments to the board on the waiver or entry. tion request up to the time of its vote on the application.

(f) If the exclusive representative of the affected employees of the requesting load government unit objects to the weiver or exemption request it may inform the base of the objection to and the grounds for the objection to the weiver or exemption request within 60 days of the receipt of the application.

Subd. 4. Hearing. If the agency or the exclusive representative does not agree we the waiver or exemption request, the board shall set a date for a hearing on the application. The hearing must be conducted informally at a mosting of the board. Persons reresenting the local government unit shall present their case for the waiver or excaption, and persons representing the agency shall explain the agency's objection to it. Members of the board may request additional information from either party. The board may also request, either before or at the hearing, information or comments from representatives of business, labor, local governments, state agencies, consultants, and members of the public. If necessary, the hearing may be continued at a subsequent board messing. A weiver or exemption must be granted by a vote of a majority of the board messing. The board may modify the terms of the waiver or exemption request in arriving at the agreement required under subdivision 5.

Subd. 5. Canditions of agreements. If the board grants a request for a waver or exemption, the board and the local government unit shall enter into an agreement providing for the delivery of the service or program that is the subject of the application. The agreement must specify desired outcomes and the means of measurement by which the board will determine whether the outcomes specified in the agreement have been met. The agreement must specify the duration of the waiver or exception, which my be for no less than two years and no more than four years, subject to renewal if beit parties agree. The board may reconsider or renegotiate the agreement if the rule or be affected by the waiver or exemption is amended or repealed during the term of the orignal agreement. A waiver of a rule under this section has the effect of a variance grants by an agency under section 14.05, subdivision 4. A local unit of government that is granted an exemption from enforcement of a procedural requirement is statt law under this section is exempt from that law for the duration of the exemption. The board may require periodic reports from the local government unit, or conduct investigations of the service or program.

Subd. 6. Enforcement. If the board finds that the local government unit is failing to comply with the terms of the agreement under subdivision 5, it may reacind the agreement. Upon the rescission, the local unit of government becomes subject to the rules and laws covered by the agreement.

Subd. 7. Access to data. If a local government unit, through a cooperative program under this section, gains access to data collected, created, received, or maintained by another local government that is classified as not public, the unit gaining access is governed by the same restrictions on access to and use of the data as the unit that collected, created, received, or maintained the data.

History: 1993 c 375 art 15 s 3; 1994 c 587 art 8 s 3-7

45.798 SERVICE BUDGET MANAGEMENT MODEL GRANTS.

One or more local units of governments, an association of local governments, the entropolitan council, a local unit of government acting in conjunction with an organization or a state agency, or an organization established by two or more local units of government under a joint powers agreement may apply to the board of government innovation and management for a grant to be used to develop models for innovative service budget management. A copy of the application must be provided by the units to the exclusive representatives certified under section 179A, 12 to represent employees who provide the service or program affected by the application.

Proposed models may provide options to local governments, neighborhood or community organizations, or individuals for managing budgets for service delivery. A copy of the work product for which the grant was provided must be furnished to the board upon completion, and the board may disseminate it to other local units of government or interested groups. If the board finds that the model was not completed or implemented according to the terms of the grant agreement, it may require the grantes to repay all or a portion of the grant. The board shall award grants on the basis of each qualified applicant's score under the scoring system in section 465.802. The amount of a grant under this section may not exceed \$50,000.

History: 1993 c 375 art 15 s 4; 1994 c 587 art 8 s 8

465.799 COOPERATION PLANNING GRANTS.

Two or more local government units; an association of local governments; a local unit of government acting in conjunction with the metropolitan council, an organization, or a state agency; or an organization formed by two or more local units of government under a joint powers agreement may apply to the board of government innovation and cooperation for a grant to be used to develop a plan for intergovernmental cooperation in providing services. A copy of the application must be submitted by the applicants to the exclusive representatives certified under section 179A.12 to represent employees who provide the service or program affected by the application.

The plan may include model contracts or agreements to be used to implement the plan. A copy of the work product for which the grant was provided must be furnished to the board upon completion, and the board may dimensione it to other local units of government or interested groups. If the board finds that the grantee has failed to implement the plan according to the terms of the agreement, it may require the grantee to repay all or a portion of the grant. The board shall award grants on the basis of each qualified applicant's more under the scoring system in section 465,802. The amount of a grant under this section may not exceed \$50,000.

History; 1993 c 375 art 15 s 5; 1994 c 587 art 8 s 9

ARTICLE 16

BOARD OF INNOVATION

Section 1. [465.7971] WAIVERS OF STATE RULES; POLICIES.

Subdivision 1. APPLICATION. A state secret may apply to the board for a waiver from; (1) an administrative rule or policy adouted by the department of employer relations that deals with the state personnel system; (2) an administrative rule or policy of the department of administration that deals with the state mocurement system; or (3) a policy of the department of finance that deals with the state accounting system. Two or more state associate may submit a joint application. A waiver application spate identify the rule or policy at invest and many describe the improved outcome sought through the waiver.

Subd. 2. REVIEW PROCESS. (a) The board shall review all applications submitted under this section. The board shall dismiss an application if it finds that the application proposes a wriver that would result in due process violations, violations of federal law or the state or federal constitution, or the loss of services to people who are entitled to them. If a proposed waiver would violate the terms of a collective bargaining agreement effective under chapter 179A, the wriver is not effective without the consent of the exchusive representative that is a party to the arrestment. The board may approve a waiver only if the board determines that if the waiver is granted: (1) services can be provided in a more efficient or effective manner, and (2) services related to human resources must be provided in a manner consistent with the policies expressed in article 13, sectice 2, and in section 43A.01 and services related to procurement must be provided in a manager consistent with the policies expressed in article 13, section 4. In the case of a waiver from a policy of the department of inance, the board may approve the waive only if it determines that services will be provided in a more efficient or effective manner and that state funds will be adequately accounted for and safemarded in a manner that complies with generally accented sovernyment accounting principles.

(b) Within 15 days of receipt of the application, the board shall good a copy of the application to: (1) the approxy whose rule or policy is involved; and (2) all cacturive representatives who represent employees of the second requestion the waiver. The second whose rule or policy is involved may mail a copy of the application to all persons who have represented with the second under section 14.14, subdivision is.

(c) The second whose rule or policy is involved or an exclusive representative shall notify the board of its accession with or objection to and arounds for objection to the univer within 60 days of the date when the application was transmitted to the second or the exclusive representative. An assocr's or each sive representative's failure to do so is considered agreement to the waiver.

(d) If the sectory of the exclusive representative objects to the valver, the board shall schedule a meeting at which the ascroy requesting the waiver may

New language is indicated by paderline, deletions by etrihenet.

present its case for the weiver and the objecting party may respond. The board shall decide whether to utant a weiver at its next reminarly scheduled meeting following its receipt of an asserv's resconse, or the cod of the 60-day response period, whichever occurs frux. If consideration of an application is not concluded at the meeting, the matter may be carried over to the next meeting of the board. Interested persons may submit written comments to the board on the waiver request.

(c) if the board grants a request for a waiver, the board and the assaur requesting the waiver shall cater into an ascence relating to the outcomes desired as a result of the waiver and the means of measurement to determine whether those outcomes have been achieved with the waiver. The assessment must specify the duration of the waiver, which must be for at least two years and not more than four years. If the board determines that an ascency to which a waiver is aranted is failing to comply with the terms of the assessment, the board may reached the assessment.

Subd. 3. DOARD. For purposes of evaluating waiver respects involving rules or policies of the department of administration, the thief administrative law judge shall appoint a third administrative law judge to replace the comminsioner of administration on the board.

Sec. 2. EFFECTIVE DATE

Section 1 is effective the day following final ensement.

ARTICLE 17

LOCAL GOVEENMENT

Section 1. Minnesota Statutes 1994, section 256B.056, is amended by adding a subdivision to read;

Subil 4a ASSET VERIFICATION. For purposes of verification, the value of a life estate shall be considered not saleable unless the owner of the remainder interest intends to purchase the life estate and the owner of the remainder sell the entire property.

Sec. 2. Minnenota Statums 1994, section 256B.056, is amended by adding a subdivision to read:

Subci. 4b. INCOME VERIFICATION. The local seency shall not require a monthly income verification form for a recipient who is a resident of a long-term care facility and who has monthly exact income of \$80 or less.

Soc. 3. Minnesota Statutes 1994, eaction 256B.056, is amended by adding a subdivision to read;

New language is indicated by underline, deletions by estimate.

Appendix I

Nondelegation Doctrine Memorandum

GOVERNOR'S ADMINISTRATIVE PROCEDURE ACT REVIEW COMMISSION



MEMORANDUM

Governor Lawton Chiles

Robert M. Rhodes, Chairman

Senator Locke Burt	TO:	Commission Members
Senator Rick Dantzler	FROM:	Donna E. Blanton \mathfrak{PEP}
Representative Bud Bronson	DATE:	December 1, 1995
Representative Ken Pruitt	SUBJECT:	Florida's Nondelegation Doctrine and Agency Exceptions
Representative Dean Saunders		
Linda Loomis Shelley	During our discussion of flexibility issues at the November 16 Commission meeting, several Commissioners questioned whether a general waiver or variance provision could be constitutionally included in Florida's Administrative Procedure	
Martha J. Edenfield	Act. The concerns related to the separation of powers requirement in article II,	
Clay Henderson	section 3 of the Florida Constitution, and the "nondelegation doctrine" that state courts have developed when construing that provision.	
Wade L. Hopping	After researching the cases interpreting article II, section 3, I believe it is	
Eleanor Hunter	•	draft a general exceptions provision in the Florida APA that would

satisfy constitutional requirements, if that is the intent of the Commission. This memo first discusses the constitutional provision and related case law, and then lists elements that should be included in any general exceptions provision.

Article II, Section 3, Florida Constitution

Alan C. Starling

Jon Mills

Jon C. Moyle, Jr.

This provision-states:

The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

Florida courts have explained that this section encompasses two fundamental prohibitions.¹ First, no branch of government may encroach upon the powers of another. Second, no branch may delegate to another branch its constitutionally assigned powers. This second prohibition frequently is referred to as the

MEMO - Commission Members December 1, 1995 Page 2

> "nondelegation doctrine." It can be implicated when the Legislature allows another branch of government (such as an executive branch agency) to establish policy without sufficient guidelines from the Legislature.²

> Florida courts have taken a much stricter view of the nondelegation doctrine than have federal courts.³ With the case of <u>Askew v. Cross Key Waterways</u>,⁴ the Florida Supreme Court resurrected Florida's longstanding nondelegation doctrine and applied it in the context of the new APA. The court stated that "the Legislature is not free to redelegate to an administrative body so much of its lawmaking power as it may deem expedient."⁵ The court made clear, however, that the doctrine does not prohibit administrative agencies from "fleshing out" legislative policy, and even noted that "[f]lexibility by an administrative agency to administer a legislatively articulated policy is essential to meet the complexities of our modern society⁶ What the Legislature may not do is repose in an administrative body "the power to establish fundamental policy."⁷

> Despite the stated strict adherence to the nondelegation doctrine following <u>Cross Key Waterways</u>, a close reading of the cases indicates that courts allow agencies considerable flexibility in interpreting the general policies stated by the Legislature.⁸ As the First District Court of Appeal recently explained:

The legislature may perform its function by laying down policies and establishing standards while leaving to agencies the making of subordinate rules within prescribed limits and the determination of facts to which the policy, as declared by the legislature, is to apply. The fact that some authority, discretion or judgment is necessarily required to be exercised in carrying out a purely administrative or ministerial duty imposed by a statute, does not invalidate the statute. Although the legislature is obliged by the nondelegation doctrine to establish adequate standards and guidelines, the drafting of detailed or specific legislation may not always be practical or desirable.⁹

Courts have adopted a pragmatic approach, carving exceptions to the nondelegation doctrine in cases involving licensing and determinations of fitness of license applications; the regulation of a business operated as a privilege rather than a right when such business is potentially dangerous to the public; and in cases
MEMO - Commission Members December 1, 1995 Page 3

where the subject matter is highly complex, and expertise and flexibility are needed to deal with its complexity and fluid conditions.¹⁰

Nonetheless, the Florida Supreme Court reiterated the importance of the doctrine in <u>Chiles v. Children A. B. C. D. E. and F</u>,¹¹ striking down a statute that assigned to the executive branch the broad discretionary authority to reapportion the state budget. The court stated that any attempt by the Legislature to delegate to another branch of government the power to enact laws or to declare what the law shall be is void.¹² However, the court acknowledged that if the Legislature establishes fundamental policy, other branches of government may constitutionally carry out that policy. "The legislature can delegate functions so long as there are sufficient guidelines to assure that the legislative intent is clearly established . . .," the court reasoned.¹³

The supreme court stated in a case last year that it is "impossible to adopt a single bright-line test to apply to all alleged violations of the nondelegation doctrine."¹⁴ The court acknowledged that in some instances the delegation of discretion is warranted and that flexibility is important to the effective operation of administrative agencies.¹⁵

The clearest conclusion that can be reached from the nondelegation doctrine as it applies to the issue in this memo is that administrative agencies cannot be granted general authority to waive <u>statutory</u> provisions. That likely would be construed as delegating the authority to make law and policy.¹⁶

A general provision granting administrative agencies authority to waive or vary their own rules, however, probably can be drafted in a constitutional fashion. As noted in the cases previously discussed, a certain amount of discretion is granted to agencies along with the authority to make rules. The Legislature probably also can grant agencies the discretion to make exceptions to those rules.

Thus, so long as the Legislature does not give administrative agencies the authority to establish policy and provides adequate standards to agencies in the exercise of their discretion, the nondelegation doctrine does not prohibit the enactment of a general exceptions provision in the APA.

Recommended Elements of Any General Exceptions Provision

If the Commission decides to propose a general exceptions statute within the APA, several elements should be included to increase the likelihood that the statute will pass constitutional scrutiny. The recommendations below are drawn from Florida case law, various commentaries on exceptions and waiver provisions, and proposals in other states.¹⁷

* Language making clear that it is the policy of the <u>Legislature</u> (not the agency) that exceptions to rules are appropriate in certain circumstances;

* Reasonably detailed guidelines and standards stating when the Legislature believes it is appropriate to grant exceptions (i.e., when hardship can be demonstrated; when fairness requires an exception; or when policy reasons justify an exception);

* A statement that agencies under no circumstances have authority to grant exceptions to statutory requirements;

* A requirement that the decision to grant or deny an exception be explained in writing and that the specific statutory standards concerning exceptions be addressed;

* The standard under which the agency's explanation would be reviewed (i.e., competent substantial evidence);

* A statement that the procedural requirements of chapter 120 (such as for notice and hearing) will apply to requests for exceptions.

Ouestions for Discussion

- 1. Does the Commission want to recommend the enactment of a general exceptions provision (with standards to guide agencies) in the Administrative Procedure Act?
- 2. Must a request for an exception be made by someone affected by a particular rule, or may an agency initiate an exception itself?

- 3. If the Commission recommends enactment of a general exceptions provision, should the general law exceptions provision apply to all agencies? Or should agencies be allowed to opt out? Should there be uniform standards and guidelines for all agencies, or should agencies be directed to adopt their own rules for consideration of such requests?
- 4. Should any general exceptions provision include a requirement that agencies report annually to the Governor and the Legislature concerning the number of requests for exceptions and the action taken on those requests?
- 5. Instead of a general exceptions provision, the Florida Legislature could continue to authorize exceptions to statutes and rules within specific statutory schemes, such as those in chapter 403.¹⁸ Does this approach allow adequate flexibility?
- 1. See, e.g., Chiles v. Children A. B. C. D. E. and F. 589 So. 2d 260 (Fla. 1991).
- 2. <u>B.H. v. State</u>, 645 So. 2d 987 (Fla. 1994).
- 3. <u>Id.</u> at 992 ("In sum, Florida has expressly and repeatedly rejected whatever federal doctrine can be said to exist regarding nondelegation.").
- 4. 372 So. 2d 913 (1978).
- 5. <u>Id</u>. at 924.
- 6. <u>Id</u>.
- 7. <u>Id</u>.
- For discussions of the courts' treatment of the doctrine, see John E. Fennelly, <u>Non-Delegation Doctrine and the Florida Supreme Court:</u> What You See Is Not What You Get, 7 St. Thomas L. Rev. 247 (1995); Johnny C. Burris, <u>The 1988 Survey of Florida Law, Administrative Law</u>, 13 Nova L. Rev. 727 (1989).

- 9. <u>Ameraquatic, Inc. v. Department of Natural Resources</u>, 651 So. 2d 114, 117 (Fla. 1st DCA 1995) (emphasis supplied).
- 10. <u>A.A. v. State</u>, 605 So. 2d 106, 107 n.2 (Fla. 1st DCA 1992) (Ervin, J., specially concurring) (citing cases).
- 11. 589 So. 2d 260 (Fla. 1991).
- 12. <u>Id</u>. at 264.
- 13. <u>Id</u>. at 268.
- 14. <u>B.H.</u>, 645 So. 2d at 993.
- 15. <u>Id</u>.
- 16. For additional discussion of this point, see F. Scott Boyd, <u>How the Exception Makes the Rule: Agency Waiver of Statutes, Rules, and Precedent in Florida</u>, 7 St. Thomas L. Rev. 287 (1995). Although granting agencies general authority to waive or vary statutory provisions is problematic, the Legislature can adopt statutes granting agencies specific authority to waive specific statutory provisions, so long as standards and guidelines are provided. For a discussion of existing specific exceptions statutes in Florida law, see the "Flexibility Issues" memorandum distributed to the Commission in the November 16 meeting agenda packet.
- 17. Sources other than Florida case law are discussed extensively in the "Flexibility Issues" memo.
- 18. See discussion of these statutory schemes in the "Flexibility Issues" memo.

Appendix J

Final Draft of Proposed Variance and Waiver Statute

Governor Lawton Chiles

Robert M. Rhodes, Chairman

Senator Locke Burt

Senator Rick Dantzler

Representative Bud Bronson

Representative Ken Pruitt

Representative Dean Saunders

Linda Loomis Shellev

Martha J. Edenfield

Clay Henderson

Wade L. Hopping

Eleanor Hunter

ion Mills

Jon C. Moyle, Jr.

Alan C. Starling

GOVERNOR'S ADMINISTRATIVE PROCEDURE ACT REVIEW COMMISSION

PROPOSED SECTION AUTHORIZING VARIANCES AND WAIVERS FINAL DRAFT

Section 120.52, relating to Definitions, is amended as follows:

(17) "Variance" means a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. Any variance shall conform to standards for variances outlined in this chapter and in the model rules, adopted pursuant to the requirements of section 120.54(10).

(18) "Waiver" means a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Any waiver shall conform to standards for waivers outlined in this chapter and in the model rules, adopted pursuant to the requirements of section 120.54(10).

A new section in chapter 120 is created to read:

Variances and Waivers.

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. This section does not authorize agencies to grant variances or waivers to statutes. This section does not supersede, and is in addition to, variance and waiver provisions in substantive statutes.

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute can be or has been achieved by other means and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. (3) The Governor and Cabinet, sitting as the Administration

<u>Commission, shall adopt model rules of procedure pursuant to the requirements</u> of section 120.54(10) establishing procedures for granting or denying petitions for variances and waivers.

(4) Agencies shall advise persons of the remedies available through this section and shall provide copies of this section and the model rules on variances and waivers to persons who inquire about the possibility of relief from rule requirements.

(5) A person who is subject to regulation by an agency rule may file a petition with that agency requesting a variance or waiver from the agency's rule. In addition to any requirements mandated by the model rules, each petition shall specify:

(a) the rule from which a variance or waiver is requested;

(b) the type of action requested;

(c) the specific facts that would justify a waiver or variance for the petitioner; and

(d) the reason why the variance or the waiver requested would serve the purposes of the underlying statute.

(6) Within 15 days after receipt of a petition for variance or waiver, an agency shall provide notice of the petition to the Department of State, which shall publish notice of the petition in the first available issue of the Florida Administrative Weekly. The model rules shall provide a means for interested persons to provide comments on the petition.

(7) An agency shall grant or deny a petition for variance or waiver within 90 days of its receipt. If such petition is not granted or denied within 90 days of receipt, the petition shall be deemed approved. An order granting or denying the petition shall be in writing and shall contain a statement of the relevant facts and reasons supporting the agency's action. The agency's decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to section 120.57. Any section 120.57 proceeding in regard to a variance or waiver shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by this chapter.

(8) Each agency shall maintain a record of the type and disposition of each petition filed pursuant to this section. On October 1 of each year, each agency shall file a report with the Governor and the Legislature listing the number of petitions filed requesting variances to each agency rule, the number of petitions filed requesting waivers to each agency rule, and the disposition of all petitions.

Appendix K

Accountability Issues Memorandum

GOVERNOR'S ADMINISTRATIVE PROCEDURE ACT REVIEW COMMISSION



ACCOUNTABILITY ISSUES

Governor Lawton Chiles

Robert M. Rhodes, Chairman

Senator Locke Burt

Senator Rick Dantzler

Representative Bud Bronson

Representative Ken Pruitt

Representative Dean Saunders

Linda Loomis Shelley

Martha I. Edenfield

Clay Henderson

Wade L. Hopping

Eleanor Hunter

Ion Mills

jon C. Moyle, Jr.

Alan C. Starling

Listed below are a number of issues that relate to concerns about agency "accountability." These issues include proposals from a variety of sources, including recent legislation enacted by the Florida Legislature but vetoed by the Governor¹ ("the Act"); recommendations from commentators and other groups; and approaches in other states and the federal government. This list originally was much longer; we have attempted to eliminate proposals that are primarily technical and focus instead on major policy issues. This list is only a summary and is not intended as an analysis of any of these issues; rather, the purpose is to help Commissioners identify areas for further consideration at our January meeting.

SECTION 120.535

Adopted by the Legislature in 1991, this section states that agency rulemaking is not a matter of discretion. Each agency statement not defined as a rule must be adopted by the rulemaking process as soon as feasible and practicable, subject to identified statutory exceptions. The Act repealed this section, but replaced it with section 120.547, which continued the requirement that statements must be adopted as rules unless certain statutory exceptions apply. The Governor has suggested an alternative involving the suspension of section 120.535 for three years.²

REGULATORY COSTS

Under the Act, the current statutory language concerning preparation of an economic impact statement would be repealed. Agencies would be required to prepare a statement of estimated regulatory costs of a proposed rule, except in the case of a procedural rule, or a rule adopted pursuant to a federal program where such rule is identical to or no more restrictive than the federal law or regulation being adopted or implemented by the agency.

This statement would have to include:

1) a good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a

general description of what types of individuals the rule is likely to affect;

- 2) a good faith estimate of the cost to the agency of implementing and enforcing the proposed rule and any anticipated effect on state or local revenues;
- 3) a good faith estimate of the transactional costs likely to be incurred by individuals and entities required to comply with the rule;
- 4) an analysis of the impact on small business;
- 5) any additional information that the agency determines may be useful in informing the public of the costs or benefits of complying with the proposed rule; and
- 6) a good faith description of any reasonable alternative methods.

According to the Act, agencies adopting rules must, among alternative approaches to any regulatory objective and, to the extent allowed by law, choose the alternative that imposes the lowest net cost on the regulated person, county, or municipality, or provide a statement of the reasons for rejecting the alternative in favor of the proposed rule. Additionally, if an affected person provides a written proposal for a lower cost regulatory alternative to a proposed rule, which substantially accomplishes the statutory objectives, then the agency could be made to either adopt the alternative approach or provide a written explanation of its reasons for rejecting the alternative.

The Governor has articulated an alternative to the Act's proposals.³

The Water Management District Review Commission has proposed an amendment to section 373.113, Florida Statutes, which governs rulemaking by district governing boards, to state that substantive rules adopted must

represent the least cost alternative while accomplishing the goals of the statute being implemented.

* JAPC REVIEW OR OTHER FORM OF LEGISLATIVE REVIEW

Under the Act, the Joint Administrative Procedures Committee would maintain a continuous review of the administrative rulemaking process. Such review would include a review of agency procedure and of complaints based on such agency procedure. The committee would establish measurement criteria to evaluate whether agencies are complying with the delegation of legislative authority in adopting and implementing rules. The committee would also continuously review statutes that authorize agencies to adopt rules and make recommendations as to the advisability of considering changes to the delegated legislative authority to adopt rules in specific circumstances.

The Act states that if the committee objects to a proposed or existing rule, or portion thereof, and the agency fails to initiate administrative action to modify, amend, withdraw, or repeal the rule consistent with the objection, or thereafter fails to proceed in good faith to complete such action, the committee could submit to the President of the Senate and the Speaker of the House a recommendation that legislation be introduced to modify or suspend the adoption of the proposed rule, or amend, or repeal the rule, or portion thereof.

The idea of legislative suspension and veto of agency rules in Florida has been discussed.⁴

In Wisconsin, the Legislature has established a detailed review process for proposed agency rules as well as for the policies contained in existing administrative rules.

* All drafts of agency rules must be submitted to a legislative rules clearinghouse for review. The clearinghouse prepares a report on the proposed rule, and the agency must hold a public hearing in most instances.

- * All proposed administrative rules are referred by the presiding officer of each house to a substantive legislative committee. An agency may not promulgate a proposed rule until the completion of the committee review period unless both House and Senate committees waive their jurisdiction.
- * Committees may object to a proposed rule only for any one of six specific reasons.
- * Once a substantive committee makes an objection, the proposed rule is referred to a joint legislative committee. If this committee also objects to a rule, it must introduce within 30 days a bill in each house of the Legislature to prevent the promulgation of the rule.
- * If the bills are not enacted, the agency may promulgate the proposed rule. If either bill is enacted, the agency may not promulgate the proposed rule that was objected to unless a subsequent law specifically authorizes its promulgation.

Statutes also give the joint legislative committee authority to suspend rules that have been promulgated and are being enforced if the committee has first received testimony on the suspension at a public hearing, and if the suspension is based on one or more of six specific statutory reasons.

- * If the committee suspends a rule, it must introduce, within 30 days, a bill in each House of the Legislature to repeal the suspended rules.
- * If both bills are defeated or fail to be enacted in any other manner, the rule remains in effect and the committee may not suspend it again.
- * If either bill is enacted, the rule is repealed and may not be promulgated again by the agency unless a subsequent law specifically authorizes such action. See Wisconsin Legislative

Council Staff Information Bulletin 95-2, <u>Legislative Review of</u> <u>State Agency Administrative Rules</u>, January 1995.⁵

Congress has initiated "Corrections Days." Speaker Newt Gingrich came up with the idea that twice a month the House would consider federal regulations considered to be unnecessary and would pass House resolutions condemning them. Opponents of this plan contend that this plan is "set up perfectly for one-sided stories" and that with only one day to consider and vote on so many "corrections," deliberation and debate will likely suffer. Corrections Day may thus become a bonanza for special interests. Proponents of Corrections Day contend that the House rules for the corrections bills will prevent the casual overturning of rules as a means to cater to special interest pressures of the day. Additionally, they note that "corrections" must be concurred in by the Senate and the president to become law.⁶

* PRESUMPTIONS

Under the Act, when any substantially affected person seeks determination of the invalidity of a proposed rule as an invalid exercise of delegated legislative authority, the rule would not be presumed to be valid or invalid. Challenges must state with particularity the objections to the proposed rule and the reasons that the rule is invalid. The agency then would have the burden to prove the validity of the rule as to the objections raised. The Governor has proposed an alternative to this language.⁷

The Water Management District Review Commission has proposed that the Legislature modify the standard applied in rule challenge hearings to remove the presumption of validity that currently exists in favor of the agency. In determining the validity of administrative rules, a hearing officer should consider the agency's interpretation of the statute and the challenger's interpretation of the statute on a "level playing field." This recommendation was passed by the Commission on October 20, 1995.

COSTS AND ATTORNEY FEES

In rule challenges, the Act provides for costs and reasonable attorney's fees if an agency fails to prove the validity of provisions of its rule that were specifically objected to by a challenger. The agency can avoid the award of attorney fees and costs if it demonstrates that its actions were substantially justified or special circumstances exist that would make the award unjust.

The Act states that upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court could award reasonable attorney's fees and costs to a prevailing party for the administrative proceeding and the appellate proceeding.

The Act also creates a requirement in proposed section 120.547 that entitles a person to reasonable costs and attorney's fees if, subsequent to a hearing officer's determination that an agency policy or statement is sufficiently developed, an agency relies upon the policy or statement as the basis for agency action.⁸

The Governor has proposed alternatives to the language in the Act.⁹

* <u>OTHER AGENCY STATEMENTS</u>

Under the Act, agencies would be prohibited from including as a condition of approval of any license or permit any action that is based on a statement, policy, or guideline of another agency unless the permitting agency has expressly adopted the statement, policy, or guideline as a rule or unless such action is expressly authorized or required by general law.

An alternative proposal would authorize the licensing or permitting agency to include a suggesting comment from another agency as a condition if the agency making the suggestion adopted the condition as a rule.

The Governor has proposed alternative language on this issue.¹⁰

LIMITS ON RULEMAKING AUTHORITY

The Act states that a general grant of rulemaking authority is not sufficient to allow an agency to adopt a rule. Agencies must implement a specific law when adopting a rule. Agencies also would lack the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency would be construed to extend no further than the particular powers and duties conferred by the same statute.

1. CS/CS/SB 536.

- 2. See the chart prepared by Dan Stengle and distributed to Commissioners in the agenda packet for the November 16 meeting for further discussion of the Governor's alternative. A copy of the chart is attached to this memorandum.
- 3. For a comparison of current law, proposed 1995 legislation, and the Governor's alternative proposal on this issue, see the attached chart.
- 4. The pros and cons of these proposals, as well as important constitutional considerations, are discussed in Dan R. Stengle & James Parker Rhea, Putting the Genie Back in the Bottle: The Legislative Struggle to Contain Rulemaking by Executive Agencies, 21 Fla. St. U. L. Rev. 415 (1993).
- 5. A copy of this document is attached.
- 6. <u>See, e.g.</u>, <u>Points of View</u>, Legal Times, April 3, 1995; <u>Editorial &</u> <u>Comment</u>, The Columbus Dispatch, July 30, 1995.
- 7. See the chart attached to this memorandum for the Governor's views on presumption of validity.

- 8. Proposed section 120.547 was intended to be a replacement for existing section 120.535.
- 9. See the chart attached to this memorandum for the Governor's views on attorney fees issues.
- 10. See the attached chart.



LEGISLATIVE REVIEW OF STATE AGENCY ADMINISTRATIVE RULES

INFORMATION BULLETIN 95-2*

INTRODUCTION

An "administrative rule" is a regulation, standard, policy statement or order of general application promulgated by a state agency. An administrative rule has the force of law. Rules are issued by an agency (1) to make specific, implement or interpret provisions of statutes that are enforced or administered by the agency or (2) to establish procedures for the agency to follow in administering its programs. Rules are published in the Wisconsin Administrative Code.

The purpose of this Information Bulletin is to set forth the procedure by which the Legislature (1) reviews proposed administrative rules during the process of their promulgation and (2) reviews the policies contained in existing administrative rules.

The legislative rules review procedure is contained in ch. 227, Stats. This review procedure affords Legislators the opportunity to affect the content of policies, having the force of law, that regulate the lives of Wisconsin citizens. These procedures are summarized in Chart 1 and Chart 2 attached to this Bulletin.

Any questions regarding the rules review process may be directed to Ronald Sklansky, Senior Staff Attorney (266-1946), or Richard Sweet, Senior Staff Attorney (266-2982), Legislative ≥

Council Administrative Rules Clearinghouse. I. A RULE BEGINS WITH AN AGENCY When an agency decides to promulgate an administrative rule (that is, to either create a new rule or modify an existing rule), it must first draft the proposed rule. The Administrative Rules *This Information Bulletin was prepared by Ronald Sklansky, Senior Staff Attorney.

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DATE

a. Conclusions and recommendations of the agency that demonstrate the need for the proposed rule.

b. Explanations of modifications made in the proposed rule as a result of testimony received at public hearings.

c. A list of persons who appeared or registered for or against the proposed rule at any public hearing held by the agency.

d. A response to Legislative Council Staff recommendations, contained in the Rules Clearinghouse report, indicating acceptance of the recommendations in whole, acceptance of the recommendations in part, rejection of the recommendations and specific reasons for not accepting recommendations.

e. A final regulatory flexibility analysis, if the proposed rule will have an effect on small businesses.

The other parts of the report include a plain language analysis of the proposed rule, copies of or references to related forms and a fiscal estimate of the cost of the rule.

4. REFERRAL OF RULE BY PRESIDING OFFICER

Within seven working days, following receipt of a proposed administrative rule, the presiding officer of each House refers the rule to one committee. The committee to which a rule is referred may be either a standing committee or a joint legislative committee created by law, other than the Joint Committee for Review of Administrative Rules (JCRAR).

5. COMMITTEE REVIEW PERIOD

Generally, the committee review period extends for 30 days after referral of a proposed rule by the presiding officer. However, a committee review period may be extended. Specifically, the review period may be extended for 30 days from the date of either of the following actions, if taken by the chairperson, within the initial 30-day period:

a. The chairperson requests in writing that the agency meet with the committee to review the proposed rule; or

b. The chairperson publishes or posts a notice that the committee will hold a meeting or hearing to review the proposed rule and immediately sends a copy of the notice to the agency.

7. RESPONSIBILITIES OF THE JOINT COMMITTEE FOR REVIEW OF ADMINISTRATIVE RULES (JCRAR)

If either reviewing committee objects to a proposed rule, the rule must be referred to the JCRAR. The JCRAR must take executive action on the rule and may:

a. Nonconcur in a committee objection;

b. Object to the rule (that is, concur with the reviewing committee); or

c. Seek rule modifications.

The review period for the JCRAR is 30 days. The review period may be extended for an additional 30 days (or more, if modifications are agreed to) in the same manner as by the initial reviewing committee.

If the JCRAR objects to a rule, it must introduce, within 30 days, a bill in each House of the Legislature to prevent the promulgation of the rule. If both bills are defeated, or fail to be enacted in any other manner, the agency may promulgate the proposed rule that received an objection. If either bill is enacted, the agency may not promulgate the proposed rule that was objected to unless a subsequent law specifically authorizes its promulgation.

<u>8. LEGISLATIVE REVIEW AFTER PROMULGATION OF A RULE</u>

The statutes give the JCRAR authority to suspend rules that have been promulgated and are being enforced:

a. If the JCRAR has first received testimony on the suspension at a public hearing; and

b. If the suspension is based on one or more of the reasons set forth in item 6, above, for a committee objecting to a proposed rule. If the JCRAR suspends a rule, it must introduce, within 30 days, a bill in each House of the Legislature to repeal the suspended rule. If both bills are defeated or fail to be enacted in any other manner, the rule remains in effect and the JCRAR may not suspend it again. If either bill is enacted, the rule is repealed and may not be promulgated again by the agency, unless a subsequent law specifically authorizes such action.

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Attachments

CHART 1

REVIEW OF PROPOSED ADMINISTRATIVE RULES IN WISCONSIN



CHART 2

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REVIEW OF EXISTING ADMINISTRATIVE RULES IN WISCONSIN



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Appendix L

Section 120.535 Memorandum

GOVERNOR'S ADMINISTRATIVE PROCEDURE ACT REVIEW COMMISSION



Governor Lawton Chiles

Robert M. Rhodes, Chairman

Senator Locke Burt

Senator Rick Dantzler

Representative Ken Pruitt

Representative Dean Saunders

Linda Loomis Shelley

Martha J. Edenfield

Clay Henderson

Wade L. Hopping

Eleanor Hunter

Jon Mills

Jon C. Movle, Jr.

Alan C. Starling

Background and Current Law

When the Legislature adopted section 120.535 in 1991, it was acting to reverse a trend in the case law that had resulted in making agency rulemaking the Representative Bud Bronson exception rather than the general rule.¹ The following language was included in the staff analysis of the measure:

SECTION 120.535, FLORIDA STATUTES

This bill is intended to limit the discretion currently exercised by administrative agencies when selecting the means for implementation of delegated legislative authority. The bill provides a statutory standard for determining when an agency is required to implement delegated authority by rulemaking.²

That statutory standard begins with these unambiguous words: "Rulemaking is not a matter of agency discretion."³ According to the statute, all agency statements that are "rules" as defined in section 120.52(16), Florida Statutes, must be adopted by the statutory rulemaking procedure "as soon as feasible and practicable." This concept was borrowed from the 1981 Model State Administrative Procedure Act. although the specific feasibility and practicability criteria are unique to Florida.⁴ Under section 120.535, rulemaking is presumed feasible and practicable unless the agency proves that certain defined conditions exist.⁵

Commentators generally hailed the adoption of section 120.535 as a necessary correction to judicial interpretations that gave agencies great leeway in deciding when their policies must be adopted as rules.⁶ Consider the comments of former Florida State University Law Professor Pat Dore in the last article she wrote before her death in January of 1992:-

Section 120.535 should go a long way toward reversing undue agency reliance on case-by-case adjudication to announce policy. What started out as a justifiable exception to rulemaking for "incipient" policy . . . has become, over the years, a license for agencies to avoid rulemaking by exercising their unbridled discretion to do so. Section 120.535 is important because it tells the agencies and the courts quite directly that whether and when agencies use the rulemaking process is not a matter of agency discretion.⁷

The points emphasized by the commentators concerning section 120.535 seem to be the same as those made to this Commission at its first meeting by several speakers. Supporters of section 120.535 frequently emphasize that it was adopted to restore Florida administrative practice to what lawmakers originally intended in 1974 when the APA was adopted. As former Senator Curt Kiser, Mary Smallwood, and Commissioner Wade Hopping stated on October 12, 1995, the APA was adopted in large measure to combat "phantom government," the idea that agency policies were neither generally known nor consistently applied. Predictability in government decision-making was a key goal of the original APA and one that supporters of section 120.535 say that the statute is designed to accomplish.

Other Problems and Proposed Changes

Even as the commentators praised the adoption of section 120.535, however, they noted that the burgeoning number of agency rules perhaps evidenced other problems. Writing just one year after Professor Dore published her article, Professor Stephen Maher stated:

The 1991 amendments may have already succeeded in forcing agencies into greater use of the rulemaking process, solving what many commentators identified as a significant failing in the administrative process. However, just as this legislative solution has begun to work, some are beginning to argue that the large number of agency rules being adopted is proof that agencies are out of control and more legislative control of the rulemaking process is needed. Before further changes are made, we should decide whether more agency rules are a sign of a success or failure, of a solution that is working, or a problem that is brewing.⁸

Kiser offered this Commission a response to that question at the October 12 meeting. He emphasized that rules in and of themselves are not the problem; rather, problems surround the overly rigid rules adopted by some agencies. Kiser suggested that the Legislature could exercise more oversight and control of the rulemaking process by including within legislative committee staff analyses of bills a provision stating whether or not rulemaking would be required.

Governor Lawton Chiles has criticized agency rules in general and section 120.535 in particular. In Executive Order 95-256, which created this Commission, the Governor expressed his view that required rulemaking results in "a proliferation of overly-precise rules, overwhelming red tape and deprives agency decision-makers of the ability to exercise good judgment and common sense." In his message vetoing CS/CS/SB 536, the Governor stated that adoption of section 120.535 caused the number of rules to nearly double. The Governor wrote:

Our system of government is in danger of veering out of control. It has become dominated by rules and regulations. For all the good thought that goes into the promulgation of a rule, and for whatever laudable purpose it seeks to achieve, a rule cannot think. . . . It is time to reject the rules-dominated system of government created over the last 30 years.⁹

Although the Governor has criticized the "feasible and practicable" requirement in section 120.535, observers at the time the section was adopted viewed this language as providing significant flexibility to agencies. As Professor Dore stated:

This legislation provides standards for judging feasibility and practicability that should give agencies the flexibility they legitimately need. At the same time, people who are most interested in and affected by policy developments should once again be able to participate in policy formulation through the various rulemaking proceedings available under chapter 120.¹⁰

The Governor's Alternative

The Governor argues that the proliferation of rules favors special interests that have the resources to comply with numerous government mandates and that use rules to seek competitive advantage in the marketplace.¹¹ Although the Governor has called for the outright repeal of section 120.535, more recently he has indicated that he would agree to a suspension of the section for three years coupled with a procedure for flexible application of existing rules and a new standard for challenging agency action that is not the result of a promulgated rule.¹²

Proposed Improvements in the Legislative Process

In response to calls for greater legislative control over the rulemaking process, some commentators have stated that the problem is one of the Legislature's own creation. Because the Legislature passes laws with few or no guidelines to agencies, the job of implementing legislative policies is left to regulators who have little choice but to speculate about what must have been intended. Thus, agencies adopt rules based either on what they think the Legislature intended or what they wish the Legislature intended. As David Gluckman has stated, "[M]any of the problems could be corrected if the Legislature would write laws more clearly and specifically."¹³

Perhaps Senator Kiser's proposal concerning legislative staff analyses could be helpful in addressing this problem. In addition to stating whether rulemaking is required to implement a new law, the staff analysis could address the adequacy of the delegation of authority to the agencies that would be required to implement the Legislature's policy and legislative standards.

Section 120.535 unquestionably has prompted additional rulemaking. This is true even though the remedies provided by the section have been criticized as weak.¹⁴ The statute allows an agency to rely on an unpromulgated rule after a section 120.535 proceeding has been initiated, or even won, so long as the agency begins the rulemaking process.¹⁵ Although the section includes an attorney fee provision, an agency can avoid having to pay if it begins the rulemaking process.¹⁶ As Professor Maher has explained:

Who will pay to force an agency into rulemaking if they know that, even if they prevail, the agency will be able to use nonrule policy against them in section 120.57 proceedings pursuant to section 120.57(1)(b)15.? Those with the greatest interest in using section 120.535 will be those who have some future stake in the policy or those who can find some way to prevent the agency from applying unpromulgated statements of agency policy against them in section 120.57 proceedings.¹⁷

Perhaps because of the section's weak remedy, there has been relatively little section 120.535 litigation. Just four reported cases citing the section were found during a recent Westlaw database search. The most significant of those is

Christo v. State Department of Banking and Finance, 649 So. 2d 318 (Fla. 1st DCA 1995), which holds that section 120.56 no longer provides litigants with a remedy for challenging unadopted agency policies.¹⁸ Professor Maher stated in a recent article that the Division of Administrative Hearings heard just 51 section 120.535 cases in 1994, only 12 of which when to final decision.¹⁹ That compares with 7,323 cases at DOAH in 1994 involving disputes between Floridians and state agencies and 304 rule challenges.²⁰ In 1993, DOAH heard 31 section 120.535 cases, but only 13 went to final decision. There were 7,309 disputes between agencies and Floridians at DOAH in 1993, and 244 rule challenges.²¹ Professor Maher offered one explanation for the relatively small amount of section 120.535 litigation: "The fact that rulemaking volume was up dramatically without much administrative litigation under Section 120.535 strongly suggests that many agencies took Section 120.535 to heart and adopted their policies as published rules in voluntary compliance with the section."²²

Trends in Other States

. . .

While debate over section 120.535 continues in Florida, other states are moving toward a preference for rulemaking in their own APAs.²³ In the proposed new Iowa APA, the following language is included:

In addition to other rule-making requirements imposed by law, each agency shall:

(3) as soon as feasible and to the extent practicable, adopt rules, in addition to those otherwise required by this Act, embodying appropriate standards, principles, and procedural safeguards that the agency will apply to the law it administers.²⁴

This language comes from section 2-104(3) of the 1981 Model State Administrative Procedure Act, which includes identical language.²⁵

Professor Bonfield noted the trend toward required rulemaking several years ago when he wrote: "[T]here is a growing movement to impose a legally binding preference for rulemaking as the primary means of state agency lawmaking.... [D]espite certain advantages of lawmaking by ad hoc order, a binding general preference for state agency lawmaking by rule rather than by ad hoc order is both desirable and feasible, so long as that general preference is subject to a rule of

reason."²⁶ The reason for such preference is characterized by Professor Jim Rossi as a choice of sunshine over shadow:²⁷ "Without a provision such as 120.535, agencies face strong incentives to lapse into shadow adjudicative decisionmaking, outside of the more open, public procedures of rulemaking."

- 1. See, e.g., Patricia A. Dore, Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders, 19 Fla. St. U. L. Rev. 437, 437 (1991) ("The limited . . . exception swallowed the rule."); Stephen T. Maher, Administrative Procedure Act Amendments: The 1991 and 1992 Amendments to the Florida Administrative Procedure Act, 20 Fla. St. U. L. Rev. 367, 374 (1992) ("At the point that legislation was proposed on this issue, rulemaking had become the exception rather than the rule.").
- 2. Staff of Fla. H.R. Comm. on Govtl. Ops, HB 1879 (1991) Staff Analysis 4 (final May 22, 1991).
- 3. § 120.535(1), Fla. Stat. (1993).
- 4. Dore, supra note 1, at 445.
- 5. § 120.535(1), Fla. Stat. The presumption of feasibility is rebutted if an agency proves the existence of one of three conditions:
 - 1. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or
 - 2. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or
 - 3. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

The presumption of practicability is rebutted if an agency proves that:

- 1. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or
- 2. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.
- 6. <u>E.g.</u>, <u>McDonald v. Department of Banking and Finance</u>, 346 So. 2d 569 (Fla. 1st DCA 1977). <u>McDonald</u> started a trend that continued in the courts for years. Basically, the courts recognized an exception to the adoption of policy by rule where the policy was "incipient," or not fully developed. Because the policy was still evolving, it was not yet considered to be of "general applicability" as required in the definition of "rule" in section 120.52(16).
- 7. Dore, <u>supra</u> note 1, at 448.
- 8. Maher, supra note 1, at 438 (emphasis supplied).
- 9. Message from Governor Lawton Chiles to Secretary of State Sandra Mortham, July 12, 1995, at 2 (vetoing CS/CS/SB 536).
- 10. Dore, <u>supra</u> note 1, at 454.
- 11. <u>Id</u>. at 4.
- 12. See the chart prepared by Dan Stengle of the Governor's Office comparing existing law with CS/CS/SB 536 and the Governor's alternative. This chart is included with the Commission agenda packet.
- 13. David Gluckman, <u>1994 APA Legislation: The History, The Reasons, The Results</u>, 22 Fla. St. U. L. Rev. 345, 346 (1994).
- 14. See Maher, supra note 1, at 398-99.
- 15. §§ 120.535(5), 120.57(1)(b)15., Fla. Stat..
- 16. § 120.535(6), Fla. Stat. In CS/CS/SB 536 ("the Act"), this general attorney fee requirement was carried over to proposed section 120.547. Under the Act, a person would be entitled to reasonable costs and attorney fees if, subsequent to

a hearing officer's determination that an agency policy or statement is sufficiently developed, an agency relies upon the policy or statement as the basis for agency action.

- 17. Maher, supra note 1, at 399.
- 18. The case makes clear that section 120.535 is the only means for challenging an agency's failure to adopt policies as rules. Before the adoption of section 120.535, section 120.56 was used for this purpose.
- 19. Stephen T. Maher, <u>Why Florida Needs Section 120.535</u>, Florida Statutes, Administrative Law Section Newsletter, at 6 (December 1995).
- 20. <u>Id</u>.
- 21. <u>Id</u>.
- 22. <u>Id</u>. ·
- 23. Letter from Professor Jim Rossi to Robert M. Rhodes, November 8, 1995; see also Arthur Bonfield, State Administrative Policy Formulation and the Choice of Lawmaking Methodology, 42 Admin. L. Rev. 121 (1990).
- 24. § 2-104, Proposed New Iowa Administrative Procedure Act, Iowa State Bar Association, at 9 (October 24, 1995, Tentative Draft).
- 25. Bonfield, supra note 23, at 142-43 (quoting the 1981 MSAPA).
- 26. Bonfield, supra note 23, at 121.
- 27. See Rossi, supra note 23.

Appendix M

Correspondence on Potential Fiscal Impact

Steel Hector & Davis Tallahassee, Floride

Robert M. Rhodes (904) 222-2300

BY HAND DELIVERY

January 16, 1996

The Honorable E. Earl Zehmer First District Court of Appeal 301 Martin Luther King, Jr., Boulevard Tallahassee, Florida 32399-1850

Dear Judge Zehmer:

As you may know, the Governor's Administrative Procedure Act Review Commission is considering several possible amendments to Chapter 120, Florida Statutes, the Administrative Procedure Act.

One of the proposals we are considering would establish legislative policy that a presumption of correctness or validity not attach to proposed rules which are subject to administrative challenge under Section 120.54(4), Florida Statutes. I wanted to advise you of this proposal and invite you to share any thoughts with us about its possible impact on the appellate court system.

The Commission meets again on January 25 and will complete its work in early February. Our final report will be presented to the Governor and the Legislature.

We look forward to the possibility of hearing from you.

My very best wishes.

Sincerely,

Robert M. Rhodes

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c: The Honorable James R. Wolf Donna Blanton

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DONALD IL BRANNON MARINL

DISTRICT COURT OF APPEAL FIAST DISTRICT. STATE OF FLORIDA TALLAHASSEE

January 24, 1996

Mr. Robert M. Rhodes Steel Hector & Davis Suite 601 215 South Monroe Street Tallahassee, FL 32301-1804

Re: Proposed amendments to chapter 120

Dear Mr. Rhodes:

Thank you for your letter of January 16 requesting comment on the judicial impact of a proposal to amend chapter 120, Florida Statutes, to establish a legislative policy that a presumption of correctness or validity not attach to proposed rules which are subject to administrative challenge under Section 120.54(4). I have circulated your letter to several members of the court for comment. Those judges responding and I agree that this proposal is likely to have a significant impact on the court by increasing the number of appeals involving rules challenges. The following comments are based on the stated description of the concept and deal only with the procedural aspects and probable effects on the court. Our comments are not to be considered as an expression of our view on the desirability vel non of this proposal or on any legal issues that might come before the court should this proposal be adopted.

In the absence of a presumption of validity attaching to an agency's exercise of delegated rule making power, litigants would probably have to look to the appellate courts as the ultimate, if not sole, forum in which to determine the legal scope of an agency's delegated legislative authority under the wording of a statute. Whether a rule exceeds that authority could be decided with little regard to the need to give affect to agency expertise. Under current practice, a district court of appeal reviews the ruling or order of a lower tribunal for purposes of correcting errors of law, and for this reason the lower tribunal's order or

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RICHARD W. ENVIN, III ANNE C. BOOTH JAMES E. JCANCO EDWARD T. BARPIELD CHARLES E. HINER, JR. MICHAEL E. ALLEN JAMES R. WOLF CHARLES J. KANN, JR. PETER D. WEBSTER STEPHAN R MICHAE L. ARTHUR LAWNENCE, JR. MARQUENTE H. DAVIS ROBERT T. BENTON, R WILLIAMA, VAN NORTWER, JR. JAMES Page Two Mr. Robert M. Rhodes January 8, 1996

ruling comes before the district court with a presumption of validity or correctness. In most rule challenge proceedings, an agency's rule is presumed valid because the agency is the body or forum charged with administering the statutes involved, and the presumption gives effect to the infusion of agency expertise in determining the meaning and effect to the legislative enactment. The presumption of validity operates to leave the agency as the de novo or initial determiner of (1). the scope of the statutory delegation of authority and (2) whether a rule exceeds that delegated legislative authority. The agency's determination must stand until shown to be legally incorrect upon subsequent review. If the presumption of validity is removed, however, then the hearing officer in rule challenge proceedings will not have to give deference to the agency and will become the initial determiner of the legal scope and meaning of the authorizing statute upon which the agency relies. This new concept could lead to innumerable rule challenges, if for no other reason than a litigant's decision to take a chance on the hearing officer having a different view of the statute than the agency. Of course, this procedure may also result in more appeals of hearing officer orders on rule challenges because, even though this court would ordinarily presume the hearing officer's order is correct, the court would be free to apply the judges' construction of the statutory language since the hearing officer must base his or her decision on the record and is not accorded any special expertise in reaching a decision. Hence, appellate courts could be placed in the position of providing what would be the equivalent of de novo review in determining the legal scope and meaning of the legislative authority delegated to the agency, whether or not that determination involved matters of agency expertise. Frankly, it appears that this concept may lead to many more challenges of agency rules than under the current practice where deference generally must be accorded to the agency in most cases.

We trust this information will be of assistance to you and the commission in your deliberations. Please feel free to call on us for further information if that would be helpful.

Sincerely yours, Earle Zehner

EBZ:sb

Appendix N

Presumptions Memorandum

GOVERNOR'S ADMINISTRATIVE PROCEDURE ACT REVIEW COMMISSION

PRESUMPTIONS



Governor Lawton Chiles

Robert M. Rhodes. Chairman

Current Law

Senator Locke Burt

Senator Rick Dantzler Representative Bud Bronson Representative Ken Pruitt Linda Loomis Shelley Martha J. Edenfield Clay Henderson

Wade L. Hopping

Eleanor Hunter

Jon Mills

Jon C. Moyle, Jr.

Alan C. Starling

Under current law, when a proposed rule or an existing rule is challenged, the burden is on the challenger to prove the invalidity of the rule by a preponderance of the evidence. Generally, courts explain that they are deferring to the agency's construction of a statute the agency is charged with enforcing, or courts state that the agency's interpretation is entitled to "great weight." Occasionally, courts say that the rule is entitled to a "presumption" of correctness or validity.¹ This presumption does not apply to adjudicatory decisions by state Representative Dean Saunders agencies, which may be challenged under section 120.57;² rather, it applies to rule challenges under sections 120.54 or 120.56.³ This presumption developed through case law shortly after the APA was adopted, and has been repeatedly emphasized by the courts. The First District Court of Appeal recently summarized the case law as follows:

> In a rule challenge, 'the burden is upon one who attacks a proposed rule to show that the agency, if it adopts the rule, would exceed its authority; that the requirements of the rule are not appropriate to the end specified in the legislative act; that the requirements contained in the rule are not reasonably related to the purpose of the enabling legislation or that the proposed rule or the requirements thereof are arbitrary or capricious.' Another settled principle in the area of administrative rulemaking is that 'agencies are to be accorded wide discretion in the exercise of their 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 <u>clearly erroneous</u>... 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.⁴

Of the many cases discussing these general principles, one that is frequently cited is State Department of Health and Rehabilitative Services v. Framat Realty, Inc.⁵ This is the case that established the premise that an agency's interpretation
of a statute gains legitimacy through the public rulemaking process and therefore is entitled to deference, even though other interpretations may be preferable. The court reasoned:

Whether the Department's interpretation . . . is the only possible interpretation of the statute, or the most desirable one, we need not say. It is within the range of permissible interpretations of the statute, and that interpretation has acquired legitimacy through rulemaking processes in which those challenging the rule fully participated or had an opportunity to participate.⁶

A perception exists that the courts have made it too difficult for challengers to win in rule challenge proceedings. Two recent cases stating the general rules emphasize the concerns expressed by those who believe balance should be returned to the rule challenge review process.⁷

Another concern that has been expressed relates to the standards governing review of agency action in bid protest cases. Once an agency has announced either its intent to reject all bids or an intent to award a contract to one of the bidders, a protester has the burden to show that the agency's intended action is fraudulent, arbitrary, illegal, or dishonest. <u>E.g. Department of Transportation v.</u> <u>Groves-Watkins Constructors.</u>⁸ The Commission may want to consider whether this standard provides too much deference to agencies and should be revised.

1995 Proposals

CS/CS/SB 536 (the "Act") removes the presumption in favor of validity of proposed rules and adopted rules in an attempt to level the playing field. Challengers must state with particularity the objections to the proposed rule or the adopted rule and the reasons that the rule is invalid. The agency then has the burden of proving the validity of the rule as to the objections raised.

Governor's Alternative

The Governor has proposed an alternative to this language. According to the chart prepared by Dan Stengle and included in this packet, the Governor would agree that a proposed rule is presumed neither valid nor invalid, However, the current presumption of validity would attach to existing rules.

- 1. See, e.g., <u>Board of Trustees of Internal Improvement Trust Fund v. Levy</u>, 656 So. 2d 1359, 1363 (Fla. 1st DCA 1995). The term "presumption" is used broadly in this memorandum to refer to the courts' general deference for agency rulemaking.
- 2. This is because an agency's preliminary decision is not final agency action. Rather, proceedings under section 120.57 provide a forum for development of agency policy, and the hearing officer issues a recommended order. The final order is issued by the agency head. <u>See, e.g., Couch Construction Co. v.</u> Department of Transportation, 361 So. 2d 172 (Fla. 1st DCA 1978).
- 3. The test is the same for a proposed rule or an existing rule. <u>Florida Waterworks</u> <u>Assn. v. Florida Public Service Commission</u>, 473 So. 2d 237 (Fla. 1st DCA 1985).
- 4. <u>Department of Labor and Employment Security v. Bradley</u>, 636 So. 2d 802 (Fla. 1st DCA 1994) (citations omitted).
- 5. 407 So. 2d 238 (Fla. 1st DCA 1981).
- 6. <u>Id</u>. at 241.
- 7. These cases are <u>Board of Trustees of the Internal Improvement Trust Fund v.</u> Levy, 656 So. 2d 1359 (Fla. 1st DCA 1995) ("The burden of proving abuse of agency discretion is upon the challenger of the rule, who must meet that burden with a preponderance of the evidence." . . . "If an agency's interpretation of its governing statutes is one of several permissible interpretations, it must be upheld, despite the existence of reasonable alternatives."); Orange Park Kennel Club, Inc. v. State Department of Business and Professional Regulation, 644 So. 2d 574, 576 (Fla. 1st DCA 1994) ("An agency's construction of a statute which it administers is entitled to great weight and will not be overturned unless the agency's interpretation is clearly erroneous; the agency's interpretation need not be the sole possible interpretation or even the most desirable one; it need only be within the range of possible interpretations.").
- 8. 530 So. 2d 912 (Fla. 1988).

Appendix O

Costs and Attorney Fees Memorandum



GOVERNOR'S ADMINISTRATIVE PROCEDURE ACT REVIEW COMMISSION

Several provisions of chapter 120 authorize the award of attorney fees and

Chapter 120 includes no provisions for the award of attorney fees and costs

Supporters of increased accountability in the administrative process have

however, do have the general discretionary authority to award attorney fees and

costs in rule challenge proceedings if the challenged agency action is a "gross abuse of the agency's discretion.^{#6} Nonetheless, even when courts are specifically

authorized to impose fees and costs against agencies, they are reluctant to do so.7

argued that imposition of attorney fees and costs against administrative agencies

in more circumstances would make agencies less likely to abuse their delegated legislative authority. Opponents of increased imposition of costs and attorney fees

argue that they have a chilling effect on agencies' ability to effectively perform

in proceedings challenging either proposed rules or existing rules.

An action is

Courts.

COSTS AND ATTORNEY FEES

Governor Lawton Chiles

Robert M. Rhodes, Chairman

Senaror Locke Burt

Current Law

costs.¹ For example, fees and costs may be awarded against either private parties Senator Rick Dantzler or the government in section 120.57 proceedings if papers are filed for an improper purpose, which means "to harass or to cause unnecessary delay or for Representative Bud Bronson frivolous purpose or needless increase in the cost of litigation."² Additionally, the Florida Equal Access to Justice Act³ authorizes fee and cost awards to small Representative Ken Pruitt business parties prevailing in administrative proceedings initiated by state agencies when the agency's action is not "substantially justified."4 Representative Dean Saunders "substantially justified" when it has a reasonable basis in law and fact at the time it is initiated by a state agency.⁵ Linda Loomis Shelley

Martha J. Edenfield

- Clay Henderson
- Wade L. Hopping
- Eleanor Hunter
- Ion Mills Jon C. Moyle, Jr.

Alan C. Starling

1995 Legislation

their regulatory responsibilities.

CS/CS/SB 536, which was passed by the Legislature but vetoed by the Governor ("the Act"), provides for costs and reasonable attorney fees in proposed or existing rule challenge proceedings if an agency fails to prove the validity of provisions of its rule that were specifically objected to by a challenger. The agency can avoid the award of attorney fees and costs if it demonstrates that its actions were substantially justified or special circumstances exist that would make the

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award unjust.

The Act also states that upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court may award reasonable attorney's fees and costs to a prevailing party for the administrative proceeding and the appellate proceeding.

The Governor's Alternative

The Governor has proposed an alternative to some of the language in the Act. In proposed and existing rule challenge proceedings, the Governor would allow cost and attorney fee awards when the agency's action is not "substantially justified." This phrase would have the same meaning as it does in the Florida Equal Access to Justice Act. The Governor would limit attorney fee awards to \$15,000, but parties could be entitled to "reasonable" costs without monetary limitation.⁸

- 1. See §§ 120.535(1); 120.57(1)(b)5; 120.57(1)(b)10.; 120.575; 120.58(3); 120.59(6); 120.69 (1993).
- 2. 120.57(1)(b)5.
- 3. § 57.111, Fla. Stat.
- 4. For a thorough discussion of attorney fee and cost awards by agencies, hearing officers, and courts in proceedings authorized by the Administrative Procedure Act, see Robert T. Benton II, <u>Attorneys' Fees and Cost Awards</u>, in Florida Administrative Practice Ch. 13 (1995).
- 5. § 57.111(3)(e), Fla. Stat. (1993).
- 6. <u>Greynolds Park Manor. Inc. v. State Department of Health and Rehabilitative</u> Services, 491 So. 2d 1157, 1160 (Fla. 1st DCA 1986).
- 7. <u>City of Ococe v. Central Fla. Professional Firefighters Assoc.</u>, 389 So. 2d 296, 300 (Fla. 5th DCA 1980) ("[C]ourts should be reluctant to impose fees and costs against an agency if, for example, its order is reversed only because the agency erroneously interpreted a provision of law. . . .")

8. For a comparison of cost and attorney fee provisions in existing law, the Act, and in the Governor's proposed alternative, see the chart prepared by Dan Stengle and included in this packet.

Appendix P

Regulatory Costs Memorandum

GOVERNOR'S ADMINISTRATIVE PROCEDURE ACT REVIEW COMMISSION



REGULATORY COSTS

Governor Lawron Chiles

Senator Locke Burt

Robert M. Rhodes, Chairman Background and Current Law

Until 1992, the Florida APA required preparation of an economic impact statement before the adoption, amendment, or repeal of any rule.¹ Failure to prepare the statement constituted grounds for finding a rule invalid.² The statute's Senator Rick Dantzler economic impact statement provisions were strongly criticized as burdensome and meaningless, and the Legislature in 1992 adopted amendments designed to address Representative Bud Bronson these problems.³ The requirement that a statement be prepared for every proposed rule was repealed, and agencies instead were required to prepare such statements Representative Ken Pruitt only in specified circumstances.⁴ The list of factors an agency is required to consider in preparation of the statement was expanded, and standing requirements Representative Dean Saunders to challenge a rule on the basis of the economic impact statement were modified.⁵ Additionally, section 120.54(12) was amended to add the following language: Linda Loomis Shelley

> In adopting rules, all agencies must, among the alternative approaches to any regulatory objective and, to the extent allowed by law, choose the alternative that imposes the lowest net cost to society based upon the factors listed in paragraph (2)(c), or provide a statement of the reasons for rejecting that alternative in favor of the proposed rule. The paragraph shall not provide a basis for challenging a rule.

Proposed Changes

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Despite the changes in 1992, criticism of the economic impact statement process has continued.⁶ For example, a 1993 survey by the Florida Chamber found that a significant number of respondents thought that government regulation was "one of the biggest obstacles to profitability."⁷ The 1992 changes were considered by the business community to be ineffective in improving the quality of economic analyses prepared by state agencies.⁸ The Chamber's Governmental Reform Committee recommended a number of reforms to the APA in 1994, including changes in the economic impact statement process.⁹ Because of concerns expressed by the Chamber and others, proposals surfaced in 1994 to replace the economic impact statement with a "statement of estimated regulatory costs" (SERC). Although these proposals did not pass in 1994, the concept was modified and incorporated into CS/CS/SB 536 (the Act), which passed the 1995 Legislature

but was vetoed by the Governor.

According to the Act, the current statutory language concerning preparation of an economic impact statement would be repealed. Agencies would be required to prepare SERCs for all proposed rules except procedural rules or rules adopted pursuant to a federal program where such rules are identical to or no more restrictive than the federal law or regulation being adopted or implemented by the agency.

The SERC would have to include:

- 1) a good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of what types of individuals the rule is likely to affect;
- a good faith estimate of the cost to the agency of implementing and enforcing the proposed rule and any anticipated effect on state or local revenues;
- 3) a good faith estimate of the transactional costs likely to be incurred by individuals and entities required to comply with the rule;
- 4) an analysis of the impact on small business;
- 5) any additional information that the agency determines may be useful in informing the public of the costs or benefits of complying with the proposed rule; and
- 6) a good faith description of any reasonable alternative methods.

The Act also significantly amends the 1992 language from section 120.54(12) concerning the lowest cost alternative. Instead of providing the lowest net cost to "society," agencies would have to provide the alternative imposing the lowest cost "on the regulated person, county, or municipality." Significantly, the Act states that failure to provide a statement of estimated regulatory costs that complies with the law would be considered a material error and grounds for holding a rule invalid if the issue is raised within the first year of the rule's effective date.¹⁰

The Governor's Alternative

The Governor has articulated an alternative to the proposals in the Act. Under his proposal, agencies would have to choose the regulatory alternative "that does not impose excessive regulatory costs on the regulated person, county, or municipality which could be reduced by less costly alternatives that substantially accomplish the statutory objectives." The Governor would "encourage" agencies to prepare a SERC, but not require it unless a substantially affected person submitted to the agency a bona fide written proposal for a lower cost regulatory alternative. The Governor would allow the SERC to be used to declare a rule invalid if the issue is raised within one year of the rule's effective date, if the agency has failed to prepare or revise its SERC or has invalidly rejected the lower cost regulatory alternative; and the substantial interests of the person challenging the agency's rejection of the lower cost alternative are materially affected by the rejection.

- 1. § 120.54(2)(b), Fla. Stat. (1991). For a comparison of current law, proposed 1995 changes, and a proposed alternative offered by the Governor, see the chart prepared by Dan Stengle and included in this packet.
- 2. <u>Id.</u> § 120.54(2)(d).
- 3. David W. Nam, <u>1992 Amendments to the Florida Administrative Procedure Act</u>, Fla. B.J. 55 (July/August 1992) (citing articles by commentators criticizing the economic impact statement requirement).
- 4. § 120.54(2)(b)1., 2., Fla. Stat. (1993).
- 5. Id. §§ 120.54(2)(c),(d).
- 6. Sally Bond Mann, Legislative Reform of the Administrative Procedure Act: A Tale of Two Committees, Fla. B.J. (July/August 1994).
- 7. Lawrence E. Sellers, Jr., <u>1994 Proposals for Rulemaking Reform</u>, 22 Fla. St. U. L. Rev. 327, 329 n.9 (1994).
- 8. <u>Id</u>. at 339.

- 9. <u>Id</u>. at 329 n.11.
- 10. The person challenging the statement would have to meet certain requirements, i.e., he or she must have provided the agency with information sufficient to make the agency aware of specific concerns regarding the estimated regulatory costs, and the challenged statement in the SERC must be material to the person's substantial interests.

Appendix Q

Other Agency Statements Memorandum



GOVERNOR'S ADMINISTRATIVE PROCEDURE ACT REVIEW COMMISSION

OTHER AGENCY STATEMENTS

Governor Lawton Chiles

Current Law

Robert M. Rhodes, Chairman

Senator Locke Burt Senator Rick Dantzler Representative Bud Bronson

Representative Ken Pruitt

Representative Dean Saunders

Linda Loomis Shelley

Martha J. Edenfield

Clay Henderson

Wade L. Hopping

Eleanor Hunter

Jon Mills

Jon C. Moyie, Jr.

Alan C. Starling

Agencies that issue permits or licenses often solicit and rely on information from other agencies when imposing conditions on those permits or licenses. For example, the Department of Environmental Protection and the regional water management districts may rely on policies or guidelines of the Game and Freshwater Fish Commission in placing conditions within DEP Environmental Resource Permits (ERPs). Similarly, regional planning councils or the Department of Community Affairs may rely on comments from another agency in recommending or encouraging conditions within a DRI development order, even though the permit conditions imposed are not necessarily contained within the permitting agency's rules or specifically authorized by statute. This practice has raised concerns because of the difficulty of challenging policies of commenting agencies that may be imposed through the permitting agency's "general" statutory authority, but not formally adopted as rules by either agency.

1995 Legislation

Under the CS/CS/SB 536 ("the Act"), agencies would be prohibited from including as a condition of approval of any license or permit any action that is based on a statement, policy, or guideline of another agency unless the permitting agency has expressly adopted the statement, policy, or guideline as a rule or unless such action is expressly authorized or required by general law.

An alternative proposal discussed during the 1995 session, but not adopted, would authorize the licensing or permitting agency to include a suggesting comment from another agency as a condition if the agency making the suggestion adopted the condition as a rule and the condition is within the jurisdiction of the permitting agency.

Governor's Alternative

The Governor has proposed alternative language on this issue. According to the chart prepared by Dan Stengle and included in this packet, no approving or licensing agency could include as a condition of approval any action based on a statement, policy, or guideline of a commenting agency unless the statement, policy, or guideline "is within the jurisdiction of the commenting agency and the approving or licensing agency gives the licensee an opportunity to challenge the condition as invalid."

Appendix R

Hearing Officer Final Order Authority Memorandum

GOVERNOR'S ADMINISTRATIVE PROCEDURE ACT REVIEW COMMISSION



Governor Lawton Chiles

Robert M. Rhodes, Chairman

Senator Locke Burt	I.
Senator Rick Dantzler	
Representative Bud Bronson	Proc
Representative Ken Pruitt	give
Representative Dean Saunders	
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Final Order Authority for Hearing Officers

ISSUE STATEMENT AND CONTEXT FOR DISCUSSION.

A recurring debate in discussions concerning Florida's Administrative rocedure Act ("APA") centers around whether hearing officers should be iven the authority to enter final orders in all section 120.57 proceedings.

Under the present APA, an individual whose substantial interests are affected by a state agency may institute formal or informal proceedings by filing a request for a hearing under section 120.57, Florida Statutes.¹ In some instances, the hearing may be conducted by the head of the agency involved in the dispute, but in the majority of cases the petition is referred to the Division of Administrative Hearings ("DOAH").

Based upon the arguments and evidence submitted at hearing, the hearing officer issues a recommended order that includes findings of fact, conclusions of law, interpretations of administrative rules, and proposed penalties. In most circumstances, the recommended order is then presented to the agency, which may adopt, reject, or modify the conclusions of law, but may not reject or modify the hearing officer's findings of fact unless the agency reviews the entire record and establishes with particularity that the

findings of fact are not based on competent substantial evidence or that the proceedings did not comply with the requirements of law.²

The agency head then issues a final order setting forth in detail the findings of fact and conclusions of law of the hearing officer that have been adopted, rejected, or modified, and this order constitutes final agency action that may be appealed by the adversely affected party to the appropriate district court of appeal pursuant to section 120.68, Florida Statutes.

In certain proceedings, hearing officers currently enter final orders rather than recommended orders. Most notably, hearing officers enter final orders in rule challenges under sections 120.535, 120.54(4), and 120.56, Florida Statutes. Hearing officers also enter final orders in attorney's fees proceedings under the Florida Equal Access to Justice Act (§ 120.57(1)11); in growth management proceedings in which land development regulations are challenged on the ground that they are inconsistent with a local government's adopted comprehensive plan (§ 163.3213); in exceptional student educational proceedings (§ 230.23(4)(m)5); in proceedings under the Baker Act that determine whether involuntarily hospitalized patients should be released (§ 394.467(4)); and in certain cases involving reinstatement of

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road contractors' eligibility to bid (§ 337.165(2)(d)). Proponents of final order authority would grant to DOAH hearing officers the authority to enter a binding final order in all proceedings under section 120.57. This fundamental change to section 120.57 would effectively allow individuals substantially affected by preliminary agency action to take their disputes with state agencies to DOAH for a final determination, as the hearing officer's final order would operate as a final administrative adjudication on the correctness of an agency's intended action. The unsuccessful party (either the individual or the agency) could then seek immediate judicial review of the hearing officer's final order pursuant to section 120.68. There have been several legislative attempts to vest final order authority in hearing officers in recent years,³ but none has proceeded far enough to merit substantial scrutiny and debate. The following discussion summarizes the primary arguments that have been offered in support and in opposition to vesting final order authority in hearing officers.⁴

II. ARGUMENTS IN <u>SUPPORT</u> OF FINAL ORDER AUTHORITY FOR HEARING OFFICERS:

1. The current process of providing agencies with final order authority does not ensure or promote accountability, and vesting final order

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authority in hearing officers will not result in a significant loss of accountability:

- State agencies have not demonstrated that having final order authority results in greater accountability to the public. Rather than providing a mechanism for impartial scrutiny and careful introspection of intended agency action, the current process instead provides a disincentive to agencies to deal fairly and responsibly with affected parties because an agency knows from the outset that in many cases it can circumvent adverse findings by a hearing officer. An agency can therefore maintain an improper or unreasonable position it feels strongly about even after an adverse determination, thereby compelling the affected party to undertake a time-consuming and costly appeal under section 120.68 to ultimately obtain administrative justice, an alternative that is not available to many participants.
- Vesting final order authority in hearing officers will have the effect of making agencies more accountable and responsive to the public. Agencies will have a greater incentive to fully consider and evaluate the correctness and fairness of their intended agency actions if they know going into a section 120.57 proceeding that the hearing officer's determinations will be final. Similarly, it is foreseeable that a greater number of disputes will be settled before engaging in adjudication under section 120.57.
- The impartial and unbiased corps of DOAH hearing officers must meet the same minimum requirements as circuit judges, and are no less accountable than the agency personnel who generally draft final orders. In many cases final orders are written by unknown, nonaccountable lawyers in an agency's general counsel's office. Hearing officers are supervised by the Director of DOAH (who is appointed by the Administration Commission and confirmed by the Senate), and are therefore no less accountable to the public than agency lawyers who are held accountable only to their own (appointed and Senate confirmed) agency heads.

- 2. The current process has greatly diminished the credibility of the APA as an effective, affordable and meaningful mechanism for resolving disputes with agencies:
- There is an inherent perception of unfairness and lack of credibility in an adjudicatory process that allows an agency to be both the judge and party to the proceeding. Citizens are discouraged from exercising their constitutional due process rights in proceedings under section 120.57 because of the perception that an agency who has rendered an informal adverse decision will likely do so again after the substantial time and expense of a section 120.57 proceeding. Opponents of final order authority stress a potential loss of accountability, but to affected parties trying to comprehend why an agency is allowed to decide the correctness of its own actions after a section 120.57 proceeding, the obvious and immediate perception is that agencies are not held accountable to the public for their unjustified actions.
- The current process often fails to serve its intended goal of informing agencies of their improper actions and of "changing the agency's mind" after scrutiny by an independent hearing officer.⁵ Rather, the process is frequently abused by agencies through recharacterization of factual findings in the recommended order as conclusions of law, or as factual issues infused with policy considerations over which the agency asserts special expertise and knowledge as a means to reach an agency's desired end.⁶ Vesting final order authority in hearing officers will remedy these problems and allow affected parties to have their administrative disputes decided by an impartial and disinterested final decisionmaker.
 - Vesting final order authority in hearing officers will reduce the amount of time and money an affected party must expend in obtaining a final determination of his or her dispute, thus further increasing the integrity of the APA. Specifically, it would save affected parties the time and expense of drafting lengthy exceptions to recommended orders, and would eliminate the need for oral argument before the

agency issuing the final order.

- Above all else, the APA must be accessible and provide meaningful processes for dispute resolution for individuals substantially affected by agency action. Florida law generally compels its citizens to first pursue a remedy for administrative disputes within the APA,⁷ and if the APA is to retain any integrity as a meaningful mechanism for resolving such disputes, hearing officers must be vested with final order authority in adjudicatory proceedings under section 120.57, regardless of the role these proceedings were originally designed to play.
- 3. Vesting final order authority in hearing officers will greatly limit an agency's ability to pursue arbitrary and inconsistent policy decisions in the name of administrative flexibility:
- Opponents of final order authority for hearing officers contend that agencies must have flexibility and discretion to pursue emerging policy decisions. These arguments are merely an attempt to justify the pursuit of incipient agency policy on a case-by-case basis, which is not in the public interest. The proper forum for policy direction, development, and decisionmaking is formal rulemaking, not in section 120.57 proceedings.⁴ If state agencies wish to subject their developing public policy decisions to scrutiny on a case-by-case basis, then the correctness of those decisions must be subject to an immediate and final determination of correctness by an independent and disinterested hearing officer.
- 4. Vesting final order authority in hearing officers will not lead to less informed decisions or inconsistent results:
- If agency personnel have special expertise and knowledge that is needed in formulating appropriate agency policy, then the agency should use that expertise during the formation of its intended agency action, not after adjudicatory proceedings have been conducted. Moreover, it is rare that an agency has such special insight and

expertise over a certain factual question that it is justified in rejecting a hearing officer's findings of facts because the factual issues are infused with special policy considerations in which the agency has expertise.⁹ In the vast majority of cases, the hearing officer will be able to sufficiently guide public policy choices through the adjudicatory process and arrive at a proper determination concerning the correctness of intended agency action. Hearing officers could also be allowed to specialize in certain areas of the law, thereby ensuring the level of expertise necessary in certain proceedings. Further. agency expertise is undoubtedly exercised in the development and adoption of rules, yet hearing officers are permitted to enter final orders in rule challenge proceedings under section 120.54(4) and section 120.56. Hearing officers are similarly skilled and qualified enough to make final determinations on agency policy that has not yet been adopted as a rule or in which the interpretation of an existing rule is at issue. Arguments concerning inconsistent results are also not persuasive, as hearing officers will be able to rely upon prior final orders as precedent for resolving disputes in particular matters.

III. ARGUMENTS IN <u>OPPOSITION</u> TO FINAL ORDER AUTHORITY FOR HEARING OFFICERS:

- 1. Removing final order authority from state agencies drastically reduces the level of accountability inherent in Florida's APA in general and in agencies in particular:
- A fundamental objection to vesting hearing officers with final order authority focuses on the lack of accountability attendant to DOAH hearing officers. Agency heads are appointed by the Governor or by another executive authority, and are thus subject to immediate executive oversight. In addition, agency heads must generally obtain Senate confirmation, and may be called before legislative committees to answer and explain their agency's decisions and actions. This structure ensures that individuals making final decisions on agency policy are directly accountable to the public through elected

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officials.¹⁰

- By contrast, DOAH hearing officers are not subject to traditional accountability mechanisms or oversight from political or executive processes. Hearing officers are hired by the director of DOAH, are not subject to confirmation, enjoy the status of career service employees, and are free from administrative supervision and political influence. In short, the exercise of public policy discretion is often involved in section 120.57 proceedings, and the final determination of such policy should be made by elected or politically appointed and accountable officials, rather than insulated, independent hearing officers.
- 2. Vesting final order authority in DOAH hearing officers would violate Florida's Constitution and unlawfully alter the function of the executive branch:
- Vesting final order authority in hearing officers would violate article II, section 3 and article IV, section 6 of the Constitution of Florida. Article II, section 3 provides in relevant part that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided" in the Florida Constitution. Article IV, section 6 accordingly provides that "[a]]] functions of the executive branch of state government shall be allotted among not more than twenty-five departments," and that the administration of each department be under the direct supervision of a Cabinet member or an officer or board appointed by the governor. Pursuant to these constitutional provisions, the Legislature has established a detailed organizational structure of executive agencies. one which provides for direct supervision by a Cabinet member or another appointed executive authority and which therefore ensures that executive responsibility for the implementation of programs and policies is "clearly fixed and ascertainable."¹¹ Although DOAH is technically a division of the Department of Management Services, chapter 120 expressly provides that DOAH is not subject to control. supervision, or direction by the Department in any manner.¹² Vesting

final order authority in DOAH hearing officers would have the effect of unconstitutionally allotting the critical executive function of implementing and enforcing duly enacted legislation to one independent, nonaccountable division which by law is not subject to direct executive supervision or oversight. The process would also violate the principle that executive responsibility for the implementation of legislative programs and policies should be clearly fixed and ascertainable, as agencies would no longer have ultimate executive responsibility for the specific programs and policies they are required to implement. In short, allowing hearing officers--who are not accountable nor subject to executive oversight--to make final determinations on substantive issues of public policy, would violate the separation of powers principles that are fundamental to Florida's Constitution and that are inherent in the organizational structure of the state's executive branch.

3. Agencies must have final order authority if they are to fulfill their primary executive function:

- The executive branch has the "broad purpose of executing the programs and policies adopted by the Legislature."¹³ To fulfill this function, executive agencies must necessarily exercise discretion in interpreting statutes and in making policy decisions regarding the Legislature's intent. As such, an agency must have the authority to make a final determination on how it chooses to exercise its delegated discretion in interpreting statutory policy. If hearing officers are vested with final order authority in section 120.57 proceedings and are allowed to make final determinations on whether a particular policy adopted by an agency is proper, then their function will necessarily supersede the primary function of executive agencies. Such a result would have far reaching implications for the state's executive branch that would not be in the public interest.
- 4. Retaining final order authority in agencies is consistent with the principles embedded in the APA and in section 120.57 proceedings in particular:

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- Unlike judicial review of final agency action, section 120.57 proceedings are intentionally designed to afford parties affected by intended agency action with an opportunity to change the agency's mind.¹⁴ An agency's preliminary decision is not final agency action,¹⁵ and therefore proceedings under section 120.57 are primarily intended to aid in the formulation of final agency action, not to serve as a vehicle for review of informal agency action taken before the initiation of section 120.57 proceedings.¹⁶ Rather, section 120.57 proceedings provide a forum for full investigation of pertinent facts by the interested parties and ensure that the agency will have complete information to make the best decision in issuing its final order. In essence, section 120.57 proceedings are designed to protect an affected party's constitutional due process guarantees, which require that the affected individual be provided with notice and an opportunity to be heard before final agency action is taken. Except in limited cases, they are not intended to function as administrative law "circuit courts" in which the correctness of preliminary agency action is ultimately determined, nor do constitutional guarantees require that they function in such a manner.¹⁷
- The process works. State agencies generally give great deference to the recommendations of hearing officers, and an agency cannot avoid its obligation to follow findings of fact simply by labeling them conclusions of law.¹⁸ Removing final order authority from state agencies will fundamentally alter the function and purpose of section 120.57 proceedings, without an adequate showing that such a change is necessary and without a sufficient analysis of the resulting consequences and implications of such a change. Such a fundamental change will also effectively nullify two decades of judicial decisions interpreting and applying the current processes in section 120.57, and may place a heavy burden on district courts of appeal resulting from more appeals from DOAH final orders.
- 5. Retaining final order authority in agencies ensures a necessary level of flexibility in agency policy decisionmaking:

- Agency action frequently involves an exercise of discretion regarding policy choices. The conclusions of law ultimately adopted by an agency in its final order serve as a mechanism for choosing between distinct and legitimate alternative interpretations of statutory and rule provisions. Thus, retaining final order authority in the state agencies not only ensures accountability, but also provides necessary flexibility to agencies in establishing administrative policy. If section 120.57 is to serve the purpose primarily intended by the Legislature, then agencies must be the final arbiters of agency policy.
- Hearing officers serve the unique function in Florida of critiquing an agency's policy before the agency finally acts on a citizen's case under that policy. Based on the evidence and cross-examination of agency witnesses, hearing officers enter findings of two sorts: findings on ordinary facts, which are conclusive; and findings on policy-related issues, which though not conclusive may either dissuade the agency or turn up ordinary fact issues on which findings are conclusive. Collapsing these functions into final order authority will deprive citizens of the freedom the hearing officer now exercises to critique agency policy without being finally responsible to announce agency policy.
- 6. Retaining final order authority in the agencies recognizes that agencies are the best arbiters of emerging agency policy and proper interpretation of delegated authority based on their unique expertise:
- When an affected party challenges proposed agency action, the agency must function in a quasi-judicial role to determine the correctness of its intended action. Providing state agencies with final order authority ensures that those individuals with special expertise and knowledge of a particular subject matter will make a final determination on the correctness of agency action, which in turn benefits the public.
- Hearing officers often hear disputes on matters in which they have limited or no experience, and while this may facilitate impartial and unbiased factfinding, it does not necessarily result in the best decision

being made by those most knowledgeable in the subject matter of the dispute.

- 7. Retaining final order authority in agencies allows agencies to pursue consistent policy decisions and thus results in more consistent application of agency policy:
- Vesting final order authority in hearing officers will have the undesirable effect of reducing the level of consistency in agency policymaking. Agency action is more consistent when applied by the same person, and that same individual is also more accountable to political oversight. In contrast, vesting final order authority in hearing officers will have the likely effect of increasing the number of hearing officers who will handle greater case loads, and will also expand the body of caselaw that a hearing officer must be familiar with, all of which diminish the consistent application of agency policy. Further, hearing officers may disagree with one another on certain matters of administrative law and may render final orders that treat similarly situated individuals inconsistently, thereby diminishing the consistency and integrity of the APA.
- 8. The current process for proceedings under section 120.57 works: Any amendments should focus on fixing specific problem areas rather than making a fundamental process change:
- Any perceived flaws or abuses in the current process can be remedied by establishing more specific limitations on the authority of an agency to overrule the hearing officer's recommended order, rather than vesting final order authority for all administrative proceedings in hearing officers. For example, the Legislature might provide that an agency may not reject findings of fact or conclusions of law in a hearing officer's recommended order unless the agency specifically establishes that the findings or conclusions are "clearly erroneous."
- Alternatively, both the public and the agencies may be best served by an approach that retains final order authority in the agencies as the

general rule, but expands the range of proceedings in which hearing officers have final order authority.¹⁹ As noted in the introduction, hearing officers presently enter final orders in certain proceedings. There arguably are other proceedings in which final order authority for hearing officers is both practical and desirable, particularly where a party's fundamental rights are involved and where the need for flexibility in making policy choices is limited. By contrast, proceedings that involve complex, discretionary issues of emerging agency policy and implicate the special expertise and knowledge of an agency are more appropriate for final determination by an agency.

- 1. An individual substantially affected by agency action must generally exhaust the administrative remedies available under the APA (including judicial review in the District Court of Appeal pursuant to § 120.68) before seeking relief in circuit court. See, e.g., Gulf Coast Home Health Serv. of Florida, Inc. v. Department of Health and Rehab. Serv., 513 So. 2d 704 (Fla. 1st DCA 1987).
- 2. Section 120.57(1)(b)10, Florida Statutes; see also Harvey v. Nuzum, 345 So. 2d 1106 (Fla. 1st DCA 1977).
- 3. See Fla. SB 550 (1995); Fla. SB 1674 (1992).
- 4. Many of the arguments set forth below were extracted from articles in the Florida Bar's Administrative Law Section Newsletter. See Pfeiffer, "From the Chair," Administrative Law Section Newsletter, Vol. XIV, No. 1, pg. 1 (1992), and Matthews and Petrovich, "Give DOAH Final Order Authority," Administrative Law Section Newsletter, Vol. XIV, No. 2, pg. 3 (1992), for a complete discussion.
- 5. See e.g., Johnston v. Department of Professional Regulation, 456 So. 2d 939 (Fla. 1st DCA 1984); Smith v. Department of Health and Rehab. Serv., 555 So. 2d 1254 (Fla. 3d DCA 1990); Short v. Florida Dep't of Law Enforcement, 589 So. 2d 364 (Fla. 1st DCA 1991); Robinson v. Department

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of Administration, 513 So. 2d 212 (Fla. 1st DCA 1987).

- 6. See cases cited in previous footnote; see also Matthews and Petrovich, *supra* note 4, at 3.
- 7. See, e.g., Gulf Coast Home Health Serv. of Florida, Inc. v. Department of Health and Rehab. Serv., 513 So. 2d 704 (Fla. 1st DCA 1987).
- 8. See also § 120.535, Fla. Stat.
- 9. See Dade County Police Benevolent Ass'n v. City of Homestead, 444 So. 2d 465, 472-73, fn.3 (Fla. 3d DCA 1984), vacated 467 So. 2d 987 (Fla. 1985). The court in this 1984 decision surveyed 34 cases in which the findings of a hearing officer had been overturned, substituted, or modified by an agency, and in only four of the cases surveyed by the court was the agency's conduct deemed proper based on a finding that the determinations involved were infused with policy considerations involving special insight by the agency.
- 10. See §20.02(4), Florida Statutes, which provides that responsibility within the executive branch for the implementation of programs and policies should be clearly fixed and ascertainable.
- 11. § 20.02(4), Fla. Stat.
- 12. § 120.65(1), Fla. Stat.
- 13. § 20.02(1), Fla. Stat.
- See Mercedes Lighting & Elec. Supply, Inc. v. Department of Gen. Servs., 560 So. 2d 272, 278 (Fla. 1st DCA 1990); Douglas J. Rillstone and Michael D. Rouse, <u>An Examination of Grove-Watkins: Where Do We Go Now?</u>, 65 Fla. B. J. 77 (June 1991).
- 15. See e.g., Couch Const. Co. v. Department of Transportation, 361 So. 2d 172 (Fla. 1st DCA 1978).

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- McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977); see also Kenneth D. Goldberg, <u>Gaining Access to Formal</u> <u>Administrative Proceedings to Challenge Final Agency Action</u>, 67 Fla. B. J. 67 (May 1993).
- 17. The goal of Chapter 120 proceedings is "the generation of a record and final action based thereon capable of court review to ensure responsible agency decisionmaking and policymaking." Goldberg, *supra* note 16.
- 18. Department of Labor & Employment Security v. Little, 588 So. 2d 281 (Fla. 1st DCA 1991).
- 19. See, e.g., Pfeiffer, supra note 4, at 1.

Appendix S

IDR Working Group Memorandum

GOVERNOR'S ADMINISTRATIVE PROCEDURE ACT REVIEW COMMISSION



MEMORANDUM

Governor Lawton Chiles

Robert M. Rhodes, Chairman	TO:	Commission Members
Senator Locke Burt	FROM:	Donna E. Blanton
Senator Rick Dantzler	DATE:	December 6, 1995
Representative Bud Bronson	SUBJECT:	IDR Working Group

Representative Ken Pruitt

Representative Dean Saunders
Linda Loomis Shelley
Martha J. Edenfield
Clay Henderson
Wade L. Hopping
Eleanor Hunter
Jon Mills

Jon C. Moyle, Jr.

Alan C. Starling

This Commission's Informal Dispute Resolution Working Group met on December 6 to discuss the need for informal dispute resolution procedures in the administrative process and possible recommendations to the full Commission. Members attending were Senator Rick Dantzler, chair of the working group, and Commissioners Eleanor Hunter, Jon Moyle and Wade Hopping. Additionally, several advisors to the working group and other interested persons attended. Others present were Patsy Palmer; Bill L. Bryant, Jr.; Bob Jones; Tom Taylor; Carol Forthman; and Kasongo Butler. David L. Powell submitted written comments.

The group generally agreed that informal dispute resolution procedures could be valuable in the administrative process. However, members agreed that the need for and use of such procedures would vary greatly from agency to agency, and a mandatory "one size fits all" approach to informal administrative dispute resolution is considered inadvisable.

Members generally endorsed the informal dispute resolution procedures in CS/CS/SB 536 and said that those proposals should be used as the basis for additional recommendations.

One change the group agreed should be made to the 1995 proposals is to the provision of proposed section 120.573, which states that agencies must inform parties "whether" mediation is available. Several group members said that the intent was that agencies must offer mediation if it is available for that particular type of dispute; agencies should not be allowed to selectively withhold mediation for a particular dispute if the agency generally uses it. Additionally, group members said that proposed legislation should be more specific about who pays for informal dispute resolution and more specific about the time frames involved. MEMO - Commission Members December 6, 1995 Page 2

> Additionally, the group generally agreed it would be useful to identify agencies where various types of mandatory informal dispute resolution could be used as pilot projects. Again, the group noted that certain types of dispute resolution might work best in certain agencies, or for specific programs within certain agencies. These projects should be monitored and evaluated, the group agreed. Several members noted that implementing the programs would have a fiscal impact. Without adequate funding, the pilot projects are not likely to be successful.

> Most members of the group also agreed that hearing officers at the Division of Administrative Hearings should be authorized to direct parties to mediation or other means of alternative dispute resolution. Commissioner Hunter, a hearing officer, expressed reservations about this issue. She stated that informal dispute resolution would be most effective before disputes reach DOAH. A majority of the group, however, indicated that informal dispute resolution should be used both before and after disputes reach DOAH.

> Senator Dantzler said he would ask Dan Stengle from the Governor's Office to modify the proposals in CS/CS/SB 536 to reflect the working group's discussions. The group then will review the proposals and consider whether to make a recommendation to the full Commission.

Appendix T

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ADR Pilot Projects Memorandum



STATE OF FLORIDA

Office of the Governor

THE CAPITOL TALLAHASSEE, FLORIDA 32399-0001

LAWTON CHILES GOVERNOR

> Memorandum To: Senator Dantzler From: Dan R. Stengle Date: January 11, 1996 Re: ADR Pilot Project

At your request, we have reviewed programs and processes in state government that would have potential for inclusion as "pilot projects" for Alternative Dispute Resolution (ADR). As you recognize, support and leadership from the agency are important to the success of a selected ADR pilot project. Therefore, this preliminary list of potential pilot projects has been compiled with the approved and input from agency heads and general counsels.

As you have indicated, as we move forward to develop these pilot projects in legislation, we should try to structure them with various ADR components. As well, we would hope to craft some sort of evaluation process with outcome measures. In these ways, we could better assess the successes and failures between and among the pilot projects selected.

In evaluating program areas as potential ADR pilot projects, we looked at the current processes for dispute resolution in the program areas. Disputes arising in the programs which we are suggesting for ADR pilot projects are especially numerous, expensive, drawn-out, or contentious. It is thought that ADR may reduce the costs or the time involved in resolving disputes, or reduce the amount of administrative litigation involved in resolving disputes. Further, ADR may lead to more satisfying results for the various parties to the disputes.

The following are suggested for development as ADR pilot projects in the identified departments:

- (1) Business and Professional Regulation
 - A. Discipline of licensees, Board of Veterinary Medicine
 - B. Rulemaking, pari-mutuel wagering
 - C. Rulemaking, mobile home industry
- (2) <u>Corrections</u>

Employee discipline

(3) <u>Game and Fresh Water Fish Commission</u> Captive wildlife license issuance Senator Dantzler Page Two January 11, 1996

- (4) <u>Health and Rehabilitative Services</u> Welfare benefit recovery
- (5) <u>Highway Safety and Motor Vehicles</u> Motor vehicle dealer franchises
- (6) <u>Housing Finance Agency</u> Funding/grant awards
- (7) <u>Juvenile Justice</u> Employee discipline
- (8) <u>Management Services</u> Purchasing disputes

As I understand it, you are interested in having these pilot projects drafted to the substantive statutory program areas, rather than to chapter 120, F.S., the Administrative Procedure Act. Donna Blanton and I are prepared to move forward in crafting the various ADR pilot projects for inclusion in legislation. Of course, we will continue to work with the affected agencies in developing the pilot projects.

As well, you may wish to consider adding evaluation and reporting provisions to some of the numerous ADR processes already established in law. If you would like for us to attempt to identify some of those, please let me know.

Thank you for your evaluation and consideration of these efforts to date, Senator.

cc: Commissioners, Governor's Administrative Procedure Act Review Commission

Appendix U

Bid Protests Memorandum