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## Administrative Law

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## Administrative Law

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*The authors discuss recent developments in the field of administrative law in Florida. They discuss the constitutional and legal limitations imposed on the Florida legislature, administrative agencies and judiciary when involved in the administrative process. They then analyze the recent trend towards consolidation of proceedings among agencies and conclude that, if the trend is to gain any momentum, the legislature must redraft the regulatory schemes.*

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### I. INTRODUCTION

The growing complexity of modern society and the attendant proliferation of diverse interest groups pressing for regulatory legislation to protect specific interests, has prompted a continued increase in the number and variety of administrative agencies.<sup>1</sup> Developed to interpret and apply general laws,<sup>2</sup> administrative agencies provide the requisite attention to detail, the case by case balancing of interests and the sensitivity to changing conditions which cannot be translated into specific legislative pronouncements.<sup>3</sup> As the

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1. See, e.g., Fleming, *Environmental Litigation: An Analysis of Basic Strategies, Procedures, Substantive Rights and Their Effects*, 9 ST. MARY'S L.J. 749, 750 (1978).

2. See *State v. Cumming*, 365 So. 2d 153, 155 (Fla. 1978).

3. This has long been recognized by the Florida courts. See, e.g., *South Atlantic S.S.*

clamor for legislative solutions to social problems has spawned a plethora of administrative agencies, the field of administrative law has become an increasingly important part of the practice of law.<sup>4</sup> In the State of Florida, the Administrative Procedure Act<sup>5</sup> (APA) establishes the basic procedural framework for administrative agencies,<sup>6</sup> to ensure that adjudicative procedures of agencies operate uniformly,<sup>7</sup> and to protect the due process rights of all individuals affected by agency action.<sup>8</sup>

This comment will highlight the developments in Florida administrative law in 1977 and 1978. It will cover the limitations on the legislature when creating the agencies,<sup>9</sup> the limitations on the agencies when exercising their powers<sup>10</sup> and the limitations on the judiciary when reviewing administrative action.<sup>11</sup> The comment will also analyze specific amendments to the APA<sup>12</sup> and the future direction of administrative law.<sup>13</sup>

## II. LIMITATIONS ON THE LEGISLATURE

The principal limitation on the legislature when creating or empowering agencies is the constitutional doctrine of delegation of powers. The general rule for determining an unlawful delegation is as follows:

"When the statute is couched in vague and uncertain terms or is so broad in scope that no one can say with certainty, from the terms of the law itself, what would be deemed an infringement of the law, it must be held unconstitutional as attempting

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Co. v. Tutson, 139 Fla. 405, 418, 190 So. 675, 680 (1939). See also State v. Cumming, 365 So. 2d 153, 155 (Fla. 1978).

4. As administrative agencies multiply and expand, private interests become subject to governmental control. The heightened regulation of private interests has increasingly been contested. Indicative of this trend is the fact that the number of appeals reaching the federal courts from agencies increased from 1,522 in 1970 to 2,205 in 1974. K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 1.04, at 10 (1976).

5. FLA. STAT. §§ 120.50-.73 (1977 & Supp. 1978).

6. *Id.* at § 120.72(1)(a) (Supp. 1978) (legislative intent to create uniform administrative procedures and to supplant all other such acts). In fact, the Florida APA is being considered as a model for the revision of the Federal Administrative Procedure Act. Miami Herald, Nov. 7, 1978, § A, at 9, col. 1.

7. Chung-Ling Yu v. Criser, 330 So. 2d 198, 201 (Fla. 1st DCA 1976).

8. See, e.g., FLA. STAT. §§ 120.54, .57, .68 (Supp. 1978) (establishing procedures for rulemaking, adjudicative hearings and judicial review).

9. See notes 14-33 and accompanying text *infra*.

10. See notes 34-69 and accompanying text *infra*.

11. See notes 70-121 and accompanying text *infra*.

12. See notes 122-62 and accompanying text *infra*.

13. See notes 163-77 and accompanying text *infra*.

to grant to the administrative body the power to say *what the law shall be*."<sup>14</sup>

Thus, it is essential that the delegating act limit the agency's discretion in exercising power and guide the agency in implementing policy.<sup>15</sup>

The Supreme Court of Florida applied this standard when it held section 112.313(2)(a) of the Florida Statutes (1975) an unconstitutional delegation of legislative authority to the Commission on Ethics.<sup>16</sup> The statute in question made it illegal for any public official to accept any gift which "would cause a reasonably prudent person to be influenced in the discharge of official duties."<sup>17</sup> Although recognizing that vagueness in a statute could be cured if the terms used had acquired a sufficiently well-established meaning in trade usage, in the common law or in federal law, the court held that the reasonably prudent man test had not acquired a specific meaning.<sup>18</sup> Consequently, because section 112.322(2)(a)<sup>19</sup> permitted the Commission on Ethics to render advisory opinions on the legality of proposed actions, section 112.313(2)(a) was an unconstitutional delegation of the legislative power.

It is well established that a court may examine statutory sections related to those contested to determine if those contested are unconstitutionally vague. For instance, in *City of Belle Glade v. Florida East Coast Railway*,<sup>20</sup> the District Court of Appeal, Fourth District, upheld a statute<sup>21</sup> which required the city to apply to the Department of Transportation for a permit prior to constructing a crossing over the railroad's right-of-way. In upholding the validity of the statute, the court looked to other sections of the Florida Statutes<sup>22</sup> to provide guidelines and limitations on the Department of Transportation in the issuance of the permits.<sup>23</sup>

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14. *D'Alemberte v. Anderson*, 349 So. 2d 164, 169 (Fla. 1977) (quoting *Conner v. Joe Hatton, Inc.*, 216 So. 2d 209, 211 (Fla. 1968) (emphasis in original) (citations omitted)).

15. *Delta Truck Brokers, Inc. v. King*, 142 So. 2d 273, 275 (Fla. 1962). The Supreme Court of Florida has stated that the delegation doctrine is constitutionally mandated by FLA. CONST. art. II, § 3, which states that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." *Askew v. Cross Key Waterways*, 372 So. 2d 913, 918 (Fla. 1978).

16. 349 So. 2d at 169.

17. FLA. STAT. § 112.313(2)(a) (1975).

18. 349 So. 2d at 168.

19. FLA. STAT. § 112.322(2)(a) (1975) (current version at *id.* (1977)).

20. 344 So. 2d 873 (Fla. 4th DCA 1977).

21. FLA. STAT. § 338.21 (1973) (current version at *id.* (Supp. 1978)).

22. *Id.* § 334.02 (legislative intent).

23. 344 So. 2d at 875.

Another restriction on agency discretion which might serve to validate an otherwise invalid delegation of power, derives from the procedural safeguards contained in the APA. In *Albrecht v. Department of Environmental Regulation*,<sup>24</sup> the petitioners challenged the validity of section 253.124(2)<sup>25</sup> on the basis that the phrase "to such an extent as to be contrary to the public interest" was not sufficiently specific to provide adequate standards for administrative decisionmaking.<sup>26</sup> In addition to certain criteria enumerated in the statute, the court relied on the APA and its "significant procedural safeguards which serve to restrict [the Department of Environmental Regulation's] discretion in considering permit applications,"<sup>27</sup> to uphold the validity of the statute. The court concluded that the APA's "procedural safeguards [had] lessened the need for strict statutory standards in the delegation of power to administrative agencies."<sup>28</sup>

In *Askew v. Cross Key Waterways*,<sup>29</sup> however, the Supreme Court of Florida rejected the argument that the procedural safeguards contained in the APA will by themselves cure an unconstitutional delegation of power. Section 380.05(1)(a) of the Florida Statutes<sup>30</sup> authorized the Division of State Planning to recommend the designation of certain areas as "areas of critical state concern" to the Administration Commission. Although noting that the specificity of the guidelines may depend on the subject matter and its susceptibility to articulation of finite standards, the court held the statute unconstitutional because the standards provided<sup>31</sup> "reposited in the Administration Commission the fundamental legislative task of determining which geographic areas and resources are in greatest need of protection."<sup>32</sup> Thus, the statute was unconsti-

24. 353 So. 2d 883 (Fla. 1st DCA 1977).

25. FLA. STAT. § 253.124(2) (1975) (establishes procedure for approval of fill permits).

26. 353 So. 2d at 885.

27. *Id.* at 886.

28. *Id.* at 887.

29. 372 So. 2d 913 (Fla. 1978).

30. FLA. STAT. § 380.05(1)(a) (1975).

31. (2) An area of critical state concern may be designated only for:

(a) An area containing, or having a significant impact upon, environmental, historical, natural, or archaeological resources of regional or statewide importance.

(b) An area significantly affected by, or having a significant effect upon, an existing or proposed major public facility or other area of major public investment.

(c) A proposed area of major development potential, which may include a proposed site of a new community, designated in a state land development plan.

*Id.* § 380.05(2).

32. 372 So. 2d at 919. The court concluded the opinion by suggesting two alternative

tutional because it relegated a primary policy decision to the administrative agency. Moreover, the court in *Askew* specifically rejected the argument that the procedural safeguards alone would cure an otherwise invalid delegation, because article II, section 3, of the Constitution of the State of Florida mandated the delegation doctrine.<sup>33</sup>

### III. ADJUDICATION VERSUS RULEMAKING: THE PARAMETERS OF AGENCY DECISIONMAKING

In implementing their decisions, administrative agencies may choose one of two methods: (1) they may promulgate rules and regulations which establish standards to be followed by all; or (2) they may seek to compel an individual to conform to a specific standard through an adjudicative hearing. The APA prescribes the procedures to be followed by the agency in each case.<sup>34</sup> Each procedure has advantages and disadvantages. Once an agency has expressed its policy in a valid rule, the agency does not have to defend its policy every time it seeks compliance; it merely invokes the rule.<sup>35</sup> Once a rule is promulgated, however, the agency has little discretion over the future application of that rule. On the other hand, adjudicative proceedings provide the agency with greater flexibility in the implementation of policy.<sup>36</sup>

Although there is no similar requirement in the federal system,<sup>37</sup> the Florida courts have required that particular agency decisions be implemented via the rulemaking proceedings rather than by adjudicative hearings.<sup>38</sup> This has been achieved by analyzing the agency decision to determine whether it falls within the statutory

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statutory schemes which would pass constitutional muster. The first scheme would require the legislature to choose the areas in advance, as was done with the Big Cypress area in FLA. STAT. § 380.055 (1977). Alternatively, the legislature could adopt a procedure which would involve legislative ratification of administratively developed recommendations, a scheme approved of in *CEEED v. California Coastal Zone Conservation Comm'n*, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (Ct. App. 1974). 372 So. 2d at 920.

33. 372 So. 2d at 924. For the text of FLA. CONST. art. II, § 3, see note 15 *supra*.

34. The procedures for rulemaking are established in FLA. STAT. § 120.54 (Supp. 1978); those for adjudicative hearings are established in *id.* § 120.57.

35. *Department of Admin. v. Harvey*, 356 So. 2d 323, 326-27 (Fla. 1st DCA 1977).

36. For a discussion of the necessary balance between the need for agency compliance with its own rules and the need for flexibility to operate by use of adjudicative hearings to impose agency policy in specific cases, see *McDonald v. Department of Banking & Fin.*, 346 So. 2d 569, 580-82 (Fla. 1st DCA 1977).

37. *SEC v. Chenery Corp.*, 332 U.S. 194, 201-02 (1946) (no requirement that federal agencies use rulemaking procedures in some instances and adjudication in others).

38. *E.g.*, *Price Wise Buying Group v. Nuzum*, 343 So. 2d 115 (Fla. 1st DCA 1977).

definition of "rule"<sup>39</sup> and, if so, requiring that those decisions be implemented through section 120.54<sup>40</sup> proceedings.

As can be expected, the definition of "rule" has been the subject of much recent litigation. In *Price Wise Buying Group v. Nuzum*,<sup>41</sup> the Director of the Division of Beverages issued a declaratory statement rescinding a memorandum issued by the former director which had "represented the [division's] official position regarding the extension of credit to vendors and ha[d] been relied upon by the members of the alcoholic beverage industry in Florida."<sup>42</sup> The court held that the declaratory statement was a rule because it was an agency statement of general applicability which implemented, interpreted, or prescribed law or policy.

A finding that an agency statement is a rule is significant, because a hearing officer of the Department of Administrative Hearings has the authority to declare an agency decision invalid if it is premised on an invalidly promulgated rule.<sup>43</sup> In *Department of*

39. (14) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

(b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

(c) The preparation or modification of:

1. Agency budgets.
2. Contractual provisions reached as a result of collective bargaining.
3. Agricultural marketing orders under chapter 573 or chapter 601.
4. Curricula by an educational unit.

(d) Agency action which has the effect of altering established hunting or fishing seasons when such action is adequately noticed in the area affected through publishing in a newspaper of general circulation or through notice by broadcasting in an electronic media [sic].

FLA. STAT. § 120.52(14) (Supp. 1978).

40. *Id.* § 120.54.

41. 343 So. 2d 115 (Fla. 1st DCA 1977).

42. *Id.* at 115.

43. In contrast, administrative hearing officers generally do not have the authority to determine the constitutionality of statutes as this is considered to be an intrinsically judicial function. *State ex rel. Atlantic Coast Line R.R. v. State Bd. of Equalizers*, 84 Fla. 592, 94 So. 681 (1922). For a discussion of the line of demarcation between judicial and administrative authority, see notes 70-109 and accompanying text *infra*. See also Swan, *Administrative Adjudication of Constitutional Questions: Confusion in Florida Law and a Dying Misconception in Federal Law*, 33 U. MIAMI L. REV. 527 (1979).

*Administration v. Stevens*,<sup>44</sup> Dr. Stevens, who had been laid off, petitioned the Division of Administrative Hearings to declare invalid a directive of the Department of Health and Rehabilitative Services (HRS) and certain guidelines issued by the Department of Administration (DOA). These guidelines and directives provided "that when a lay-off [of an HRS employee] is to be made, an employee with greater [*sic*] retention points can 'bump' or usurp the job of another employee in the same class."<sup>45</sup> The hearing officer found that the contested pronouncements were rules which had not been adopted pursuant to the APA and, consequently, were invalid. The DOA and HRS appealed, contending that the hearing officer did not have the authority to declare that the HRS directive and the DOA guidelines were invalidly adopted rules because such a determination involved the exercise of judicial power.

Rejecting that argument, the District Court of Appeal, First District, held that section 120.56<sup>46</sup> empowered the hearing officer to make such a determination. The court premised its holding on the basis that the hearing officer was exercising a validly delegated quasi-judicial power expressly authorized by article V, section 1 of the Constitution of the State of Florida.<sup>47</sup> The court further held that the statements in question were rules, because they purported "to create certain rights and adversely affect others."<sup>48</sup>

Given this interpretation of "rule," few agency pronouncements, scrutinized closely, could avoid falling within the statutory definition. Recognizing in this view a potentially chilling effect on agencies' development of policy, the First District established guidelines for invalidating an agency's action for failure to promulgate rules properly, in *McDonald v. Department of Banking & Finance*.<sup>49</sup> In *McDonald*, the Comptroller of the Department of

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44. 344 So. 2d 290 (Fla. 1st DCA 1977).

45. *Id.* at 291.

46. FLA. STAT. § 120.56(1) (1975) (current version at *id.* (Supp. 1978)), which provides: "(1) Any person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground:

(a) That the rule is an invalid exercise of validly delegated legislative authority.

(b) That the rule is an exercise of invalidly delegated legislative authority."

Section 120.56(1) was amended by 1976 Fla. Laws, ch. 76-131, § 6, to read as follows:

"(1) Any person substantially affected by a rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." *Id.* (Supp. 1978). This amendment withdraws any authority on the part of the hearing officer to determine the validity of a statute delegating authority to the agency.

47. 344 So. 2d at 291-92.

48. *Id.* at 296.

49. 346 So. 2d 569 (Fla. 1st DCA 1977).



Banking and Finance denied an application for a bank charter, rejecting the hearing officer's findings of fact under the statutory guidelines,<sup>50</sup> without offering any evidence to contradict those findings or explaining deviations from prior practices.<sup>51</sup> The court reversed the agency,<sup>52</sup> refusing to impose upon all statements of policy the procedural requirements for rulemaking.

Although adopting the definition of "rule" given in *Stevens*<sup>53</sup> (a policy statement of general applicability which by its own effect creates rights or requires compliance), the court's opinion allowed for the possibility of refining policy through adjudication of individual cases.<sup>54</sup> The court did uphold the imposition of rulemaking procedures in many cases, arguing that although not required explicitly by the APA, the rulemaking procedures would atrophy unless the court required their use in certain instances.<sup>55</sup> But since it recognized that not all agency statements of general policy are invalid because not expressed in a rule, the court analyzed the APA to determine which agency decisions are void as improperly promulgated rules.<sup>56</sup> The court noted that the APA requires an agency to

50. FLA. STAT. § 659.03(2) (1975) (repealed by 1976 Fla. Laws, ch. 76-168, § 3, effective July 1, 1980), provides the following criteria:

(2) The department shall approve or disapprove the application, in its discretion, but it shall not approve such application until, in its opinion:

(a) Public convenience and advantage will be promoted by the establishment of the proposed bank or trust company.

(b) Local conditions assure reasonable promise of successful operation for the proposed bank or the principal office of the proposed trust company and those banks or trust companies already established in the community.

(c) The proposed capital structure is adequate.

(d) The proposed officers and directors have sufficient banking or trust experience, ability and standing to assure reasonable promise of successful operation.

(e) The name of the proposed bank or trust company is not so similar as to cause confusion with the name of an existing bank.

(f) Provision has been made for suitable banking house quarters in the area specified in the application.

An agency may reject the hearing officer's findings only if they were not supported by competent substantial evidence or if the proceedings did not comply with the essential requirements of the law. FLA. STAT. § 120.57(1)(b)(9) (Supp. 1978). A court may reverse an agency determination only if it is not supported by competent substantial evidence. *Id.* § 120.68(10). Thus, a court may face a conflict between the hearing officer's findings and the agency's determination, each due the same deference. For a discussion of how the District Court of Appeal, First District, resolved this dilemma, see notes 110-121 and accompanying text *infra*.

51. 346 So. 2d at 584-86.

52. FLA. STAT. § 120.68(11) (Supp. 1976) (permitting remands to the agency).

53. Compare *McDonald*, 346 So. 2d at 581 with *Stevens*, 344 So. 2d at 296.

54. 346 So. 2d at 580-81.

55. *Id.* at 580.

56. *Id.* at 582-83.

adopt procedures for the presentation of policy at agency hearings.<sup>57</sup> Analogously, an agency must entertain challenges to policy in informal proceedings.<sup>58</sup> Moreover, in its final orders, an agency must describe its policy with sufficient specificity to permit judicial review<sup>59</sup> and must explain and justify any deviation from an existing rule.<sup>60</sup>

Thus, the First District concluded that policy not yet expressed through rules may be presented in adjudicative hearings.<sup>61</sup> Such policy, however, must be subject to challenge at hearings and be established by evidence. Because validly promulgated rules eliminate the need for debate of policy at hearings, the agency has an incentive to utilize the rulemaking procedures.<sup>62</sup> Consequently, because the department in this case had neither promulgated a rule nor proven wrong the conclusions of the hearing officer, the agency's order was vacated and the case remanded.<sup>63</sup>

The ability to establish policy at hearings can be a two-edged weapon. For example, in *Department of Administration v. Harvey*,<sup>64</sup> a rejected applicant for a state job petitioned the Division of Administrative Hearings for a declaration that the minimum training and experience requirements of the Division of Personnel were actually invalidly adopted rules. The division petitioned for judicial review of the hearing officer's determination that the requirements were rules which had not been adopted pursuant to the APA's rulemaking procedures. Despite the division's argument that to require section 120.54<sup>65</sup> proceedings would be unduly burdensome,<sup>66</sup> the First District affirmed the hearing officer, reasoning that it would be much more burdensome for the agency to have to prove the validity of its requirements at a hearing requested by a rejected applicant.<sup>67</sup>

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57. FLA. STAT. § 120.53(1)(c) (Supp. 1976).

58. *Id.* § 120.57(2)(a)(1)-(2).

59. *Id.* § 120.68(7).

60. *Id.* § 120.68(12)(b).

61. 346 So. 2d at 582.

62. *Id.* at 583.

63. *Id.* at 586.

64. 356 So. 2d 323 (Fla. 1st DCA 1977).

65. FLA. STAT. § 120.54 (Supp. 1976) (current version at *id.* (Supp. 1978)).

66. There were approximately 2,900 job classifications with specifications for each class. During the fiscal year 1975-76, 347 new classes were established, 106 classes were abolished and 455 classes were revised. 356 So. 2d at 327 (McCord, C.J., dissenting).

67. 356 So. 2d at 326.

#### IV. THE PARAMETERS OF JUDICIAL REVIEW

##### A. *Constitutional Issues*

Although the APA provides for judicial review of "final agency action,"<sup>68</sup> the actual parameters of judicial intervention in the administrative process have been the subject of much recent litigation. Thus, it is well established that an administrative officer cannot resolve a constitutional attack on a statute or rule, for that would usurp the judicial power.<sup>69</sup> A hearing officer, however, may determine whether a rule has been validly adopted.<sup>70</sup> Moreover, the District Court of Appeal, First District, has held that a hearing officer of the Department of Administrative Hearings has the authority to pass upon the constitutionality of a proposed rule.<sup>71</sup> Thus, the prevailing rule is that while administrative officers may pass upon the constitutionality of proposed rules, the determination of the constitutionality of statutes and validly adopted rules is a uniquely judicial function which is exclusively vested in the courts.<sup>72</sup>

##### B. *Collateral Review by Circuit Courts*

The APA vests all judicial power of direct review<sup>73</sup> in the district courts of appeal, except for those matters for which judicial review by the Supreme Court of Florida is provided by law.<sup>74</sup> Although

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68. FLA. STAT. § 120.68(1) (Supp. 1978).

Because "final agency action" is the primary jurisdictional requirement for judicial review under the APA, the definition of the term has been the subject of much litigation. For example, a hearing officer's determination of the validity or invalidity of a proposed rule constitutes final agency action which is reviewable in the district court of appeal. 4245 Corp., *Mother's Lounge v. Division of Beverage*, 348 So. 2d 934, 936 (Fla. 1st DCA 1977). Final agency action also exists when the rules are filed with the Department of State. *Florida Admin. Comm'n v. District Court of Appeal*, 351 So. 2d 712, 714 (Fla. 1977).

69. *State ex rel. Atlanta Coast Line R.R. v. State Bd. of Equalizers*, 84 Fla. 592, 94 So. 681 (1922).

70. *Department of Admin. v. Stevens*, 344 So. 2d 290 (Fla. 1st DCA 1977). For a more detailed discussion of this case, see notes 44-48 and accompanying text *supra*.

71. *Department of Environ. Reg. v. Leon County*, 344 So. 2d 297 (Fla. 1st DCA 1977). The court reaffirmed the general rule that determining the constitutionality of statutes and adopted rules is an exercise of the judicial power which is vested only in the courts. To reach the holding that an administrative agency may pass on the constitutionality of a proposed rule, the court compared such action to a legislature's or legislative committee's not enacting or reporting favorably upon legislation considered unconstitutional. The First District argued that the process of reviewing the constitutionality of proposed legislation or proposed rules does not usurp the judicial function, but checks the power of the decisional body. Moreover, the hearing officer's determinations are subject to judicial review. *Id.* at 298-99.

72. This position has been recently criticized. See Swan, *supra* note 43, *passim*.

73. In this context, direct review is the term used to signify judicial review after final agency action as provided in FLA. STAT. § 120.68(1) (Supp. 1978).

74. FLA. STAT. § 120.68(2) (Supp. 1978).

section 120.72(1) purports to make exclusive the judicial remedies provided by the act,<sup>75</sup> the APA was amended in 1975 to provide that no section in the APA is intended to divest the circuit courts of their power to render declaratory judgments.<sup>76</sup> Similarly, the APA cannot limit the constitutional powers of the circuit court<sup>77</sup> to issue injunctions and extraordinary writs.<sup>78</sup> Thus, despite the legislature's having granted the district courts of appeal the power of direct review of administrative action, collateral review by the circuit courts continues pursuant to their traditional equitable powers.<sup>79</sup>

The general rule, however, is that judicial review of administrative actions may not be had until the aggrieved party has exhausted his administrative remedies.<sup>80</sup> The companion doctrines of exhaustion of remedies and primary jurisdiction<sup>81</sup> are not statutorily created or constitutionally mandated jurisdictional limitations, but judicially imposed restrictions on the power of a court to delineate the interface between the spheres of judicial and administrative action.<sup>82</sup> The Supreme Court of Florida recently noted that "[t]he determination of whether the circumstances of a particular controversy warrant judicial intervention . . . is ultimately one of policy rather than power."<sup>83</sup> The supreme court concluded that "as a general proposition, the circuit court should refrain from entertaining declaratory suits except in the most extraordinary cases, where the party seeking to bypass usual administrative channels can demonstrate that no adequate remedy remains available"<sup>84</sup> under the APA. The extent of the circuit courts' authority to interfere in the administrative process remains a heavily litigated area.

Thus far, the exhaustion of remedies doctrine has been a diffi-

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75. *Id.* § 120.72(1)(a).

76. 1975 Fla. Laws, ch. 75-191, § 11 (codified at FLA. STAT. § 120.73 (Supp. 1978)).

77. FLA. CONST. art. V, §§ 5(b), 20(c)(3).

78. *State ex rel. Dep't of Gen. Servs. v. Willis*, 344 So. 2d 580, 589 (Fla. 1st DCA 1977).

79. *Id.*

80. *Id.*

81. The doctrine of exhaustion of remedies applies where a claim is cognizable in the first instance only by an administrative agency; judicial interference is withheld until the administrative process has run its course. Primary jurisdiction, on the other hand, applies where a claim is initially cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. In such a case, the judicial process is suspended, pending referral of such issues to the administrative agency for determination. *United States v. Western Pac. R.R.*, 352 U.S. 59 (1956), *quoted with approval in State ex rel. Shevin v. Tampa Elec. Co.*, 291 So. 2d 45, 46-47 (Fla. 2d DCA 1974).

82. 344 So. 2d at 589 (quoting 2 F. COOPER, STATE ADMINISTRATIVE LAW 573 (1965)).

83. *Gulf Pines Memorial Park, Inc. v. Oakland Memorial Park, Inc.*, 361 So. 2d 695, 699 (Fla. 1978).

84. *Id.*

cult obstacle to hurdle in any attempt to invoke circuit court jurisdiction. In *State ex rel. Department of General Services v. Willis*,<sup>85</sup> a general contractor sought an injunction from the circuit court to restrain the Department of General Services from engaging in various bidding practices which he alleged were illegal.<sup>86</sup> The department moved to dismiss for lack of jurisdiction and failure to state a cause of action. The circuit court denied the motion, and the department brought an original proceeding in prohibition in the District Court of Appeal, First District, to prohibit the circuit court from assuming jurisdiction.<sup>87</sup> Granting the writ of prohibition, the court argued that the contractor had failed to exhaust his administrative remedies in not having requested a section 120.57<sup>88</sup> hearing; consequently, the circuit court could not assert jurisdiction.<sup>89</sup> The court left open the door for the assertion of the circuit courts' equitable jurisdiction if the agency error was "so egregious or devastating that the promised administrative remedy [would be] too little or too late."<sup>90</sup>

Similarly, in *School Board v. Mitchell*,<sup>91</sup> the First District precluded a state employee from seeking a declaratory judgment in circuit court.<sup>92</sup> When the employee's position was eliminated pursuant to a reorganization plan adopted by the school board, she petitioned the circuit court for a declaratory judgment as to her rights under her contract and under the statutory scheme which regulates school system personnel.<sup>93</sup> Reversing the circuit court's assertion of jurisdiction, the First District held that a court could

85. 344 So. 2d 580 (Fla. 1st DCA 1977).

86. The contractor alleged, *inter alia*, that the department had failed to require that the contract be awarded to the lowest bidder, failed to prepare architectural drawings and specifications, used "closed" specifications so that only particular manufacturers could bid, and failed to obtain the approval of the Division of Building Construction and Property Management Maintenance. *Id.* at 584 n.1.

87. *Id.* at 584.

88. FLA. STAT. § 120.57 (1975) (current version at *id.* (Supp. 1978)). The court noted that the legislature had conspicuously omitted from § 120.57 the sentence: "Failure to proceed under this section shall not constitute failure to exhaust administrative remedies." Since this provision was included in *id.* §§ 120.54(4)(d), .56(4) (current versions at *id.* §§ 120.54(4)(d), .56(5) (Supp. 1978)), the court concluded that the legislative intent was that parties should exhaust their available administrative remedies before seeking judicial review. 344 So. 2d at 591.

89. 344 So. 2d at 591-92.

90. *Id.* at 590 (dictum).

91. 346 So. 2d 562 (Fla. 1st DCA 1977).

92. In addition to the declaratory action, the employee had sought judicial review of an agency rule in the District Court of Appeal, First District. That action was stayed pending the outcome of the declaratory action. *Id.* at 563.

93. FLA. STAT. §§ 231.02-.611 (1975) (current version at *id.* (1977 & Supp. 1978)).

not assert subject matter jurisdiction over a petition for declaratory judgment where the petitioner had failed to exhaust her administrative remedies,<sup>94</sup> absent an egregious or devastating agency error which would render the administrative remedy ineffectual.<sup>95</sup>

In a third case, *Carrollwood State Bank v. Lewis*,<sup>96</sup> a state bank had petitioned the circuit court for declaratory and injunctive relief because the administrative agency had not recognized the bank's substantial interest in the matter and refused to afford it a hearing.<sup>97</sup> The First District affirmed the dismissal for lack of subject matter jurisdiction, because the complaint did not allege that any statute or rule was unconstitutional or that the administrative remedies were inadequate.<sup>98</sup> In *Department of Health & Rehabilitative Services v. Artis*,<sup>99</sup> the District Court of Appeal, Fourth District, held that temporary loss of income is not sufficiently irreparable harm to justify assertion of the circuit court's equitable jurisdiction to interfere with the administrative process. Similarly, the Fourth District has also held that a school board's decision to establish boundary lines which were not acceptable to some parents was not so egregious or devastating as to justify the assertion of circuit court jurisdiction.<sup>100</sup>

One notable exception to the exhaustion of remedies doctrine has been recognized when the pleadings reveal a constitutional challenge to the facial validity or application of a statute, rule or regulation. The Supreme Court of Florida utilized this rationale to uphold the assertion of circuit court jurisdiction in an action which challenged the facial validity of a tax statute.<sup>101</sup> More recently, in *Gulf*

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94. The petitioner had failed to request a hearing pursuant to FLA. STAT. § 120.57 (1975) (current version at *id.* (Supp. 1978)). 346 So. 2d at 567. The court argued by analogy to the traditional view of circuit courts' subject matter jurisdiction, which would not be asserted if litigation on the same issue was proceeding in another tribunal or if a special tribunal had been established to decide the specific controversy. *Id.* at 564.

95. *Id.* at 568.

96. 362 So. 2d 110 (Fla. 1st DCA 1978).

97. The Department of Banking and Finance had approved the location of a competing branch bank across the street from the Carrollwood State Bank. Upon learning of the approval, Carrollwood State Bank twice petitioned the department for administrative hearings. Both requests were denied, the department alleging that the bank was not a person whose substantial interests were determined by the agency. Carrollwood State Bank requested a formal order denying its request for administrative hearings, but never received one. *Id.* at 112. The court stated that the department's position was untenable. *Id.* at 113.

98. *Id.* at 116.

99. 345 So. 2d 1109, 1111 (Fla. 4th DCA 1977).

100. *School Bd. v. Constant*, 363 So. 2d 859 (Fla. 4th DCA 1978).

101. *Department of Revenue v. Amrep Corp.*, 358 So. 2d 1343, 1349 (Fla. 1978) (alternative holding). The plaintiffs challenged the validity of FLA. STAT. § 199.023(7) (1977) on the basis that the exemption it provided for intercompany accounts receivable of affiliated groups

*Pines Memorial Park, Inc. v. Oaklawn Memorial Park, Inc.*,<sup>102</sup> the supreme court noted that since an administrative hearing officer lacks the authority to consider the constitutional challenges raised by the complaint, it would be pointless to require exhaustion of administrative remedies.<sup>103</sup> Although the court stated that the APA did not displace circuit court jurisdiction to enjoin enforcement of facially unconstitutional agency rules or, by implication, statutes, the court did sound one caveat: The mere assertion of a constitutional issue does not automatically entitle a party to circumvent the administrative remedies.<sup>104</sup> Thus, in *State ex rel. Florida State Board of Nursing v. Santora*,<sup>105</sup> the District Court of Appeal, First District, held that absent a "clear and positive statement"<sup>106</sup> of the constitutional challenge in the complaint, the circuit court must dismiss for lack of subject matter jurisdiction. The District Court of Appeal, Third District, however, has relaxed the clear and positive statement requirement by holding that the plaintiff should have been granted the opportunity to amend his complaint before dismissing it with prejudice.<sup>107</sup>

### C. Standard of Review in the District Courts of Appeal

In *McDonald v. Department of Banking & Finance*,<sup>108</sup> the District Court of Appeal, First District, addressed the issue of what is the appropriate standard of review to apply to an agency rejection of a hearing officer's findings premised on a lack of competent substantial evidence.<sup>109</sup> McDonald applied to the Department of Banking and Finance for permission to open and operate a bank and was conditionally granted authority. Subsequently, the Comptroller revoked the conditional approval and denied the application. McDon-

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constituted a violation of equal protection. 358 So. 2d at 1345. The court upheld the assertion of jurisdiction for two reasons: (1) FLA. STAT. § 26.012(2)(e) (1975) grants exclusive jurisdiction to the circuit courts "[i]n all cases involving legality of any tax assessment or toll;" and (2) the complaint challenged the constitutional validity of the statutes. 358 So. 2d at 1348-49.

102. 361 So. 2d 695 (Fla. 1978).

103. *Id.* at 699 (citing *Department of Revenue v. Young Am. Builders*, 330 So. 2d 864 (Fla. 1st DCA 1976)).

104. *Id.* In the instant case, the constitutional challenge was to the very statute which the administrative agency was attempting to apply. *Id.* at 697-98.

105. 362 So. 2d 116 (Fla. 1st DCA 1978).

106. *Id.* at 117.

107. *Metropolitan Dade County v. Department of Commerce*, 365 So. 2d 432, 434-35 (Fla. 3d DCA 1978).

108. 346 So. 2d 569, 578-79 (Fla. 1st DCA 1977).

109. For a discussion of the other issues in this case, see notes 49-65 and accompanying text *supra*.

ald then requested a section 120.57<sup>110</sup> hearing. The hearing officer, applying to his findings the criteria established in section 659.03(1),<sup>111</sup> recommended that the charter be granted. But the department entered a final order rejecting the hearing officer's findings of fact as not based on competent substantial evidence and denied the application.<sup>112</sup>

When reviewing the decision of a hearing officer, an agency must accord his findings of fact due deference and may not reject them unless they were not based on competent substantial evidence or the proceedings did not comply with the essential requirements of law.<sup>113</sup> Similarly, a reviewing court must sustain an agency's findings of fact unless they were not based on substantial competent evidence.<sup>114</sup> Thus, a district court reviewing an agency's rejection of a hearing officer's findings of fact is placed in a dilemma: How can a court accord the same respect to both the agency's and the hearing officer's contradictory findings of fact?<sup>115</sup>

To resolve the issue, the District Court of Appeal, First District, adopted the analysis of *Universal Camera Corp. v. NLRB*.<sup>116</sup> Stating that the hearing officer's findings are part of the record,<sup>117</sup> the court held that a reviewing court should accord them as much probative force as they intrinsically command.<sup>118</sup> Thus, "when the question is

110. FLA. STAT. § 120.57 (Supp. 1976) (current version at *id.* § 120.57 (Supp. 1978)).

111. *Id.* § 659.03(1) (1975) (repealed by 1976 Fla. Laws, ch. 76-168, § 3(2)(t), effective July 1, 1980) provides as follows:

(1) Upon the filing of an application, the department shall make an investigation of:

(a) The character, reputation, financial standing and motives of the organizers, incorporators and subscribers in organizing the proposed bank or trust company.

(b) The need for banking or trust facilities or additional banking or trust facilities, as the case may be, in the community where the proposed bank or the principal office of the proposed trust company is to be located, giving particular consideration to the adequacy of existing banking or trust facilities and the need for further banking or trust facilities in the locality.

(c) The present and future ability of the community to support the proposed bank or the principal office of the proposed trust company and all other existing banking or trust facilities in the community.

(d) The character, financial responsibility, banking experience, and business qualifications of the proposed officers.

(e) The character, financial responsibility, business experience, and standing of the proposed stockholders and directors.

112. 346 So. 2d at 575-77.

113. 346 So. 2d at 578; FLA. STAT. § 120.57(1)(b)(9) (Supp. 1978).

114. 346 So. 2d at 578; FLA. STAT. § 120.68(10) (Supp. 1978).

115. 346 So. 2d at 578.

116. 340 U.S. 474 (1951), *cited in McDonald*, 346 So. 2d at 578-79.

117. 346 So. 2d at 579; FLA. STAT. §§ 120.57(1)(b)(5)(f), .68(5)(a) (1975).

118. 346 So. 2d at 579.



simply the weight or credibility of testimony by witnesses, or when the factual issues are otherwise susceptible of ordinary methods of proof, or when concerning those facts the agency may not rightfully claim special insight,"<sup>119</sup> the reviewing court will accord greater probative force to the hearing officer's findings. Conversely, greater weight will attach to the agency's findings if the contested issue is founded upon matters of policy over which the agency has special responsibility.

#### D. Appellate Procedure

The Supreme Court of Florida has the power, granted by the Constitution of the State of Florida, to adopt and amend the Florida Rules of Appellate Procedure.<sup>120</sup> Exercising this power, the court amended the Florida Appellate Rules so that, effective March 1, 1978, a new procedure became effective for commencing judicial review of final agency action pursuant to section 120.68 of the Florida Statutes (Supp. 1978).<sup>121</sup> The commentary to this revision confirms that the court was not attempting to propose rules which conflict with the APA.<sup>122</sup> Nevertheless, the new rules do have an important effect upon the filing of a request for appellate review under the APA. Rather than using a petition for review, as would be required by the language of section 120.68(2), the new rules eliminate the use of the petition. Instead, a simple notice of appeal is filed.<sup>123</sup> The committee notes state that the notice is to: "constitute the petition required in Section 120.68(2), Florida Statutes (Supp. 1976). There is no conflict with the statute since the substance of the review proceeding remains controlled by the statute and the Legislature directed review be pursuant to the procedures set forth in these rules."<sup>124</sup>

#### V. RECENT AMENDMENTS TO THE APA

Notwithstanding the role of the judiciary in developing limitations on the legislature, the legislature's role in administrative law remains important. That role consists of not only creating laws but also monitoring and changing these laws by new legislation. Thus, the legislative process itself provides an alternative forum for re-

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119. *Id.*

120. FLA. CONST. art. V, § 2(a).

121. *In re Proposed Florida Appellate Rules*, 351 So. 2d 981, 993-95 (Fla. 1977).

122. *See id.* at 996.

123. FLA. R. APP. P. 9.110(b).

124. 351 So. 2d at 994.

view. This holds significance not only in affecting judicial decisions but also in producing new procedural and substantive developments of the APA.

For example, several definitional changes have narrowed the scope of application of the APA. The definition of "agency"<sup>125</sup> was amended<sup>126</sup> to exclude any legal entity or agency created pursuant to the Joint Power Act.<sup>127</sup> Also recently excluded from the definition of "agency" are the Industrial Relations Commission and the judges of industrial claims.<sup>128</sup> Similarly, the definition of "rule"<sup>129</sup> was amended to exclude preparations or modifications of curricula by educational units.<sup>130</sup> "Rule" was redefined further in 1978 to exclude a change in established hunting and fishing seasons if such changes are adequately noticed by publication in a newspaper of general circulation or by broadcasting in an electronic medium.<sup>131</sup>

Recent amendments also alter the responsibility placed upon an agency for assuring public and governmental awareness of agency actions concerning current or proposed rules. Certain economic information may no longer be readily available. The required information in the mandated economic impact statement<sup>132</sup> was reduced and generalized.<sup>133</sup> The agency is no longer required: (1) to employ professionally accepted methodology; (2) to quantify the data used in preparation of the statement; (3) to describe the long and short term consequences; (4) to state the cost-benefit relation of action to nonaction; or (5) to determine whether the proposed action represents the most efficient allocation of public resources.<sup>134</sup> Instead, the new amendment requires: (1) an estimate of the cost to the agency of implementing the proposed rule; (2) an estimate of the cost or economic benefit to persons directly affected by the rule; (3) an estimate of the impact the rule would have on competition and the employment market; and (4) a statement of the methodol-

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125. FLA. STAT. § 120.52(1) (Supp. 1976).

126. 1978 Fla. Laws, ch. 78-425, § 1 (codified at FLA. STAT. § 120.52(1)(b) (Supp. 1978)).

127. FLA. STAT. §§ 361.10-.18 (1977).

128. 1977 Fla. Laws, ch. 77-290, § 12 (codified at FLA. STAT. § 120.52(14) (Supp. 1978)).

129. FLA. STAT. § 120.52(14) (Supp. 1976).

130. 1977 Fla. Laws, ch. 77-453, § 2 (codified at FLA. STAT. § 120.52(14)(c)(4) (1977)).

Educational units are defined as local school districts, community college districts, the Florida School for the Deaf and units of the State University System other than the Board of Regents. FLA. STAT. § 120.52(6) (Supp. 1978).

131. 1978 Fla. Laws, ch. 78-425, § 1 (codified at FLA. STAT. § 120.52(14)(d) (Supp. 1978)).

132. FLA. STAT. § 120.54(2) (1977).

133. 1978 Fla. Laws, ch. 78-425, § 2 (codified at FLA. STAT. § 120.54(2) (Supp. 1978)).

134. Compare FLA. STAT. § 120.54(2)(a) (1977) with *id.* (Supp. 1978).

ogy and data used.<sup>135</sup> The amendment does provide, however, that failure to provide an economic impact statement shall be grounds for invalidating a rule. But after October 1, 1978, there is a one-year limitation on any challenge to a rule for failure to provide a statement.<sup>136</sup>

Other amendments attempt to increase public awareness of agency proceedings. The required quantum of notice of an agency's intention to adopt, repeal or amend a rule was expanded by requiring that the proposed rule be available to the public for inspection and copying.<sup>137</sup> A 1978 amendment requires a public hearing on a proposed rule upon request by a person affected by the rule.<sup>138</sup> If no request is made, the decision to conduct a public hearing is within the agency's discretion. Prior to the amendment, the APA required only that a person affected by a contemplated rule be given the opportunity to present evidence and argument on all the issues under consideration.<sup>139</sup> In 1977, an amendment also increased the information required to be filed with the Administrative Procedures Committee.<sup>140</sup> Before adopting a rule, an agency must now file a statement which either describes the extent to which the rule establishes standards more restrictive than federal standards, states that the proposed rule is no more restrictive than federal standards, or states that no federal standards controlling the same subject exist.

Further significant developments:

Once notice of a proposed rule has been given pursuant to section 120.54(1),<sup>141</sup> changes in proposed rules prior to their adoption can be made under certain circumstances.<sup>142</sup> An additional basis which would justify a change was added in 1978 by allowing an agency to alter a proposed rule in response to written material received by the agency within fourteen days after the notice and thereafter made a part of the record of the proceeding.<sup>143</sup>

A 1977 amendment to section 120.54(12) of the Florida Statutes (Supp. 1976) clarified that rules not filed with the Department of State shall become effective upon adoption by the agency head or

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135. 1978 Fla. Laws, ch. 78-425, § 2(a) (codified at FLA. STAT. § 120.54(2)(a) (Supp. 1978)).

136. *Id.* § 2(c) (codified at FLA. STAT. § 120.54(2)(c) (Supp. 1978)).

137. *Id.* § 2 (codified at FLA. STAT. § 120.54(1)(b) (Supp. 1978)).

138. *Id.* § 3 (codified at FLA. STAT. § 120.54(3) (Supp. 1978)).

139. FLA. STAT. § 120.54(3) (1977).

140. 1977 Fla. Laws, ch. 77-453, § 3 (codified at FLA. STAT. § 120.54(11)(a) (1977)).

141. FLA. STAT. § 120.54(1) (Supp. 1978).

142. *Id.* § 120.54(12)(b).

143. 1978 Fla. Laws, ch. 78-425, § 2 (codified at FLA. STAT. § 120.54(12)(b) (Supp. 1978)).

at some later date specified by rule or statute.<sup>144</sup>

The qualifications required of a hearing officer<sup>145</sup> were amended in 1978, increasing the number of years the officer is required to be a member in good standing of the Florida Bar from three to five.<sup>146</sup>

Another amendment altered the power of administrative agencies to enforce subpoenas or orders directing recovery:<sup>147</sup> An agency may no longer hold someone in contempt for failure to comply.<sup>148</sup> The agency must now file a petition for enforcement<sup>149</sup> in the circuit court of the judicial circuit in which the individual against whom enforcement is sought resides. Failure to comply with the court order will result in a citation for contempt of court.<sup>150</sup>

Section 120.57(1)(b)(9) of the Florida Statutes (Supp. 1976) was amended so that a court which has reversed an agency's order may award attorney's fees without having to find that the agency acted maliciously or in bad faith.<sup>151</sup>

The licensing provisions of the APA were modified. The time limit for approval or denial of license applications was amended to allow for a statutory shortening of the usual ninety-day period provided by law.<sup>152</sup> This period will now be tolled by the initiation of a proceeding under section 120.57 and shall resume ten days after the recommended order is submitted to the agency and the parties.<sup>153</sup> A new section concerning proceedings for the issuance, denial, renewal or amendment of a license or approval of a merger pursuant to title XXXVI<sup>154</sup> or title XXXVII<sup>155</sup> of the Florida Statutes was added in 1977<sup>156</sup> and revised in 1978.<sup>157</sup> The new section requires the Department of Banking and Finance to publish in the Florida Administrative Weekly notice of the application within twenty-one days of its receipt.<sup>158</sup> The department will conduct a hearing if requested by any person within twenty-one days after the publication

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144. 1977 Fla. Laws, ch. 77-453, § 3 (codified at FLA. STAT. § 120.54(12) (1977)).

145. FLA. STAT. § 120.65(2) (1977).

146. 1978 Fla. Laws, ch. 78-425, § 9 (codified at FLA. STAT. § 120.65(2) (Supp. 1978)).

147. FLA. STAT. § 120.58(3) (1977).

148. 1978 Fla. Laws, ch. 78-425, § 7 (codified at FLA. STAT. § 120.58(3) (Supp. 1978)).

149. FLA. STAT. § 120.69(1)(a) (1977).

150. *Id.* § 120.58(3) (Supp. 1978).

151. 1977 Fla. Laws, ch. 77-453, § 5 (codified at FLA. STAT. § 120.57(1)(b)(9) (1977)).

152. 1978 *id.*, ch. 78-95, § 57 (codified at FLA. STAT. § 120.60(2) (Supp. 1978)).

153. 1977 *id.*, ch. 77-453, § 6 (codified at FLA. STAT. § 120.60(2) (Supp. 1978)).

154. FLA. STAT. §§ 654.001-661.44 (1977 & Supp. 1978).

155. *Id.* §§ 665.011-.717.

156. 1977 Fla. Laws, ch. 77-453, § 6 (codified at FLA. STAT. § 120.60(3) (1977)).

157. 1978 *id.*, ch. 78-425, § 8 (codified at FLA. STAT. § 120.60(3) (Supp. 1978)).

158. FLA. STAT. § 120.60(3)(a)(1) (Supp. 1978).

of the notice.<sup>159</sup> Notice of the hearing will be published at the cost of the applicant or licensee, in a newspaper of general circulation in the area affected by the application.<sup>160</sup> If a new license is neither approved nor denied within 180 days after receipt of the original application, or a timely request for additional information or corrections, or within thirty days after a public hearing on the application, whichever is the latest, the license will be deemed approved, subject to satisfactory completion of certain statutory conditions.<sup>161</sup> Moreover, the legislature increased the permissible methods of notifying the licensee of revocation, suspension, annulment or withdrawal of any license. In addition to service by certified mail, agencies may now provide notice by actual service to the licensee.<sup>162</sup> If service is not possible by either of the above two methods, constructive service is permissible.<sup>163</sup>

Finally, section 120.68(3)<sup>164</sup> was amended in 1978 to clarify that a petition to the agency is not a prerequisite to a petition for superseas in a court.<sup>165</sup>

## VI. TRENDS IN ADMINISTRATIVE LAW

Presently, the United States is experiencing a proliferation of administrative regulations. Often, the expansion of regulatory schemes results in numerous agencies at multiple levels of government being granted concurrent jurisdiction over the same subject matter.<sup>166</sup> This multitude of agencies leads to duplicative proceedings and inconsistent rulings.<sup>167</sup>

The duplicative hearings and their attendant problems could be greatly reduced by consolidating multiple proceedings. Such a

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159. *Id.* § 120.60(3)(a)(2).

160. *Id.* § 120.60(3)(b).

161. *Id.* § 120.60(3)(c).

162. 1977 Fla. Laws, ch. 77-453, § 6 (codified at FLA. STAT. § 120.60(5) (1977)).

163. 1978 *id.*, ch. 78-425, § 8 (codified at FLA. STAT. § 120.60(5) (SUPP. 1978)).

164. FLA. STAT. § 120.68(3) (1977).

165. 1978 Fla. Laws, ch. 78-425, § 11 (codified at FLA. STAT. § 120.68(3) (Supp. 1978)).

166. For example, if an individual desired to build a development which discharged effluents into Biscayne Bay, the development could fall within the jurisdiction of five separate agencies. First, the Director of Environmental Resources Management is empowered to regulate and enforce air and water pollution standards in Dade County. METRO. DADE COUNTY, FLA., CODE § 24-5 (1959). The development might also require a permit from the South Florida Water Management District. FLA. STAT. §§ 373.069(2)(e), .106 (Supp. 1978). The Florida Department of Environmental Regulation will also be involved, *id.* § 403.88, as might the Florida Land and Water Adjudicatory Commission, *id.* § 380.07(2) (1977). On the federal level, the United States Corps of Engineers may be involved, pursuant to 33 U.S.C. § 403 (1976).

167. *E.g.*, *Barnard v. Carey*, 60 F. Supp. 539 (D. Ohio 1945).

consolidation of agency procedures would benefit the administrative system in several ways. First, by consolidating the procedures the system would operate more economically, for both the agency and the individuals. In addition, a consolidated proceeding would provide a forum where all relevant issues might be presented and resolved in a consistent manner. Finally, the time involved in acquiring all the necessary agency determinations could be considerably reduced by curtailing the repetitive hearings.

Recently, Florida, in conjunction with the federal government, has implemented a consolidation procedure in the area of environmental regulation; with the United States Army Corps of Engineers, the Florida Department of Environmental Regulation entered into an arrangement consolidating many procedures.<sup>168</sup> The department and the corps agreed, *inter alia*, to delineate their jurisdictions<sup>169</sup> and hold joint public hearings,<sup>170</sup> and have established joint application forms.<sup>171</sup>

There is, however, a limit on the extent to which multiple agency proceedings may be consolidated: the delegation doctrine.<sup>172</sup> In Florida, the doctrine has been stated thus: "The legislature may not delegate the power . . . to exercise an unrestricted discretion in applying a law; but it . . . may expressly authorize designated officials within definite valid limitations to provide rules and regulations for the complete operation and enforcement of the law *within* its expressed general purpose."<sup>173</sup> Recently, the Supreme Court of Florida reaffirmed the vitality of the doctrine and held unconstitutional a statute which lacked a legislative delineation of priorities to guide the agency.<sup>174</sup>

Thus, not only must the legislature define the priorities which are to guide and limit agency discretion, but the agency may act only within the standards provided by the legislature. An analogous result was reached by the Supreme Court of the United States in

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168. Memorandum of Understanding Between Corps of Engineers and Florida Department of Environmental Regulation on Permit Processing and Enforcement in the Waters of the State (Aug. 19, 1976), reprinted in FLA. ADMIN. CODE § 17-4 at 16III (1976).

169. *Id.* at 16LLL.

170. *Id.*; See U.S. ARMY CORPS OF ENGINEERS, FLA. DEP'T OF ENVIRON. REG., & FLA. DEP'T OF NATURAL RESOURCES, APPLICATION FOR CONSTRUCTION, DREDGING AND FILLING IN THE WATERS OF FLORIDA, reprinted in FLA. ADMIN. CODE § 17-1 at 2X55, 2X58-59 (1969).

171. U.S. ARMY CORPS OF ENGINEERS, *supra* note 172, at 2X65-69.

172. For a more complete discussion of the delegation doctrine, see notes 14-33 and accompanying text *supra*.

173. *State v. Atlantic Coast Line R.R.*, 56 Fla. 617, 636-37, 47 So. 969, 976 (1908) (emphasis added).

174. *Askew v. Cross Key Waterways*, 372 So. 2d 913, 919 (Fla. 1978).

*Hampton v. Mow Sun Wong*.<sup>175</sup> In *Hampton* the United States Civil Service Commission had adopted regulations which barred noncitizens, including lawfully admitted resident aliens, from obtaining employment in the civil service. The petitioners, alleging a denial of equal protection,<sup>176</sup> brought an injunctive action against the Civil Service Commission to enjoin it from these practices.<sup>177</sup> The Commission attempted to justify its position by referring the Court to various considerations within the purview of the federal government which would provide a rational basis for their decision.<sup>178</sup> Rejecting these justifications, the Court stated that the Commission had no responsibility for foreign affairs, treaty negotiations, establishing immigration quotas or naturalization policies. Rather, the Commission had a limited and specific function: "to adopt and enforce regulations which [would] best promote the efficiency of the federal civil service."<sup>179</sup> Consequently, these other considerations could not provide a rational basis for the regulation; the Commission could not use factors outside of its legislative mandate to justify its actions.

The implication of the delegation doctrine for the trend toward consolidation of procedures is clear. To the extent that consolidated procedures result in agency action premised on standards and priorities other than those mandated by their constitutive legislation, such action should be invalidated as *ultra vires* the agency. Thus, if the trend towards consolidation is to acquire any significant momentum, the legislature must draft regulatory schemes in which the priorities and standards for the regulation of particular subject matter are uniform for all the agencies that have jurisdiction over the subject matter.<sup>180</sup>

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175. 426 U.S. 88 (1976).

176. U.S. CONST. amend. V.

177. 426 U.S. at 90-93.

178. *Id.* at 99-117.

179. *Id.* at 114.

180. The District Court of Appeal, First District, has held that if a Florida statute is patterned after a federal law, the Florida statute should be construed in the same manner as the federal statute. This attempt at uniformity, however, is limited to the extent that "such construction is harmonious with the spirit and policy of Florida legislation on the subject." *Pasco County School Bd. v. Florida Pub. Employees Relation Comm'n*, 353 So. 2d 108, 116 (Fla. 1st DCA 1977).