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THIRD SURVEY OF FLORIDA LAW

PART ONE PUBLIC LAW

ADMINISTRATIVE LAW

GEORGE H. PICKAR*

This article attempts to survey the changes in Florida administrative law that have appeared in the state statutes and judicial decisions of the last two years.¹ The statutes and judicial decisions do not, of course, show all the changes that have occurred; specifically, these sources do not show the changes in the rules, regulations and adjudications made by the administrative agencies.² These administrative rules constitute law in the sense of "policy," but as "law" their applicability is narrowly limited to the subject matter with which the particular agency deals. This survey is primarily concerned with those changes in administrative law which have general application.

LEGISLATIVE DEVELOPMENTS

There have been several interesting legislative developments in Florida administrative law since publication of the last survey in the field. Some new agencies have been created.³ At the same time, there has been a

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1. The field herein surveyed includes the statutes enacted by the 36th Florida Legislature (1957 session) and cases reported in 82 So.2d through and including 95 So.2d. Changes related to insurance or the insurance commission, workmen's compensation, municipal corporations and taxation are omitted; they are left for consideration in separate surveys of these topics.

2. The specific rules and regulations of each administrative agency are beyond the scope of this survey.

See Lee, *Administrative Law*, 10 *MIAMI L.Q.* 129, 130 (1956) where the writer discusses Chapter 29777, Laws of Florida, 1955 (now § 120.10, Florida Statutes, 1957), which provides for the filing of rules and regulations of administrative bodies with the Secretary of State, and for dissemination by him of this information to the interested public.

3. E.g., Florida Watchmakers' Comm'n., *FLA. STAT.* § 489.01-14 (1957); Florida State Board of Examiners of Psychology, *id.* §§ 400.01-09; Florida Air Pollution Control Comm'n., *id.* §§ 403.01-21.

noticeable and constructive tendency to meet needs through expansion of existing agencies rather than by creating new ones.⁴ There have also been several changes in the existing old line agencies.⁵ Some of these changes reflect a more realistic attitude concerning the relationship between the legislative and the administrative branches of government as well as an awareness of the need to modernize administrative procedures. Only one agency, the Board of Naturopathic Examiners, was abolished.⁶

NEW ADMINISTRATIVE AGENCIES

The practical social and economic developments of the last few years have stimulated the legislature to formulate and establish many new governmental policies and to create additional administrative machinery to effect these policies. Some of the new agencies have been vested with rule-making and adjudicatory powers; others have not been granted these powers.⁷ In this survey our primary interest lies in the former type of agency.

Florida State Board of Examiners of Psychology

Florida Statutes §§490.01-.09 (1957) regulates the right to engage in the practice of "psychologist"⁸ and creates the Florida State Board of Examiners of Psychology composed of qualified Florida psychologists to administer the statutory provisions.⁹ In broad outline this statute follows the familiar plan for regulating the right to engage in the supervised

4. E.g., State Board of Medical Examiners, page 271 *infra*; Florida State Board of Dental Examiners, page 271 *infra*; State Board of Conservation, page 272 *infra*.

5. E.g., Florida Railroad and Public Utilities Comm'n., page 268 *infra*; Fla. Citrus Comm'n., page 269 *infra*; State Bd. of Osteopathic Medical Examiners, page 270 *infra*.

6. See page 273 *infra*.

7. Among the agencies vested with neither rule-making nor adjudicatory power are the following: Florida Comm'n. on Constitutional Government, which was created to deal with the problem of invasions of State sovereignty by federal government, (Chapter 57-797); the Governor's Advisory Comm'n. of Race Relations, (Chapter 57-315); the Governor's Mansion Comm'n created to supervise and maintain structures, furnishings, equipment and grounds of the Governor's residence, (Chapter 57-61); the Florida Nuclear Development Comm'n created to deal with certain matters in the field of nucleonics and in addition to further the industrial development of Florida by attracting to the state new industries based on nuclear science and engineering, (Chapter 57-178); and the Florida Educational Television Comm'n created to help raise the educational level of citizens and residents of the state by means of educational television, (Chapter 57-312).

The legislature has also created one new commission having the power to enact rules for the guidance of governmental agencies. Chapter 57-17 creates the State Purchasing Comm'n to effect economy and efficiency in state purchasing. The commission has been empowered to make purchasing rules for the guidance of all state agencies. However, this rule-making power is intra-governmental in nature.

8. FLA. STAT. § 490.01 (1957). A person comes within the purview of the act if he holds himself out to the public by any title incorporating the words "psychological," "psychologist," or "psychology" and under such titles offers to render or renders services to individuals or to the public for remuneration.

9. FLA. STAT. § 490.03 (1957).

occupations and professions. The right is limited to persons holding certificates of registration issued by the board.¹⁰ Applicants for registration must be citizens of the United States¹¹ of good moral character¹² able to fulfill the statutory requirements as to education and experience¹⁴ and to pass an examination described in the statute.¹⁵ Certificates of registration are revocable for causes specified in the statute¹⁶ after notice and hearings.¹⁷

Some of the features of this statute make it different from its phenotypes in the local regulatory scene. The statute authorizes reciprocal certification¹⁸ under certain circumstances and also waiver of examination.¹⁹ In addition it makes the board accountable to the state for the manner in which it exercises the police power entrusted to it.²⁰

Florida Watchmakers' Commission

Florida Statutes §§489.01-11 (1957) is the most recent attempt in this state to control by a system of examination the right of the individual to engage in an ordinary commercial occupation having no relation to public health, safety or morals. This statute creates the Florida Watchmakers' Commission²¹ and attempts to limit and control the occupation of watchmaking and watch repair. The statute makes it unlawful for

10. FLA. STAT. § 490.02, 490.04(1) (1957).

11. FLA. STAT. § 490.04(1) (b) (1957).

12. FLA. STAT. § 490.04(1) (a) (1957).

13. FLA. STAT. § 490.04(1) (c) (1957). The statute requires a Ph.D. with a major in psychology from a university approved by the board or an equivalent degree in a field of psychology from a similarly approved university. The constitutionality of a statute prescribing a course of study and examination for drugless practitioners employing faith, hope and the processes of mental suggestion and adjustment was upheld over forty years ago against an attack under the Fourteenth Amendment of the Federal Constitution, particularly the equal protection clause. See *Crane v. Johnson*, 242 U.S. 339 (1917).

14. FLA. STAT. § 490.04(1) (d) (1957). At least one (1) year's experience in the field of psychology of a grade, character, and time distribution satisfactory to the board is required.

15. FLA. STAT. § 490.04(1) (1957). The statute prescribes a representative assembled written, and an oral or practical examination in psychology, or both such oral and practical examinations.

16. FLA. STAT. § 490.08(1) (1957). The causes are conviction of a felony, fraud or deceit in obtaining a certificate, or professional misconduct.

17. *Ibid.*

18. FLA. STAT. § 490.09 (1957).

19. FLA. STAT. § 490.05 (1957). Applicants who possess the education and experience qualifications prior to two years after the enactment of the statute are eligible for certification without examination. Applicants who cannot meet the Ph.D. requirement but have received the Master's Degree in psychology prior to three years before such enactment and have had six years of experience may, in the discretion of the Board, be certificated without examination.

20. FLA. STAT. § 490.03(6) (1957). The board is required to make complete annual reports of its transactions to the governor with such recommendations for the advancement and betterment of the profession as it may think best. This is in addition to the report of receipts and expenditures usually required to be made by administrative agencies.

21. FLA. STAT. § 489.03 (1957). The commission is composed of five members each of whom has followed the occupation of watchmaking in this state for at least five (5) years immediately prior to his appointment.

anyone to engage in this occupation without obtaining from the commission and maintaining in force a certificate of registration.²² A newcomer to the local trade cannot obtain a certificate unless he passes an examination²³ for which he is ineligible unless he is of good character²⁴ and has served an apprenticeship²⁵ or attended a school approved by the board.²⁶ No provision is made for reciprocal certification or waiver of examination in the case of skillful workmen of long experience and good character. Established watchmakers and watch repairmen practicing locally may obtain certificates of registration without prior apprenticeship, schooling or examination irrespective of the quality of their personal character.²⁷ Certificates of registration are subject to revocation after notice and hearing²⁸ for causes specified in the statute.²⁹ These include, *inter alia*, "unethical conduct" defined in such manner as to restrain certain competitive practices³⁰ and to give the commission inordinate powers of interference with employment and livelihood of individuals.³¹

The examination features of the statute are probably unconstitutional.³²

22. FLA. STAT. § 489.02, 489.06, (1957).

23. FLA. STAT. § 489.05 (1957). The examination includes theoretical knowledge of watch and clock construction and repair and also a practical demonstration of the applicant's skill in the manipulation and use of watchmaker's tools. The commission prescribes the standards of workmanship and skill required of watchmakers receiving its certificates.

24. FLA. STAT. § 489.04 (1957).

25. *Ibid.* Apprenticeship is for a period of eighteen (18) months.

26. FLA. STAT. § 489.04 (1957). Schooling must be for a period of not less than six (6) months, a certificate must have been issued by said school, and the school must have been one *heretofore* approved by the commission, except that any school in Florida in operation upon the effective date of the statute is given a reasonable time within which to meet the requirements fixed by the commission.

27. FLA. STAT. § 489.06(2) (1957). Persons actually engaged in watchmaking within the state on the effective date of the statute are exempt from taking the examination and are eligible for a certificate of registration within six (6) months of said date upon application, proof of occupation and payment of a ten (\$10.00) dollar fee. Florida watchmakers with the Armed Forces on the effective date of the statute are eligible for certification without examination for a period of six months after discharge under the same conditions as above.

28. FLA. STAT. § 489.09 (1957).

29. FLA. STAT. § 489.09(1) (1957). The causes are (1) obtaining a certificate of registration through error of the commission; or (2) fraud on the part of the applicant; or (3) gross incompetence of the holder; or (4) guilt of unethical conduct; or (5) obtaining or seeking to obtain anything of value by fraudulent representations in the practice of watchmaking.

30. FLA. STAT. § 489.09(3) (1957). Advertising of any character in which untruthful or misleading statements are made; advertising of prices on watch repairing or the giving of any watch or clock parts gratis or at less than cost with intent to deceive the public; performance of any service pursuant to such advertising; representing that a watch has been cleaned unless its major parts, train wheels and mainspring have been disassembled and the cap jewels removed and all parts properly cleaned are included in the definition.

31. *Ibid.* A watchmaker who fails to comply with written notice from the commission to terminate the employment of any person whom the commission says is violating the statute risks revocation of his certificate.

32. An interesting constitutional question is also raised by the provision of the statute authorizing license revocation for "unethical conduct" as therein defined. See note 30 *supra*.

Since the legislative purpose in adopting the statute is not related to the promotion of the public health or safety, the validity under the police power of the restrictions on personal liberty inherent in the examinations depends upon whether they are measures in the public welfare. From this standpoint the strongest argument that can be made in support of validity is that the use of knowledge and skill is required in the practice of watch-making and watch repair, and that minimum standards of proficiency fixed by law would be in the public interest. However, the courts have tended to take the position that the need for knowledge and skill in the practice of an ordinary gainful occupation is not of itself a sufficient basis for legislation curtailing by restrictive mental, moral or technical examination the freedom of the individual to select and engage in an occupation of his choice.³³ They have evidently placed a higher value on the liberty of the individual in this field than upon any improvement in the quality of workmanship that could result from fixing standards of knowledge and skill by state action. Implicit in this position is the idea that with regard to the ordinary gainful occupations, the public is protected against incompetence with reasonable adequacy by the interplay of natural economic forces and indirect legal influences; and that in a democratic society the public welfare is best served by the compromise between liberty and restraint which these produce. In line with this view, several courts including Florida have held to be unconstitutional statutes restricting the right to engage in the commercial practice of photography to those who pass mental and moral examinations.³⁴ In *State ex. rel. Whetsel v. Wood*,³⁵ the Oklahoma Supreme Court also held to be unconstitutional the examination provisions of a watchmaker statute substantially similar to the Florida watchmaker legislation. The court concluded that there is no greater justification for requiring a watchmaker to pass a test as to his technical qualifications than for requiring a photographer to pass such a test.³⁶

Florida Air Pollution Control Commission

Florida Statutes §§403.01-.21 (1957) is the new Florida Air Pollution Control Act. It establishes the Florida Air Pollution Control Commission in the state board of health.³⁷ This commission is probably the most important new administrative agency that the legislature has created in

33. *Sullivan v. De Cerb*, 156 Fla. 496, 23 So.2d 571 (1945); *State ex. el. Whetsel v. Wood*, 207 Okl. 193, 248 P.2d 612 (1952); *State v. Ballance* 229 N.C. 764, 51 S.E.2d 731 (1949); *Buchman v. Bechtel*, 57 Ariz. 363, 114 P.2d 227 (1941); *Bramley v. State* 187 Ga. 826, 2 S.E.2d 647 (1939); *State v. Cromwell* 72 N.D. 565, 9 N.W.2d 914 (1943); *Moore v. Sutton*, 185 Va. 481, 39 S.E.2d 348 (1946).

34. *Sullivan v. De Cerb*, note 33 *supra*; *State v. Ballance*, note 33 *supra*; *Buchman v. Bechtel*, note 33 *supra*; *Bramley v. State*, note 33 *supra*; *State v. Cromwell*, note 33 *supra*; *Moore v. Sutton*, note 33 *supra*.

35. *State ex. rel. Whetsel v. Wood*, note 33 *supra*.

36. *Id.* at 616.

37. FLA. STAT. § 403.03 (1957). The act allocates functions and powers to both the Air Pollution Control Comm'n and the State Board of Health.

many years. Working in cooperation with the board of health, its function is to deal with problems arising from the introduction into the atmosphere of undesirable substances in quantities which are injurious to human, plant and animal life by the technical operations of some of the newer industries that have come to Florida.³⁸ The ordinary legal forms of dealing with public nuisances such as injunction, damages, or penalties are inadequate in the situation by reason of the discouraging effect that the employment of such abrupt and hostile remedies would be likely to have upon the industrial development of the state. The task is to find means of protecting the public against these harmful nuisances without driving industry out of the state or discouraging industry from coming into it. The flexibility with which an administrative agency can operate makes it particularly appropriate for the job.

The commission functions by creating air control districts,³⁹ promulgating rules for the control of air pollution in such air control districts,⁴⁰ adjudicating whether there has been a violation of such rules,⁴¹ fixing a time period during which corrective measures shall be taken where the commission has determined that there is a violation and instituting court action to eliminate the public nuisance when industry refuses to take steps to eliminate or satisfactorily control the nuisance.⁴²

The eminently fair and friendly way in which each of these steps is required to be taken and the way the commission's power has been circumscribed reveals the nature of the task and the peculiar appropriateness for it of the administrative process.

First, the statute limits the right to control air pollution to pollution in an air control district.⁴³ Before such a district can be created, notice of hearing must be given and a public hearing must be held on the question of whether it should be created.⁴⁴ Particularly important in this connection is the statutory command that "no such district shall be created or dissolved by the commission unless a necessity thereof is established by a preponderance of evidence introduced at the hearing."⁴⁵

Second, control of air pollution in any air control district is limited to control by rules and regulations adopted by the commission.⁴⁶ Before making such rules and regulations the commission must give notice of hearings and hold hearings on whether the proposed rules shall be adopted.⁴⁷ In this connection administrative action is circumscribed by a statutory

38. FLA. STAT. §§ 403.02(3), 403.10 (1957).

39. FLA. STAT. § 403.12 (1957).

40. FLA. STAT. § 403.09 (1957).

41. FLA. STAT. § 403.17 (1957).

42. FLA. STAT. § 403.18 (1957).

43. FLA. STAT. § 403.09(1) (b) (1957).

44. FLA. STAT. § 403.12 (1957).

45. FLA. STAT. § 403.12 (c) (1957).

46. FLA. STAT. § 403.10 (1957).

47. FLA. STAT. § 403.09(1) (b) (1957).

command that "no rule or regulation shall be adopted unless a need for such action is shown by a preponderance of the evidence introduced at such public hearing."⁴⁸

Third, while the board of health is vested with certain powers to inspect facilities and to require technical information, the statute limits the authority of the board in the performance of this part of its function in several ways. Where the board requires reports to be filed, the requirement "shall be conditioned upon either the consent of the person employed in operations which result in air pollution or the direction of the board, which direction may be issued only after a hearing upon notice to the person engaged in such operation."⁴⁹ The right to enter and inspect premises is conditioned upon "either the consent of the owner or lessee of the premises or the direction of the board, which direction may be issued only after hearing upon notice to the owner or lessee of the premises."⁵⁰ Before entering and inspecting, the inspector is required to "sign a statement in the presence of and witnessed by a notary public or other officer qualified to take acknowledgement, that all information shall be kept confidential except as it relates directly to air pollution."⁵¹ Samples taken for analysis "shall be taken in the presence of a representative of the company" and "a duplicate of the analytical report shall be furnished promptly to the person suspected of causing air pollution."⁵²

Fourth, proceedings to eliminate air pollution where it is thought to exist in violation of commission rules and regulations may be instituted by a complaint filed with the board or by the board itself.⁵³ In connection with such proceedings the board is required to "endeavor to eliminate any source or cause of air pollution resulting from such violation by conferences, conciliation and persuasion."⁵⁴ Should the board fail to correct or remedy the alleged violation by such means, a hearing is held before the commission. Where the commission finds that air pollution exists in violation of a previously established rule or regulation, it is required to fix a reasonable time during which the respondent may take necessary measures to eliminate the hazard.⁵⁵ The commission may require periodic reports of progress, but in such case the statute commands that any information as to secret processes or methods of manufacture or production revealed by such progress reports shall be kept confidential.⁵⁶ Where such preventive or corrective measures are not taken, the commission is authorized to institute legal proceedings in any court of competent jurisdiction for injunctive

48. *Ibid.*

49. FLA. STAT. § 403.10(3) (1957).

50. FLA. STAT. § 403.10(4) (1957).

51. *Ibid.*

52. *Ibid.*

53. FLA. STAT. §§ 403.13, 403.14 (1957).

54. FLA. STAT. § 403.13 (1957).

55. FLA. STAT. § 403.17 (1957).

56. *Ibid.*

relief and the courts are empowered to grant such relief upon complaint by the commission.⁵⁷

The statute provides for judicial review by a circuit court of any order of the commission, including orders creating air control districts and orders promulgated for the control of air pollution, at the instance of any person whose interest is substantially affected thereby. Judicial review is confined to an examination of the record of the proceedings including a transcript of the evidence.⁵⁸ In such review, the statute provides that no presumption shall arise as to the correctness of the action of the commission in creating or dissolving an air control district or in entering any order or in adopting, repealing or determining the reasonableness of any rule or regulation.⁵⁹ Appeals to the appropriate district court of appeal may be taken from the final order of the circuit court.⁶⁰

LEGISLATIVE CHANGES IN EXISTING AGENCIES

Many of Florida's administrative agencies are products of an early period in the history of the development of this state's administrative law.⁶¹ Legislative attitudes of caution and distrust of the process typical of that period, together with the inexperience of legislators, produced some unfortunate consequences. In some instances the legislature would create an administrative agency, adopt standards, and then proceed inappropriately to implement the standard in the statute by an abundance of detailed rules related to the technical minutiae of the subject.⁶² In other instances the legislature would create an administrative agency, adopt rules in the statute for the guidance of the agency, and then authorize the agency to make similar rules.⁶³ In still other instances the legislature would create an agency and then circumscribe agency activity by means of fixed rules which eliminated all discretion in cases where the proper performance of the task assigned required the exercise of some discretion.⁶⁴

Some of the changes affecting existing agencies which were made by the 36th legislature consist of constructive attempts to remedy such defects.

Florida Railroad and Public Utilities Commission

Chapter 57-116⁶⁵ vests the Florida Railroad and Public Utilities Commission with discretionary power to employ the prehearing conference

57. FLA. STAT. § 403.18 (1957).

58. FLA. STAT. § 403.19(4) (1957).

59. *Ibid.*

60. FLA. STAT. § 403.19(5) (1957).

61. E.g., the Barber's Sanitary Comm'n (1939); the Florida Citrus Comm'n (1935); the Board of Osteopathic Medical Examiners (1927); the Florida Railroad and Public Utilities Comm'n (1899).

62. E.g., The Florida Citrus Code, FLA. STAT. §§ 601.16-23 (1957).

63. E.g., the Barber's Sanitary Comm'n, FLA. STAT. §§ 476.17-32 (1957).

64. E.g., the Board of Osteopathic Medicine, FLA. STAT. § 459.05 (1957).

65. FLA. STAT. § 350.631 (1957).

procedure in exercise of its judicial functions. The prehearing conference procedure is not new. For many years this tool has been standard equipment of courts and federal administrative agencies exercising adjudicatory powers for expediting or eliminating trials and hearings.⁶⁶ What is new is its introduction into the Florida administrative process.

The innovation will aid in expediting the work of the Railroad and Public Utility Commission whose burden has been sharply increasing, but the importance of the change to the development of Florida's administrative process transcends this benefit. It indicates recognition of the fact that the virtue of speed which is frequently ascribed to the administrative process, and for which it is sometimes praised as the "modern" method of government, is not an indestructible virtue inherent in that process. That virtue is destroyed when agencies become saddled with work loads exceeding their capacity to perform with reasonable dispatch.

The Florida Citrus Commission

Several legislative changes have been made expanding the authority of the Florida Citrus Commission. The significant changes for present purposes are those which attempt to rectify shortcomings of the Florida Citrus Code with respect to the authority of the Florida Citrus Commission over maturity and quality standards for citrus fruit intended for the out-of-state market.⁶⁷

As originally enacted, the Florida Citrus Code, after adopting maturity and quality standards for citrus, proceeded to specify in detail the technical minutiae thereof; such as, how many cubic centimeters of juice a grapefruit must have. The Florida Citrus Commission was given almost no authority with respect to these matters as they affected the out of state market. The following is illustrative of some of the consequences:

Chapter 57-12 amends section 601.19 Florida Statutes and makes the following innocuous changes: (1) Size sixty-four grapefruit no longer need have 265 centimeters of juice to meet the standard, but now meets it with 255 centimeters; (2) between October 16 and November 1 of the following year that size grapefruit now gets by with 240 centimeters against the old rule of 250 between October 1 and November 15; (3) between March 2 and July 31 of the same year that size now needs only 230 centimeters as against 240 formerly required between November 16 and July 31 of the following year. The commission is now authorized to decrease the juice content requirements if unusual conditions are found to exist between October 16, and March 1 (four and one half months) instead of for the much shorter time period of October 16 and November 15 (one month).

66. Federal Rule of Civil Procedure 16; Florida Rule of Civil Procedure 1. 16.

67. FLA. STAT. §§ 601.16-25 (1957).

The importance of the amendment in Chapter 57-12 for present purposes lies not in what it advises about grapefruit, but in what it reveals about the administration of Florida's citrus policy. Are these the kind of things that a legislature charged with the heavy responsibility of formulating policy for a great state should be concerned with, or are they more appropriately the task of an administrative agency? Certainly such an agency could provide flexibility, expedient action, and skillful judgment which a legislature cannot provide. Is piecemeal delegation of additional authority to the administrative process, as exemplified in the above amendment, a satisfactory way of solving the problem?

Two significant developments appear which may lay the foundation for changes of paramount importance to the future administration of Florida's citrus policy. First, the legislature has expressly recognized some of the advantages of delegating the regulation of quality standards to the administrative process and in that statute⁶⁸ turned over what appears to be the whole job of raising quality standards in the frozen concentrated orange juice segment of the citrus industry to the Florida Citrus Commission and a new advisory commission composed of representatives of that segment of the industry, jointly. Second, Chapters 57-14⁶⁹ and Chapters 57-30⁷⁰ authorize the commission to "establish . . . minimum maturity and quality standards for citrus fruits not inconsistent with existing laws."

Barbers' Sanitary Commission

Chapter 57-134 amends Chapter 476.22 Florida Statutes to read, in part, that the Barbers' Sanitary Commission may from time to time make recommendations to the legislature to protect the public health in barber shops. Prior to this amendment, the commission was authorized to "make" rules and regulations and "prescribe" sanitary requirements in addition to those made and prescribed by the legislature, subject to the approval of the state board of health. A power to recommend rules and regulations has been substituted for a power to make and prescribe them subject to the board of health's approval.⁷¹

Florida Board of Osteopathic Medical Examiners

Among other changes Chapter 57-241 amends Chapter 459 Florida Statutes which created the Florida State Board of Osteopathic Medical Examiners. One amendment substitutes a flexible standard for fixed rules with respect to the subjects embraced by the examination which must be taken by applicants for certification to practice as osteopathic physicians.

68. Laws of Florida c. 57-332.

69. Laws of Florida c. 57-14, amending FLA. STAT. § 601.10 (1955).

70. Laws of Florida c. 57-38, amending FLA. STAT. § 601.11 (1955).

71. FLA. STAT. § 476.22 (1955).

The earlier section 459.07 Florida Statutes (1955) listed the subjects of examination, but failed to take into account future advancement of knowledge and the possibility of changes in curricula at colleges of osteopathy. The amendment makes possible administrative adjustment to such changes by providing that the examination shall embrace those subjects which are found by the board to be taught in standard colleges of osteopathy and are set forth in its regulations.

Florida Board of Medical Examiners—Physical Therapy

Other changes made by the legislature during the 1957 session broaden the power of existing agencies to enable them to perform additional functions which would otherwise require the creation of new agencies.

Instead of creating a new agency, the legislature broadened the powers of the State Board of Medical Examiners by authorizing it to register physical therapists as defined by the Physical Therapy Practice Act.⁷³ It is unlawful for a person who is not registered by the board as a physical therapist to represent in any manner or by any means that he is a physical therapist.⁷⁴ To qualify for registration an applicant must have had special training in physical therapy as outlined in the statute and he must pass an examination which is given with the aid of registered physical therapists.⁷⁵ Provision is made for registration without examination in proper cases.⁷⁶ The statute authorizes suspension or revocation of registration after notice and hearing for reasons prescribed therein.⁷⁷

Florida State Board of Dental Examiners—Dental Laboratories

Chapter 57-242⁷⁸ broadens the authority of the Florida State Board of Dental Examiners to effect a policy of bringing dental laboratories as therein defined under the police power control of the state for the first time. The stated object and purpose of the statute "is to safeguard the public health by requiring that only qualified dental laboratories be permitted to operate in this state."⁷⁹ The object is accomplished by a registration system under control of the Board of Dental Examiners.⁸⁰ No examination is required.⁸¹ The board may suspend or revoke any such

72. Other changes include giving osteopathic physicians and surgeons equal rights with other schools of medical practice; increasing the requirements for renewals of licenses to practice osteopathic medicine and surgery; and providing certain penalties for failure to renew such licenses.

73. Laws of Florida c. 57-67: an act providing for the practice of physical therapy . . . and repealing FLA. STAT. § 486 (1951).

74. *Id.* § 10.

75. *Id.* § 5.

76. *Id.* §§ 7, 8.

77. *Id.* § 9.

78. FLA. STAT. §§ 466.50-58 (1957).

79. FLA. STAT. § 466.50 (1957).

80. *Id.* § 466.52.

81. *Id.* § 466.53.

certificate of registration after notice and hearing for failure to comply with this act or Chapter 466 Florida Statutes.⁸²

State Board of Conservation--Weather Modification

Chapter 57-128 broadens the powers of the State Board of Conservation to enable that board to effect a new legislative policy of regulating the occupation commonly described as "rain making" or "weather modifying."⁸³ Regulation is by a licensing system.⁸⁴ The board is required to issue a license to applicants who "appear to be qualified" by education, skill and experience and file proof of financial responsibility.⁸⁵ By the terms of the license the licensee is required to notify the board of intention to conduct an operation and to provide it with specified information with relation thereto.⁸⁶ He is also required to give prescribed notice to the public.⁸⁷ The board is authorized to revoke or suspend licenses for failure to comply with the provisions of the act.⁸⁸ Provision is made for notice, hearing and judicial review in suspension and revocation proceedings.⁸⁹

State Board of Conservation--Department of Water Resources

Chapter 57-380⁹⁰ expands the powers of the State Board of Conservation to include a Department of Water Resources to implement a legislative policy of affecting maximum beneficial utilization, development and conservation of the water resources of the state and to prevent waste and unreasonable use thereof.⁹¹ The department is administered by a director who is appointed by and is directly responsible to the board.⁹²

The board is authorized to create and dissolve water development and conservation districts as necessary to serve the purposes of the act.⁹³ It is empowered to adopt reasonable rules and regulations and to issue reasonable orders to govern the conservation and use of water resources of a district.⁹⁴ Notice and hearing are prerequisites to the establishment or dissolution of water development and conservation districts, and to the promulgation of rules, regulations and orders.⁹⁵ The findings of fact at such hearings must be supported by a preponderance of the evidence.⁹⁶ Any final action

82. *Id.* § 466.55.

83. FLA. STAT. §§ 373.261-391 (1957).

84. FLA. STAT. §§ 373.291, 373.301, 373.311 (1957).

85. *Ibid.*

86. *Id.* § 373.321.

87. *Id.* § 373.341.

88. *Id.* § 373.381.

89. *Ibid.*

90. FLA. STAT. §§ 373.071-.251 (1957).

91. *Id.* § 373.101.

92. *Id.* § 373.121.

93. *Id.* § 373.141(2).

94. *Id.* § 373.171.

95. *Ibid.*

96. *Ibid.*

of the board, affirmative or negative, is subject to judicial review.⁹⁷

State Board of Naturopathic Examiners

In only one instance did the legislature abolish an administrative agency; chapter 57-129 abolishes the State Board of Naturopathic Examiners.⁹⁸ The change stemmed from a change in legislative policy with respect to the practice of naturopathy. Under the new policy only those persons who on the effective date of the statute were licensed as naturopathic physicians and had previously been engaged in active practice in Florida for a period of two years or more are permitted to practice. The administrative functions formerly exercised by the State Board of Naturopathic Examiners with respect to license suspension, revocation and annulment have been vested in the state board of health.

JUDICIAL DECISIONS

The supreme court decided a substantial number of cases dealing with questions of administrative law in the period under review. These concerned, inter alia, the beverage commission, the citrus commission, the board of dental examiners, the game and fresh water fish commission, the hotel and restaurant commission, the industrial commission, the livestock board, the milk commission, the board of pharmacy, the plant board and the railroad and public utilities commission. Many of these were decisions of a routine nature dealing with sundry topics in the field. In some of them, however, the court made important modifications, clarifications, or interesting applications of the law.

JUDICIAL REVIEW

The law as to the proper proceeding to obtain judicial review of administrative action when the appropriate statute either fails to provide for such review or to indicate the method has for a long time been in an unsatisfactory condition. Generally, the court has distinguished between quasi-judicial, quasi-legislative and quasi-executive action and has indicated that the type of action to be reviewed is often determinative of the method of obtaining review. But the lines separating these types of action are vague. In addition, judicial review of quasi-judicial action has been allowed uncritically in both mandamus, an original proceeding, and certiorari, an appellate proceeding, thus adding to the confusion. In the recent case of *DeGroot v. Sheffield*⁹⁹ the court took an important step in correcting this situation. Defining "quasi-judicial" as an action for which notice and hearing

97. FLA. STAT. § 373.161 (1957).

98. Laws of Fla. c. 57-129, amending FLA. STAT. § 462.01 (1955) and repealing §§ 462.02-09 (1955).

99. 95 So.2d 912 (Fla. 1957).

are required by law, the court held that judicial review of quasi-judicial administrative action may no longer be had in mandamus proceedings and indicated that certiorari is the correct proceeding for this purpose. In *DeGroot v. Sheffield*, review was sought in a proceeding collateral to the one in which the administrative order was promulgated. The opinion makes it clear, however, that the court meant to interdict review by mandamus in direct proceedings as well. The burden of the court's argument was directed at the inappropriateness of mandamus proceedings for purposes of appellate review rather than at the indirectness of the challenge to the administrative order in that case. As a consequence of this decision cases like *Williams v. Whitman*,¹⁰⁰ in which judicial review of an order of the Florida State Board of Dental Examiners revoking a dentist's license was successfully obtained in mandamus proceedings, must be regarded as repudiated.

DeGroot v. Sheffield is more than a signpost indicating the correct route to judicial review in the limited class of cases we are here considering. In the past the court on judicial review in mandamus proceedings has customarily reexamined the evidence and exercised an independent judgment on the facts.¹⁰¹ In certiorari proceedings, on the other hand, it has traditionally concerned itself only with questions of law and examined the record merely to determine whether the administrative proceeding satisfied legal requirements, including the rule that the findings of fact must be supported by substantial competent evidence.¹⁰² The elimination of mandamus appreciably narrows the scope of court review and may mark a fundamental change in the attitude of the court towards the administrative process and the function of the court in relation to it.

A short time after the decision in *DeGroot v. Sheffield*, the supreme court adopted the final draft of the Florida Appellate Rules, effective July 1, 1957. Rule 4.1 provides that "All appellate review of the rulings of any commission or board shall be by certiorari as provided by the Florida Appellate Rules." This rule adopts the idea experienced in *DeGroot v. Sheffield* and widens its application to include all cases where the review is in exercise of the court's appellate jurisdiction as distinguished from original

100. 116 Fla. 196, 156 So.705 (1934).

101. See the language in *Williams v. Whitman*, note 100 *supra*. This customary procedure was also followed by the circuit court in *De Groot v. Sheffield*, note 99 *supra*.

102. This was the common law rule. See JAFFE, *ADMINISTRATIVE LAW* (1955) at p. 497:

In certiorari the only questions open are those going to the legality of the action on the basis of the record below.

To substantially the same effect, see Justice Thomal's opinion in *De Groot v. Sheffield*, note 99 *supra* at p. 916.

But see *Fla. Motor Lines Inc. v. RR. Commissioners*, 100 Fla. 538, 558, 129 So. 876,880 (1930) and DAVIS, *ADMINISTRATIVE LAW* (1951) at p. 786. The author points out that in the latter case, a certiorari proceeding, "the court substituted judgment on the decisive question of policy."

jurisdiction, at least where no other method of review is prescribed by statute.

There is need for a single all-service flexible proceeding for appellate review of administrative action generally. In some states steps have already been taken to satisfy this need. To provide such a proceeding is the substantial effect of the New York revision which has substituted for certiorari, mandamus and prohibition a so-called "proceeding to review the determination of a board or officer."¹⁰³ In New Jersey the state constitution provides for a single proceeding, the character of which is within the paramount control of the Supreme Court of New Jersey.¹⁰⁴ In Florida, Justice Drew in *Hickey v. Wells*,¹⁰⁵ as well as Justice Thornal in *DeGroot v. Sheffield*,¹⁰⁶ have pointed out the need for reform in this area. Rule 4.1 of the Florida Appellate Rules is an important step in the direction of procedural uniformity, but as Justice Drew pointed out in *Hickey v. Wells*,¹⁰⁷ legislation to this end would be desirable.

ADMINISTRATIVE FINDINGS OF FACT

In Florida, administrative action of a quasi-legislative or quasi-judicial nature must be predicated upon specific findings of fact.¹⁰⁸ This requirement exists to facilitate judicial review. Without specific findings the court is compelled to grope in the dark and to guess the inferences which the agency drew from the evidence and the factual basis upon which it predicated its conclusions of law.¹⁰⁹ Review that is not on specific findings of fact is likely to result in the substitution of judicial discretion for administrative discretion in weighing the evidence and drawing inferences therefrom. The findings when properly made are not only indicative that the agency has given careful consideration to the evidence in reaching its conclusion, but are valuable aids to the parties in preparing their cases for rehearing or judicial review.

In the recent case of *Hickey v. Wells*¹¹⁰ the court held invalid an order of the Florida State Board of Dental Examiners suspending Dr. Hickey's license for a period of three years on charges of illegal practice of the dental profession. One of the grounds of this decision was that the board's findings of fact failed to meet the legal requirement in this

103. New York Civil Practice Act, Article 78, §§ 1283-96.

104. N.J. CONST. art VI § 5 Par. 4: "Prerogative writs are superseded and in lieu thereof, review, hearing and relief shall be afforded."

105. 91 So.2d 206 (Fla. 1957).

106. 95 So.2d 912 (Fla. 1957).

107. See note 105 *supra*.

108. *Laney v. Holbrook*, 150 Fla. 622, 8 So.2d 465 (1942); *Hickey v. Wells*, note 105 *supra*. In *Laney v. Holbrook*, the findings were required as a matter of due process of law.

The idea that the constitution requires findings has not escaped criticism; see DAVIS, *ADMINISTRATIVE LAW* (1951) at p. 526.

109. See Justice Drew's opinion in *Hickey v. Wells*, note 105 *supra*.

110. 91 So.2d 206 (Fla. 1957).

regard. Such findings of fact as there were in this case were contained in the administrative order and an affidavit which the board attempted to incorporate by reference in the order. The substance of the material portion of the order was that the board had considered the evidence and Dr. Hickey was guilty as charged in the affidavit. The material part of the affidavit was that Dr. Hickey had violated provisions of Chapter 466 Florida Statutes by employing and knowingly aiding one John Johnson, who was unlicensed to practice dentistry, to perform dental work at Dr. Hickey's office. The court held that the findings of the board in this case amounted to no more than a finding of guilty as charged in the affidavit and that the statements in the affidavit did not provide adequate findings of fact when adopted for that purpose by the board.

In *Laney v. Holbrook*¹¹¹ the court had earlier held that a general verdict of guilty was not sufficiently specific to meet this requirement under a statute requiring an agency to make specific findings of fact. In the *Hickey* case, which was concerned with a substantially similar agency finding, the court reached the same conclusion on the basis of the administrative common law. The court in the *Hickey* case was not called upon to decide whether the adoption by reference of the statements in the affidavit as the agency's findings of fact would have been adequate if the affidavit had contained statements sufficient in number and kind to meet legal requirements. The decision was that such a requirement was not satisfied whether or not the statements in the affidavit were treated as part of the order. The question here posed was apparently not raised. The court's opinion seems to assume that in such event the findings would have been adequate.

ADMINISTRATIVE HEARINGS

*Hickey v. Wells*¹¹² also clarifies some important matters concerning notice of charges and fair hearings in license revocation proceedings. The earlier view on notice of charges was that notice which informs the accused with reasonable certainty of the nature and cause of the accusation against him is sufficient. The *Hickey* case takes the position that such notice is inadequate unless it also specifies with particularity the acts complained of, at least where agency procedures fail to provide a method of obtaining such disclosure from the agency. On the question of fair hearing, an earlier case held that a hearing which is fairly and impartially conducted and affords a reasonable opportunity to defend against attempted proof of the charges satisfies the legal requirement.¹¹³ The *Hickey* case indicates that the legal requirement is not satisfied unless in addition to the foregoing the accused has also been given a fair chance to prepare a defense

111. 150 Fla. 622, 8 So.2d 465 (1942).

112. See note 110 *supra*

113. *State ex. rel. Sbordy v. Rowlett*, 125 Fla. 562 at 569, 170 So. 311 at 313 (1936).

to the attempted proof of the charges. The court held that the notice of charges and the hearing were inadequate because the notice did not specify with particularity the person upon whom or the time when the illegal dentistry was practiced; the failure to provide this information denied Dr. Hickey a fair chance to prepare a defense against the attempted proof.

PREVENTING ADMINISTRATIVE ACTION

In a few cases attempts were made to defend against suspension or revocation of licenses by the "short route" of prohibition or injunction, instead of the "long route" of hearing and judicial review.¹¹⁴ Where an agency lacks jurisdiction to do what it is attempting to do a writ of prohibition is, of course, not only an appropriate but also a proper remedy. In such case the agency is usurping power, and such action should be prevented. Where jurisdiction to act exists, however, preventing action by injunction or writ of prohibition or otherwise denies to the agency the opportunity to perform its function, and denies to the court the benefit of the administrative judgment in the matter.

Declaratory and Injunctive Relief

In *Florida Hotel and Restaurant Commission v. Marseilles Hotel Co.*,¹¹⁵ a suit for declaratory and injunctive relief was brought in a circuit court by the hotel for an adjudication that the Hotel Commission could not lawfully revoke the hotel's license, and to enjoin the commission from continuing with adjudicatory proceedings directed to such a purpose. The commission charged that one Berr, a hotel employee, had been permitted by the hotel to accept bets on the hotel premises. Berr had notified the attorney for the commission that he would refuse to testify at the administrative hearing, under a plea of self-incrimination, as to whether or not the hotel had knowledge of his gambling activities. The hotel's position was that a hearing in which it would not have the benefit of Berr's testimony would deprive it of due process of law. The Hotel Commission moved to dismiss the bill. The circuit court denied the motion and temporarily enjoined the commission from continuing with the revocation proceedings. The supreme court granted certiorari, quashed the order denying the motion to dismiss, and directed the circuit court to dismiss the complaint. Its position was that the provisions for judicial review of an order of revocation of a hotel license under chapter 511 Florida Statutes are adequate to protect the hotel against a denial of due process of law even if it be assumed, *arguendo*, that the hotel would be denied a constitu-

114. *E.g.*, *Coleman v. Simmons*, 92 So.2d 257 (Fla. 1957); *Florida Hotel and Restaurant Comm'n v. Marseilles Hotel Co.*, 84 So.2d 567 (Fla. 1956); *Edgerton v. International Co.*, 89 So.2d 488 (Fla. 1956).

115. See note 114 *supra*.

tional guarantee if compelled to defend at the administrative hearing without Berr's testimony. The court also held that admittance into a court of equity cannot be gained via the "declaratory relief" route where the purpose of the suit is to enjoin an administrative hearing.

Writ of Prohibition

In *Coleman v. Simmons*¹¹⁶ an original prohibition proceeding was instituted to prevent the Florida Board of Pharmacy from revoking a pharmacy license on the ground that the issuing agency, a predecessor board, erred in interpreting the statutory prerequisites when it issued such license. The predecessor board's interpretation was that graduation from an accredited school or college of pharmacy was not a mandatory requirement. The court denied the writ of prohibition and required the licensee to seek judicial review by appeal in accordance with the applicable statute.¹¹⁷

Unlike the above case, in *Edgerton v. International Company*¹¹⁸ the issuance of a writ of prohibition to prevent the State Hotel and Restaurant Commission from proceeding to suspend or revoke a hotel and coffee shop license was affirmed. Chapter 509 Florida Statutes provides that every proceeding for suspension or revocation shall be "commenced" within sixty days after the cause for suspension or revocation arose. In this case the Commissioner's complaint and notice to show cause had been registered with sufficient postage and deposited in the mail at Tallahassee for delivery to the International Company on the sixtieth day. They were delivered to the company more than sixty days after the alleged cause for suspension or revocation arose.

The court construed the word "commenced" to mean receipt of the complaint and notice to show cause by the licensee, and thereupon held that the proceeding was not timely commenced. This holding may be explained on the theory that the sixty day requirement is jurisdictional in nature and the commission in this case was proceeding to exercise jurisdiction which it did not have.

ADMINISTRATIVE EXPERIMENTS

The courts generally take a cooperative attitude towards proposed experiments by administrative agencies in aid of a legislative purpose, but look with jaundiced eye on proposals that appear to thwart one. Sometimes a proposed experiment thwarts one statutory purpose at the same time that it aids another. In such case, even if the proposal as made may be found to be technically within bounds, the court is likely to disapprove it by reason of the appearance and proximity of evil, particularly where

116. 92 So.2d 257 (Fla. 1957).

117. *Id.* at 258.

118. 89 So 2d 488 (Fla. 1956).

the experiment can be conducted in a manner that eliminates the threatened subversion of legislative policy. The case of *Adams v. Lee*,¹¹⁰ which was concerned with questions of price control and hearings under the Milk Control Act, is illustrative. Under the act, the milk commission is authorized to alter, revise, or amend an official order theretofore made with respect to the prices to be charged or paid for milk after investigation, notice published in a newspaper and public hearing. The obvious purpose of these limitations is to give interested persons opposed to price change an opportunity to state their positions and to expose the commission's proposal to public opinion in advance of the change as a means of assuring more deliberate action by the commission. In *Adams v. Lee* the commission was considering a change in its existing price control orders in a particular milk marketing area. As part of its investigation it desired to study experimentally the effect of removing all price control in that area.

Accordingly, it adopted a resolution declaring a moratorium on the enforcement of the applicable price control orders, without altering, revising or amending any of them and without the notice and public hearing required for alteration, revision or amendment. Certain milk producers challenged the validity of the resolution. The court held the resolution to be invalid because of the failure to give the prior notice and hearing required for changes in price control orders. The court could have taken the position that the moratorium on enforcement was only a potential price change and that notice and hearing under the statute are not required unless the agency makes an actual change. Instead, it properly took the view which requires the milk commission to respect the legislative policy as to notice and hearing when it sets in motion competitive forces likely to produce price change as well as when it changes prices by direct and immediate action.

ADMINISTRATIVE DISCRETION

The phrase "administrative discretion" in the broad sense in which it is used here connotes every administrative action which is not governed by a fixed rule. It includes action which the legislature has expressly authorized to be taken "in the discretion" of the agency, but is not limited to such circumstances and includes, in addition, the exercise of judgment in the application of standards such as "reasonable," "necessary" and "proper." Accordingly, it would be proper to classify under this heading and reconsider many of the cases discussed in this survey under other headings to which they are also relevant. Since, however, little if any advantage is to be derived from doing so, the only cases that will be discussed here are cases involving the exercise of administrative discretion which are not considered under other headings.

119. 89 So.2d 217 (Fla. 1956).

Certification—Competitive Auto Transportation Service

In *Alterman Transport Line v. Carter*¹²⁰ the supreme court receded from the position it took in *Tamiami Trail Tours v. Carter*¹²¹ as to the circumstances under which the Railroad and Public Utilities Commission is authorized to certificate competitive auto transportation services. By the terms of the statute¹²² such service may not be authorized unless "the existing certificate holder or holders serving such territory fail to provide services and facilities which may reasonably be required by the Commission." In *Redwing Carriers v. Mack*¹²³ the court had construed this statute to require that existing carriers have a reasonable opportunity to provide the adequate services and facilities which they failed to provide before competitive services are certificated. However, in that case the court did not have occasion to fully explore the meaning of "reasonable opportunity."

In the *Tamiami*¹²⁴ case the court was presented with the question of whether the commission must notify the existing carriers that it requires particular services or facilities. The statutory words "which may reasonably be required by the commission" are ambiguous. They may be interpreted to create a procedural prerequisite of notice of requirements by the commission; they may be interpreted not to create such a prerequisite, but merely to establish a standard for services and facilities below which competitive service may be certificated; or they may be interpreted to establish both a standard and a procedural prerequisite of notice of requirements.

In the *Tamiami* case,¹²⁵ a majority of the court on rehearing held in effect that these words created a procedural prerequisite of notice of requirement by the commission as well as a standard for services and facilities; and the court made such notice an element of the reasonable opportunity required by the *Redwing* decision. In the *Alterman*¹²⁶ case, a majority of the court, while adhering to the *Redwing* principle, construed the statute as not creating an inflexible prerequisite of notice of requirement by the commission. This decision is likely to spontaneously stimulate initiation of improved auto transportation services and facilities by the certificate holders in areas where needed, and to expedite procurement of such services for the public by the commission where not so initiated.

Discretion to Treat Permit for Hire as Certificate

When an agency has been vested with discretionary powers and has exercised them arbitrarily or capriciously, the phrase commonly used to

120. 88 So.2d 594 (Fla. 1956).

121. 80 So.2d 322 (Fla. 1954).

122. FLA. STAT. § 323.03(3) (1957).

123. 73 So.2d 416 (Fla. 1954).

124. 80 So.2d 322 (Fla. 1954).

125. See note 124 *supra*.

126. 88 So.2d 594 (Fla. 1956).

describe the action is "abuse of discretion"; but where no discretionary powers have been granted, the action is only euphemistically so denominated. The case of *Seaboard Airline Railroad v. King*¹²⁷ may be classified as a case of abuse of discretion of the latter type with regard to a permit for hire. Such a permit is less valuable and easier to obtain than a certificate of public convenience and necessity under Florida law, because a permit is non-transferable and obtainable without hearing or proof of public need, while a certificate is a transferable property right obtainable only after public hearing and formal proof that issuance is required by the public convenience and necessity. The question in the case concerned the efficacy of administrative efforts to transform a permit into a certificate by a process of appellative metamorphosis.

In 1933, permit for hire No. 304, authorizing the hauling of household goods, was issued to one Robinson as a matter of right without notice, hearing or other formality. In 1943, Robinson, desiring to transfer this permit to one Sims, applied to the commission jointly with Sims for approval of such transfer. The application described the permit as a "limited certificate." The commission approved the transfer and described the transferred authorization as "Limited Common Carrier Certificate No. 304." In 1947 Sims applied for and was granted an extension of the above authorization to allow transportation of fertilizer and fertilizer materials. In its order the commission described the extended authorization as "Limited Common Carrier Certificate of Public Convenience and Necessity No. 304." In 1953 Sims applied to the commission for approval of transfer of a portion of the authorization to one Bloodworth. The commission approved the application and substituted two authorizations for the one previously held by Sims, issuing "Certificate of Public Convenience and Necessity No. 461" to Bloodworth for the assigned portion and "Certificate of Public Convenience and Necessity No. 460" to Sims for the retained portion. Thereafter Sims, desiring to assign "No. 460" to Rockana Carriers, Inc., applied to the commission jointly with Rockana for the approval of the transfer. The commission approved the transfer, ordering cancellation of Sims' authorization and reissuance to Rockana. Seaboard Airlines Railroad objected to the action. On certiorari, the court held that the passage of time and failure of interim complaint could not supply the power in the commission to recognize and deal with a permit so that it would eventually become a certificate and entitled to the efficacy of one.

VALIDITY OF ADMINISTRATIVE RULES AND REGULATIONS

The court decided three interesting cases involving the validity of administrative rules and regulations. These concerned the railroad and public utilities commission, the plant board and the citrus commission.

127. 89 So.2d 246 (Fla. 1956).

Railroad and Public Utilities Commission

In *State v. King*,¹²⁸ a sequel to *Seaboard Airline Railroad Co. v. King* above considered, the court held invalid the commission's Rule 61. By this rule temporary authority to provide auto transportation services may be granted prior to hearing and determination of public convenience and necessity when formal application for a permanent certificate has been made, immediate and urgent need for the transportation has been shown to exist, and all certificate holders whose rights might be adversely affected have been notified.

Following the decision in *Seaboard Airline Railroad Co. v. King*, Rockana Carriers immediately applied for a permanent certificate of public convenience and necessity and requested temporary authority to operate. All certificate holders whose rights might be adversely affected were notified. The commission granted the temporary authority to Rockana. Seaboard challenged the validity of rule 61, contending that (1) the commission has no power to grant such temporary authority to a carrier, and (2) that the provision for notice is inadequate because limited to certificate holders. The court concluded that the commission has power to grant such temporary certificates, but that notice of hearing must be given to all transportation companies, not merely certificate holders, and that therefore the notice provision of the rule was inadequate. By reason of this inadequacy the court ordered the commission to cancel the temporary authority to Rockana and to revoke rule 61.

Plant Board—Destruction of Healthy Trees Without Compensation

In *Cornel v. State Plant Board*¹²⁹ the supreme court invalidated a regulation of the State Plant Board adopted in furtherance of its program to eliminate the burrowing nematode, a nuisance harmful to citrus and other trees. The regulation required destruction as a prophylactic measure of four healthy trees beyond the last one visibly affected by the nematode without providing for compensation to the owners for either the value of or the loss of profits from the healthy trees. The regulation was held to be unreasonable and unconstitutional. The fatal defect was the failure to provide for compensation, at least for the loss of profits which the trees would be likely to produce before becoming infected.

Citrus Commission—Thickening and Sweetening Chilled Orange Juice

In *Florida Citrus Commission v. Golden Gift*¹³⁰ the question raised was the validity of a regulation of the citrus commission which, inter alia,

128. 93 So.2d 368 (Fla. 1957).

129. 95 So.2d 1 (Fla. 1957).

130. 91 So.2d 657 (Fla. 1957).

prohibits thickening and sweetening chilled orange juice (a product packaged in waxed cardboard cartons similar to those employed in the milk industry) by the use of sugar unless the carton is labelled "substandard," but permits thickening and sweetening without labelling if frozen concentrated orange juice is used as the means. Golden Gift, desiring to add sugar to its chilled orange juice without ruining its sales, attacked the validity of this regulation as unreasonable and arbitrary because sugar is a substance which is wholesome, nutritional, and innocuous; and as discriminatory because the statute regulating the canning of orange juice permits sugar to be added to canned juice without requiring that the can bear the label "substandard." The commission defended the reasonableness of the regulation on the ground that when sugar is added to fresh orange juice the practice is also to add lime juice to correct the acid content of the product, and water to maintain the ratio between the acid content and the solids, with the result that the final product is no longer the chilled single strength orange juice which the customer believes he is buying.

In answer to the charge of discrimination, the commission pointed out that sugar is not permitted to be added to frozen concentrated orange juice under the statute regulating that segment of the citrus industry, and contended that chilled orange juice is closer to the frozen concentrated than to the canned juice. The issue was whether waxed carton orange juice is governed by the statute regulating canned orange juice, by the statute applicable to frozen concentrated orange juice, or by neither of these statutes, and absent a statute specifically applicable to waxed carton orange juice, whether the regulation in question is valid under the statute vesting the citrus commission with general powers to regulate the processing of the citrus fruits for human consumption.

The circuit court found that packaging in waxed cartons is only a new and successful technique for accomplishing a result unsuccessfully tried many times before by Florida citrus growers and meets the requirements of the statutory definition of canned orange juice. On this basis it held the regulation to be invalid because it was unreasonable and discriminatory. The supreme court reversed and ruled that waxed carton orange juice is really a new type of product, that it is subject to regulation under the commission's general powers, and that the regulation in question is valid as a reasonable and non-discriminatory exercise of that power. In upholding the regulation, the court reiterated the rule that an administrative regulation is reasonable when it is reasonably related to the ends authorized and sought to be attained. The ends were declared to be protection of the citrus industry of the state and the prevention of fraud and deception in the "chilled orange juice" industry. The regulation was thought to be reasonably adapted to those ends and not shown to be discriminatory. The

opinion points out that the marketing in the fall of the year of orange juice having the appearance of freshly squeezed orange juice, but which has been sweetened, in competition with oranges which are tart, could have an adverse effect on the economy of the Florida citrus industry.

ADMINISTRATIVE RULES AND REGULATIONS AS LAW

*Bronson v. State of Florida*¹³¹ illustrates that administrative rules and regulations may be "law" in the Austinian sense, as a command of the state, of equal or greater dignity than statutes, and that their status as "law" depends not upon any characteristics inherent in the rules or regulations but upon the source from which administrative authority to make them is derived. That case involved, inter alia, the question of the lawfulness of an arrest without a warrant for shooting alligators when the shooting was not in the presence of the arresting officer. Under the common law an authorized officer may make an arrest in such circumstances if he has probable cause to believe that a "law" of the state has been violated. In this case the appellant was arrested because the officer had probable cause to believe that the defendant had violated a rule of the Game and Fresh Water Fish Commission regulating the manner and method of taking reptiles. One of the defenses was that such rule is not a "law" of the state but merely an administrative regulation. The court rejected this argument stating: "To agree with appellant would require us to attribute too little dignity to rules of the Commission."¹³² These rules had been adopted pursuant to Section 30 of article IV of the Constitution of Florida. A prior decision had held that rules of this administrative agency could not be changed by the legislature,¹³³ that the legislature did not have the power to prescribe methods of taking fish different from those prescribed by the commission,¹³⁴ and that in case of a conflict between a rule of the commission and an act of the legislature, the rule of the commission was the "governing law."¹³⁵ In the *Bronson* case the court went further and held that such rule is also a "law" within the meaning of the law of arrest without a warrant.

ADMINISTRATIVE CONSTRUCTION OF STATUTES

Administrative agencies are required to act under the applicable statute governing their activities long before the court is presented with any occasion to construe it. Accordingly, even agencies that are content to assume a modest position in the legal hierarchy are required by necessity to indulge in the art of statutory construction, a function traditionally reserved to the courts exclusively. When the validity of agency action is

131. 83 So.2d 849 (Fla. 1956).

132. *Id.* at 850.

133. *State ex. rel. Griffin v. Sullivan*, 158 Fla. 870, 30 So.2d 919 (1947).

134. *Ibid.*

135. *Ibid.*

brought in question, it is sometimes defended on the basis of the agency's construction of the statute, which is then pressed on the court for adoption. To what extent, if any, does the court acknowledge that administrative agencies may legitimately construe statutes by necessity and give effect to their views as "statutory construction"? In some of the cases the court has said that the administrative construction is a persuasive force and influential, but in others it has completely ignored the question and has proceeded with the task of judicial construction as it does when a private individual makes and acts on a private construction of the statute. Where influence and persuasive force has been attributed to the administrative construction, and it has been adopted, there has been no indication that the result reached by the court would not have been the same in any event.

In *McKinney v. State of Florida ex rel. Ersoff*,¹³⁶ the question was whether the legislature in exempting restaurants "occupying more than four thousand square feet of space," from the beverage license limitations of Section 561.20 Florida Statutes (1957), intended the footage to be measured on the outside or the inside of the restaurant. The State Beverage Department has consistently construed the statute to refer to the exterior walls of the premises. The court approved this construction. Justice Roberts, speaking for the majority of the court, was content to rest this decision on the "settled law" that "a construction placed on a statute by a state administrative officer . . . is a persuasive force and influential with the courts, when found not to conflict with some provision of the Constitution or the plain intent of the statute."¹³⁷ Justice Drew, concurring in the result, did not agree with the reason. "This case boils down to the question of whether the Act under consideration should receive a strict or a liberal construction."¹³⁸ In his view "a liberal construction is required."

*Baker v. Morrisson*¹³⁹ was concerned with the statutory requirements for qualification of applicants to take the Board of Pharmacy examination. Specifically the question was whether under chapter 465, the educational and experiential specifications are cumulative or alternative. A "period" placed by the legislative draftsman at the end of the educational requirement gave hope to an applicant able to meet the experience requirement that he might not have to meet the educational one as required by the board of pharmacy. The court, after stating the rule that the legislature is presumed to know the meaning of words and rules of grammar, and that the court in determining the intention of the legislature must consider not only the phraseology of an act, but also the manner in which it is punctuated, rescued the dual requirement of education and experience with the words

136. 83 So.2d 875 (Fla. 1956).

137. *Id.* at 876.

138. *Ibid.*

139. 86 So.2d 805 (Fla. 1956).

"We believe that this is a case where this Court is warranted in giving the Statute a meaning different from that indicated by the punctuation."¹⁴⁰

In *Florida Industrial Commission v. Ciarlante*¹⁴¹ the court approved the commission's administrative construction of the words "available for work," as used in section 443.05(3) Florida Statutes (1957), which provides that unemployment compensation is not payable unless claimant is "available for work." The statute does not define the phrase. The commission requires that applicants actively seek work to qualify as "available for work." The question was whether the agency illegally added a requirement not authorized by the statutes. The court reviewed the judicial decisions construing similar phrases in other states and found that the statutory construction by the Commission was in line with that frequently made elsewhere. Under these circumstances the court saw nothing to require substituting a different interpretation of the act from that adopted by the commission entrusted with the responsibility of administering the statute and, accordingly, sustained its interpretation.

In *Florida Industrial Commission v. Manpower Inc.*¹⁴² the court rejected the administrative construction. The case was concerned with the question of whether the authority of the commission to regulate private employment agencies extends to a business service organization which provides services under an arrangement whereby the services are performed by employees of the service organization to whom it pays salaries, the customer pays for the service at a fixed contract price, and no fee is charged to either the customer or the employee for providing employment. The question turned on the statutory definition of the words "employment agency." The statute defines such phrases to include any person, firm or corporation which for fee or profit shall "undertake to secure" help for another.¹⁴³ The commission construed this phrase to include the above type of service organization. The court concluded that while Manpower "secured help" it did not "undertake" to secure such help within the meaning of the statute and its business was therefore not an "employment agency" subject to regulation by the commission under the above statute. In reaching its conclusion the court gave consideration to the fact that Manpower's organization was not susceptible to the abuses which the private employment agency statute is intended to prevent and that its mode of operation was not an attempt to circumvent the statute.

In *Bedenbaugh v. Adams*¹⁴⁴ the court sustained the State Livestock Board hog cholera inoculation program against a challenge to its legality made in injunction proceedings to enjoin the expenditure of county funds for

140. *Id.* at 807.

141. 84 So.2d 1 (Fla. 1955).

142. 91 So.2d 197 (Fla. 1956).

143. FLA. STAT. § 449.01 (1957).

144. 88 So.2d 765 (Fla. 1956).

the program. In upholding the lawfulness of the program the court relied on sections of chapter 585, Florida Statutes, which "the parties in the trial court and in the court have overlooked."¹⁴⁵

In *Hagan v. Florida Railroad and Public Utility Commission*¹⁴⁶ the court upheld commission action which gave an unusual meaning to the concept of "new carrier." The applicant was an auto carrier certified to provide service over irregular routes to, from and between all points and places in the state of Florida, subject to a restriction that its motor vehicle equipment be domiciled only in Tampa. Applicant sought, inter alia, authorization to transfer the domicile of such equipment to Lakeland, Florida. To decide this question the commission held a hearing on the question of whether public convenience and necessity would permit a "new carrier" in Lakeland and on the basis of such hearing denied the application. In certiorari proceedings the supreme court practically ignored the contention that applicant was not a "new carrier" in Lakeland, since he was already certified to serve Lakeland.

145. *Id.* at 767.

146. 82 So.2d 592 (Fla. 1955).