

University of Miami Law Review

Volume 31
Number 4 1976 *Developments in Florida Law*

Article 2

9-1-1977

Administrative Law

The Honorable Arthur J. England Jr.

L. Harold Levinson

Follow this and additional works at: <https://repository.law.miami.edu/umlr>

Recommended Citation

The Honorable Arthur J. England Jr. and L. Harold Levinson, *Administrative Law*, 31 U. Miami L. Rev. 749 (1977)

Available at: <https://repository.law.miami.edu/umlr/vol31/iss4/2>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

university of miami law review

VOLUME 31

SEPTEMBER 1977

NUMBER 4

ADMINISTRATIVE LAW*

ARTHUR J. ENGLAND, JR.**
AND L. HAROLD LEVINSON***

This survey updates Professor Levinson's 1975 article on the Florida Administrative Procedure Act. The survey examines and reports all appellate decisions, attorney general opinions and 1976 amendments. Collateral to the discussion of the 1976 amendments, the authors focus on and report the results of the first series of amendments enacted in 1975. In addition, a legislatively proposed constitutional amendment, defeated in the last general election, and the implementing bill vetoed by the governor prior to the general election are considered.

I. INTRODUCTION	751
II. TRANSITION FROM OLD TO NEW APA	752
III. COVERAGE AND EXEMPTIONS	753
A. Rule and Order	753
B. Agency	755
C. Party	756
D. Substantial Interest	757
E. Exemptions	758
F. Conflicts Between APA and Other Statutes	759
G. Cases deciding administrative law issues without discussing APA	760
IV. RULEMAKING	761
A. Determination of validity of rule or proposed rule by hearing examiner	761
1. GROUNDS FOR INVALIDATION	761

* Portions of this article will be incorporated in the authors' forthcoming MANUALS on FLORIDA ADMINISTRATIVE LAW and FLORIDA CONSTITUTIONAL LAW, to be published by D & S Publishers, Inc.

** Justice of the Supreme Court of Florida. B.S., LL.B., University of Pennsylvania, LL.M., University of Miami. By reason of his position on the Supreme Court of Florida, Justice England declines to join or adopt any position on certain comments made by Professor Levinson on some of the developments in administrative law during the survey period. Those comments made by Professor Levinson alone are so noted below.

*** Professor of Law, Vanderbilt University. B.B.A., LL.B., University of Miami; LL.M., New York University; J.S.D., Columbia University.

2. DISCOVERY	763
3. COPIES AND NOTICE	763
B. <i>Agency Rulemaking Authority</i>	763
C. <i>Requirement That Agencies Adopt Rules</i>	764
D. <i>Proceedings Under Section 120.57 During Rulemaking</i>	765
E. <i>Model Rules</i>	766
F. <i>Legislative Oversight of Agency Rules</i>	766
1. AMENDMENT OF APA SECTION ON LEGISLATIVE OVERSIGHT	767
2. ATTEMPTED CONSTITUTIONAL AMENDMENT	767
3. ATTEMPTED LEGISLATION TO IMPLEMENT CONSTITUTIONAL PROPOSAL	768
G. <i>Time for Filing Proposed Rules with Department of State</i>	768
H. <i>Withdrawal and Modification of Proposed Rules</i>	769
I. <i>Economic Impact Statement</i>	769
V. DETERMINATIONS OF SUBSTANTIAL INTERESTS	770
A. <i>Conflict Between Hearing Examiner and Agency</i>	770
B. <i>Special Status of Workmen's Compensation Determinations by Industrial Relations Commission</i>	770
C. <i>Division's Hearing Examiners Not Required in Certain Situations</i>	772
D. <i>Agency Expertise</i>	772
E. <i>Agency Head</i>	773
F. <i>Notice</i>	773
G. <i>Record</i>	774
H. <i>Discovery</i>	774
I. <i>Time When Agency Proceeding Commences</i>	774
VI. JUDICIAL REVIEW	775
A. <i>Form of Action</i>	775
B. <i>Type of Agency Action Subject to Judicial Review</i>	776
C. <i>Standing</i>	777
D. <i>Time for Filing Petition</i>	777
E. <i>Stay</i>	778
F. <i>Record</i>	779
G. <i>Standards For Review</i>	779
H. <i>Remedies</i>	780
VII. MISCELLANEOUS	781
A. <i>Subpoena</i>	781
B. <i>Licensing</i>	781
C. <i>Public Access</i>	781
D. <i>Publication</i>	781
E. <i>Declaratory Statement</i>	782
F. <i>Division of Administration Hearings—Funding</i>	782
G. <i>Ex Parte Communications</i>	782
H. <i>Incorporation of APA into Other Statutes</i>	782
I. <i>Reviser's Bill</i>	783

I. INTRODUCTION

An article in this *Review's* Summer 1975¹ issue explored the history and major provisions of the 1974 revision of the Florida Administrative Procedure Act, and the relatively minor amendments enacted in 1975.² The present article, continuing that discussion, surveys Florida appellate decisions and attorney general's opinions from the inception of the 1974 APA,³ as well as the legislative changes enacted as amendments to the APA in 1976.⁴ This

1. Levinson, *The Florida Administrative Procedure Act: 1974 Revision and 1975 Amendments*, 29 U. MIAMI L. REV. 617 (1975). The 1974 Florida Administrative Procedure Act is also discussed in *The Florida Bar, Continuing Legal Education, Florida Administrative Practice* (1976); Alford, *Administrative Procedure Act*, 48 FLA. B.J. 683 (1974); Oertel, *Hearings under the New Administrative Procedure Act*, 49 FLA. B. J. 356 (1975); Whisenand, *Model Rules of Florida Administrative Practice—Chaos or Uniformity?*, 49 FLA. B. J. 361 (1975); Symposium, *The New Florida Administrative Procedure Act: Selected Presentations from the Attorney General's Conference*, 3 F.S.U. L. REV. 64 (1975); Note, *Can the Joint Administrative Procedures Committee Adequately Solve Administrative Conflict?*, 4 F.S.U. L. REV. 350 (1976); Note, *Rulemaking and Adjudication under the Florida Administrative Procedure Act*, 27 U. FLA. L. REV. 755 (1975).

2. The 1974 legislation is 1974 Fla. Laws ch. 74-310 (codified at FLA. STAT. ch. 120, (Supp. 1974) and FLA. STAT. § 11.60 (Supp. 1974)). The 1975 amendments are 1975 Fla. Laws ch. 75-191 (amending FLA. STAT. ch. 120 (Supp. 1974)) and 1975 Fla. Laws ch. 75-107 (amending FLA. STAT. § 120.55 (Supp. 1974)).

The primary source of legislative history is Reporter's Comments on Proposed Administrative Procedure Act for the State of Florida, submitted to Florida Law Revision Council, March 9, 1974. *Lewis v. Judges of the District Court of Appeal*, 322 So. 2d 16 (Fla. 1st Dist. 1975). These comments accompanied the reporter's draft of the proposed statute dated March 1, 1974. The comments were available to legislators and others during the legislative process which led to the enactment of the 1974 APA. Most of the 1974 APA is identical or similar to the Reporter's Draft dated March 1, 1974. The reporter was Arthur England, one of the authors, who at that time was engaged in the practice of law in Miami. The reporter's work papers, including five draft statutes and comments, are available in the library of the Supreme Court of Florida and in the archives of the Law Revision Council.

Controversy has arisen regarding the impact of the 1974 APA on workmen's compensation determinations made by the Industrial Relations Commission. One of the authors has asserted that the 1974 APA is and should be broadly applicable to such determinations; Levinson, *supra* note 1, at 636-37, 679-81. Contrary views have been expressed by several authors who contribute from time to time to the Workmen's Compensation News feature of the Florida Bar Journal; Davis, 50 FLA. B. J. 349, 567 (1976); Slepín, 50 FLA. B. J. 166, 215, 508 (1976); Slepín, 50 FLA. B. J. 599 (1975); Slepín and Whittaker, 49 FLA. B. J. 55 (1975). A relatively neutral position is taken in the case comment on *Scholastic Systems, Inc. v. LeLoup*, 307 So. 2d 166 (Fla. 1974), noted at 29 U. MIAMI L. REV. 798 (1975).

Case law and legislative developments on workmen's compensation, as affected by the 1974 APA during the period covered by this survey, are discussed in section V, B *infra*.

3. Survey coverage ends at 339 So. 2d 573, the last pamphlet of the advance sheets published in December, 1976. Some more recent slip opinions, available at the time of publication, are also discussed.

4. The major 1976 legislation amending the 1974 APA is 1976 Fla. Laws, ch. 76-131

article uses "1974 APA" to refer to the new Administrative Procedure Act as amended in 1975, unless the context indicates otherwise. The amendments enacted in 1976 will be specifically identified in the text.

II. TRANSITION FROM OLD TO NEW APA

The 1974 APA provides that "all administrative adjudicative proceedings" begun prior to January 1, 1975 shall be brought to a conclusion under the repealed predecessor Act ("the old Act"), except that the parties and agency can agree to adopt the new provisions, as nearly as is feasible, for proceedings that had not yet progressed to the stage of a hearing.⁵

As judicially interpreted, this provision preserves the old Act and case law, not only for the purpose of establishing the procedure to be followed in administrative adjudicative proceedings that were in process on the transition date, but also for determining whether or not a proceeding that was then in process should be characterized as "adjudicative." In *Lewis v. Judges of the District Court of Appeal*,⁶ the court resorted to case law construing the old Act to characterize agency action on a bank charter application that was in process on the transition date. This led to the conclusion that the agency action was "quasi-executive," and consequently not covered by the old Act. Similar agency action, if commenced after the transition date, would clearly be covered within the more expansive scope of the new APA,⁷ but the transition provision of the 1974 APA precluded retroactive application in that case. The result was that neither the old nor the new APA applied. A similar result was reached in *Broward County v. Administration Commission*,⁸ in

(amending FLA. STAT. ch. 120 (1975)). Other statutes reflected in this article are 1976 Fla. Laws ch. 76-207 (amending FLA. STAT. § 120.72 (1975)); 1976 Fla. Laws, ch. 76-1 (creating FLA. STAT. §§ 286.25-35), to be known as the Florida Economic Impact Disclosure Act of 1975; 1976 Fla. Laws ch. 76-115 (amending FLA. STAT. § 20.19 (1975)); and 1976 Fla. Laws ch. 76-178 (creating FLA. STAT. § 658.057 and amending FLA. STAT. ch. 659 (Supp. 1976)).

5. FLA. STAT. § 120.72(2) (1975) (current version at FLA. STAT. § 120.72(2)(a) (Supp. 1976)); see note 13, *infra* and accompanying text.

6. 322 So. 2d 16 (Fla. 1975).

7. This was the declared intent of the 1974 APA; Reporter's Comments, *supra* note 2, at 18; Levinson, *supra* note 1, at 628. The 1976 Legislature gave further emphasis to the expansive scope of the 1974 APA by enacting FLA. STAT. § 659.561(4) (Supp. 1976), declaring the 1974 APA applicable to banking proceedings for cease and desist orders.

8. 321 So. 2d 605 (Fla. 1st Dist. 1975).

which the Commission's approval of the sheriff's budget was characterized under the old Act as "quasi-executive", and thus exempt from district court of appeal review. In *Office of Public Defender v. Hunter*,⁹ application of the transition provision caused a transfer of the case to another district court, while in *Jacobson v. Thiessen*,¹⁰ the consequence was to require venue for judicial review in a circuit court rather than in the district court. The transition provision had a similar effect in *Chung-Ling Yu v. Criser*,¹¹ where an administrative process was found adequate under the old Act though allegedly insufficient under the 1974 APA.

The courts reached conflicting opinions as to whether the old or the new APA would govern judicial review when the agency proceeding had commenced before the effective date of the new Act but judicial review was sought after that date.¹² The conflict was resolved by a 1976 amendment to the transition section of the 1974 APA. The amendment provides that the old Act will govern judicial review of administrative adjudicative proceedings commenced before the transition date.¹³

III. COVERAGE AND EXEMPTIONS

A. Rule and Order

In *Plant City v. Mayo*,¹⁴ the court commented that actions by the Public Service Commission in its official capacity necessarily result in either an "order" or a "rule" under the 1974 APA. This comment is consistent with the legislative intent to bring all forms of agency action within the purview of the Act, either as "orders" or "rules."¹⁵

9. 323 So. 2d 316 (Fla. 1st Dist. 1975).

10. 320 So. 2d 25 (Fla. 2d Dist. 1975).

11. 330 So. 2d 198 (Fla. 1st Dist. 1975), *cert. denied*, (Fla., Nov. 19, 1976).

12. The 1974 APA was held to apply in *Plant City v. Mayo*, 337 So. 2d 966 (Fla. 1976); *Broward County v. Administration Comm'n*, 321 So. 2d 605 (Fla. 1st Dist. 1975). A contrary conclusion was reached in *Cerro Corp. v. Department of Revenue*, 336 So. 2d 628 (Fla. 1st Dist. 1976); *Office of Public Defender v. Hunter*, 323 So. 2d 316 (Fla. 1st Dist. 1975); and *Jacobson v. Thiessen*, 320 So. 2d 25 (Fla. 2d Dist. 1975).

13. FLA. STAT. § 120.72 (Supp. 1976) (amending FLA. STAT. § 120.72 (1975)).

14. 337 So. 2d 966 (Fla. 1976).

15. The terms "rule" and "order" are defined in the 1974 APA, FLA. STAT. § 120.52(9), (14) (1975). In *City of Titusville v. Public Employee Relations Comm'n*, 330 So. 2d 733, 736 (Fla. 1st Dist. 1976), the court declared that "all agency action is now reviewable by this court." See also Fla. Att'y Gen. Op. 076-123 (June 1, 1976).

*City of Key West v. Askew*¹⁶ held that action of the Administration Commission in designating certain land as an area of critical state concern was a rule. Both a hearing examiner¹⁷ and the Attorney General¹⁸ regarded personnel policies as rules within the intent of the 1974 APA. The Attorney General also determined that forms required or used by state agencies are rules,¹⁹ and a 1976 amendment to the APA legislatively expanded the definition of rule to this effect.²⁰

*Department of Administration (Personnel Division) v. Department of Administration (Division of Administrative Hearings)*²¹ held that an agency's decision on a challenge to one of its rules is an "order" under the 1974 APA, and *Venetian Shores Home and Property Owners v. Ruzakowski*²² held that an agency's grant of a license (in this case, to take off and land a seaplane on a state waterway) was also an "order."

The 1974 APA states that "all public utilities and companies regulated by the Public Service Commission shall be entitled to proceed under the interim rate provisions"²³ of other statutes. On this basis, the court held in *Florida Interconnect Telephone Co. v. Public Service Commission*,²⁴ that the "file and suspend" procedure established by other law²⁵ remained in effect despite adoption of the 1974 APA. Under the "file and suspend" law, the tariff of rates submitted to the Public Service Commission by a utility company goes into effect automatically, on a provisional basis, if the Commission fails to take negative action within a certain time. The court held that the Commission, by permitting a new tariff to take provisional effect without objection, did not render a "final order" under the 1974 APA, and was not required to conduct a proceeding at that stage of the regulatory process.

16. 324 So. 2d 655 (Fla. 1st Dist. 1975).

17. *Stevens v. Department of Health & Rehabilitative Serv's.*, No. 75-2024P. (Div. of Admin. Hearings, Apr. 28, 1976).

18. Fla. Att'y Gen. Op. 076-126 (June 2, 1976).

19. Fla. Att'y Gen. Op. 076-123 (June 1, 1976).

20. FLA. STAT. § 120.52(14) (Supp. 1976) (amending FLA. STAT. § 120.52(14) (1975)).

21. 326 So. 2d 187 (Fla. 1st Dist. 1976).

22. 336 So. 2d 399 (Fla. 3d Dist. 1976).

23. FLA. STAT. § 120.72(3) (1975).

24. 342 So. 2d 811 (Fla. 1976).

25. FLA. STAT. § 364.05(4) (1975).

B. Agency

The 1974 APA contains a precise definition of "agency" which, as a general matter, limits coverage under the Act to state-level agencies.²⁶ *Sweetwater Utility Corp. v. Hillsborough County*²⁷ and *Board of County Commissioners of Hillsborough County v. Casa Development Ltd.*²⁸ confirm that the 1974 APA is generally not applicable to county agencies.

The Department of Revenue was the only agency of state government whose former exclusion from coverage and new inclusion under the 1974 APA were the subject of judicial concern during the survey period.²⁹ In *Cerro Corp. v. Department of Revenue*,³⁰ the court conceded that the Department had been partially exempt from the old Act, while in *Straughn v. O'Riordan*³¹ the court's opinion was governed by the Department's inclusion under the old Act for rule-making responsibilities. Under the 1974 APA, of course, all of the Department's activities are covered as any other state agency.³²

The Administration Commission, which is composed of the Governor and the Cabinet, presumably is an agency under the 1974 APA. Under the old Act's term "commission," which also appears in the new Act, the Administration Commission was considered an agency subject to the provisions of the 1974 APA.³³

In an *Advisory Opinion to the Governor*,³⁴ the Justices of the Florida Supreme Court unanimously opined that the Governor is not—and under the constitution could not be—covered by the 1974 APA in the exercise of his constitutional power of executive clemency. A majority of the Justices added that the cabinet members

26. FLA. STAT. § 120.52(1) (1975); Levinson, *supra* note 1, at 623-26.

27. 314 So. 2d 194 (Fla. 2d Dist. 1975).

28. 332 So. 2d 651 (Fla. 2d Dist. 1976); *accord*, [1975] FLA. ATT'Y GEN. ANN. REP. 244.

29. The 1974 APA, FLA. STAT. § 120.52(1) (1975), supersedes the old Act, FLA. STAT. § § 120.021.(1), 120.21(1) (1973).

30. 336 So. 2d 628 (Fla. 1st Dist. 1976).

31. 338 So. 2d 832, 834 n.3 (Fla. 1976). The court refused to require a sales tax bond on the basis of a departmental policy that had not been embodied in properly adopted rules.

32. See Fla. Att'y Gen. Op. 076-123 (June 1, 1976) and Fla. Att'y Gen. Op. 076-126 (June 2, 1976), expressly stating that the Department of Revenue and the Department of Health and Rehabilitative Services are agencies within the 1974 APA.

33. *Broward County v. Administration Comm'n*, 321 So. 2d 604 (Fla. 1st Dist. 1975).

34. 334 So. 2d 561 (Fla. 1976).

who participate in certain parts of the clemency power are also exempt from the 1974 APA.³⁵

C. Party

The 1974 APA creates three classes of persons who may become a "party" to an administrative proceeding. One category includes those who have been given authority to participate in a proceeding by agency rule.³⁶ In *Laborers International Union v. Public Employee Relations Commission*,³⁷ one labor union was permitted to intervene in a collective bargaining proceeding filed by another union. The grounds for the decision were that the Commission's rules created intervention authority and the Chairman of the Public Employees Relations Commission had consented to the intervention. Another category of "party" includes those who have been allowed by the agency to intervene or participate in a proceeding.³⁸ This supplied the authority for participation in *City of Key West v. Askew*.³⁹

Another interpretation of the term "party," this time to embrace a state agency, was rendered in *Department of Highway Safety and Motor Vehicles v. Career Service Commission*,⁴⁰ when the court denied a prohibition sought to prevent testimony by employees of the Department in a proceeding before the Commission regarding discharge of a Department employee.

The term "party" is also critical in terms of the right of review. In *Plant City v. Mayo*,⁴¹ it was held that a municipality which was eligible to become a party in a Public Service Commission proceeding, and timely elected to participate, was entitled to seek judicial review, but other municipalities eligible to participate at the administrative level but who did not do so within the allowable time could not seek appellate review of the agency's final action.

35. In a separate opinion, Justice England declined to join in this portion of the majority view on the ground that the advisory jurisdiction of the Supreme Court can be exercised only with regard to the constitutional functions of the Governor. *Id.* at 563 (England, J., concurring in part, dissenting in part).

36. FLA. STAT. § 120.52(10)(c) (1975).

37. 336 So. 2d 450 (Fla. 1st Dist. 1976).

38. FLA. STAT. § 120.52(10)(c) (1975).

39. 334 So. 2d 655 (Fla. 1st Dist. 1975). See text accompanying note 16, *supra*.

40. 322 So. 2d 64 (Fla. 1st Dist. 1975).

41. 337 So. 2d 966 (Fla. 1976).

D. Substantial Interest

The term "substantial interest" is not defined in the 1974 APA, but it does condition the right of any person to obtain or participate in an administrative hearing under the 1974 APA.⁴² In *ASI, Inc. v. Public Service Commission*,⁴³ the court was called upon to determine if one motor carrier was entitled to intervene in a proceeding of another carrier to obtain a for-hire permit for the transportation of baggage under chapter 323, Florida Statutes. Noting that the applicable statutes required the Commission to issue a permit to any applicant as of right, and without a showing of public convenience and necessity, the court held that no other carrier except the applicant had a substantial interest in the proceeding. Accordingly, intervention was denied.⁴⁴

42. FLA. STAT. § 120.57(1) (1975).

43. 334 So. 2d 594 (Fla. 1976).

44. The following observation of Professor Levinson is neither joined in nor commented upon by his coauthor, Justice England.

Two aspects of the *ASI* decision are troublesome. First, the court implies that a competitor does not have a substantial interest in a permit application by another party, unless the statute requires applicants for permits to demonstrate public convenience and necessity. I cannot agree with this interpretation of the 1974 APA. In my view, a competitor should be regarded as having a substantial interest in any proceeding which would have a substantial impact upon him, such as a proceeding to issue a permit to another party in the same business if favorable action on the application would have a significant impact upon others in the business. In such circumstances, section 120.57 would permit the competitor to participate in the administrative proceedings. The extent of his participation would depend on the law applicable to the granting of permits for the specific type of business activity involved. In a situation such as that in *ASI*, where the statute does not require an applicant to demonstrate public convenience and necessity, the agency might strike as irrelevant any matters asserted by the competitor relating to public convenience and necessity. The competitor might find himself without any remaining arguments for submission to the agency—but this result would follow from defining the scope of the competitor's participation, not from excluding him for lack of substantial interest. Second, the statute at issue in *ASI* confers discretion upon the Public Service Commission to conduct a public hearing at which the Commission may consider public convenience and necessity in connection with the very type of permit involved in *ASI*. FLA. STAT. § 323.05(6) (1975). As recently as 1975, the court sustained the validity of commission action resulting from a hearing that the Commission, in its discretion, had conducted under this very provision. *Smith Terminal Warehouse Co. v. Bevis*, 312 So. 2d 721 (Fla. 1975). The competitor should have had the opportunity to assert the need, in the *ASI* proceedings under the same statute, for the commission to exercise its discretion by conducting a hearing on public convenience and necessity. If the commission had held such a hearing, the competitor should have been permitted to participate therein. If, on the other hand, the commission had declined to hold a hearing, the competitor should have had an opportunity to seek judicial relief, on the grounds that the commission abused its discretion by refusing to hold the hearing, or alternatively that the commission's refusal to hold the hearing was an unexplained departure from prior agency practice, under 1974 APA. FLA. STAT. § 120.68(12)

The substantial interest provisions of the 1974 APA are triggered only when an agency "determines" such interests by a particular form of action, according to an opinion of the Attorney General.⁴⁵ He ruled that the decision of a regional planning board (an agency generally covered by the 1974 APA) to appeal a local development order to the Florida Land and Water Adjudicatory Board was not a determination of substantial interests covered by the 1974 APA, because the interests of the parties would be "determined" by the Adjudicatory Board as the appellate tribunal rather than by the planning board as appellant.

E. Exemptions

The Administration Commission has granted limited exemptions from parts of the 1974 APA during the survey period.⁴⁶ Two of these produced legislation in 1976. The Department of Banking and Finance was exempted from part of the 1974 APA's provisions on rulemaking.⁴⁷ The School Boards of Marion and Lee Counties, and subsequently the school boards of numerous other counties and community colleges, were exempted from some of the provisions of the 1974 APA regarding notice and the use of hearing officers of the Division of Administrative Hearings in student disciplinary proceedings.⁴⁸ The Public Employees Relations Commission was exempted from the use of hearing officers of the Division of Administrative Hearings in collective bargaining hearings in which the State of Florida is the public employer.⁴⁹ Additionally, the Department of

(1975). The competitor's contentions could then be addressed on the merits, instead of being swept aside because the court found the "substantial interest" test had not been satisfied.

45. [1975] FLA. ATT'Y GEN. ANN. REP. 94.

46. JOINT ADMINISTRATIVE PROCEDURES COMMITTEE, ANNUAL REPORT, January 1, 1975 to December 31, 1975 (1976) at 28. Letters to Justice England from Deputy Attorney General James D. Whisenand (October 21, 1976 and January 4, 1977).

47. 1976 Fla. Laws, ch. 76-178 requires proceedings for cease and desist orders to be conducted within the 1974 APA, FLA. STAT. § 120.57, but does not address the matter of rulemaking that had been the subject of the exemption by the Administration Commission.

48. FLA. STAT. §§ 120.57(1)(a)6, .57(1)(b)2 (Supp. 1976) (amending FLA. STAT. § 120.57 (1975)) provided exemptions in a number of details, including the following: (1) in hearings involving student disciplinary suspensions or expulsions conducted by educational units, the 14-day notice requirement may be waived by the agency head or the hearing officer without consent of the parties; and (2) hearing examiners of the Division of Administrative Hearings are not required for hearings which involve student disciplinary suspensions or expulsions and which are conducted by educational units.

49. FLA. STAT. § 120.57(1)(a)7 (Supp. 1976) (amending FLA. STAT. § 120.57 (1975)) provides, *inter alia*, that hearing examiners of the Division of Administrative Hearings are not

Health and Rehabilitative Services received a 90-day exemption, which was not renewed, for notice, final order and appeal requirements in Baker Act proceedings.⁵⁰

The Division of Pari-Mutuel Wagering was exempted from 14-day notice requirements and the use of hearing officers of the Division of Administrative Hearings for fines up to \$200 and suspensions of jockeys.⁵¹ At the end of 1976, an application was pending before the Administration Commission from the Department of Offender Rehabilitation, seeking exemption from the 1974 APA for the Department's functions in the internal management of institutions, management of prisoners, and contacts therewith.⁵²

Two relatively minor changes were made in the 1974 APA provisions on exemption. First, if the Administration Commission grants an exemption from any provision of the section on licensing, the exemption shall be for a single application only, and shall not be renewable.⁵³ Second, when the Administration Commission issues an order granting or denying a petition for exemption, the Commission shall transmit a copy to the Joint Administrative Procedures Committee, and shall also give notice of its order in the *FLORIDA ADMINISTRATIVE WEEKLY*.⁵⁴

F. *Conflicts Between APA and Other Statutes*

The 1974 APA declares a legislative intent to replace all administrative law provisions in Florida Statutes 1973.⁵⁵ The Attorney General construed this provision⁵⁶ as overriding inconsistent requirements for rulemaking publication and notice in statutes governing the Department of Environmental Regulation,⁵⁷ and for the

required for hearings of the Public Employees Relations Commission in which a determination is made of the appropriateness of the bargaining unit.

50. *Minutes of Administration Commission* (Mar. 3, 1975)

51. *Minutes of Administration Commission* (Sept. 21, 1976), renewing an earlier exemption.

52. Letter to Justice England from Deputy Attorney General James D. Whisenand (Jan. 4, 1977). Prison discipline proceedings are presently conducted in accordance with rules adopted under the 1974 APA, but do not provide the range of procedural rights incorporated into hearings under section 120.57. See *Myers v. Askew*, 338 So. 2d 1128 (Fla. 4th Dist. 1976). For further information see text accompanying note 63 *infra*.

53. FLA. STAT. § 120.60(6) (Supp. 1976) (amending FLA. STAT. § 120.60 (1975), adding § 120.60(6)).

54. FLA. STAT. § 120.63(2)(a) (Supp. 1976) (amending FLA. STAT. § 120.63 (2)(a) (1975)).

55. FLA. STAT. § 120.72(1) (1975).

56. [1975] FLA. ATT'Y GEN. ANN. REP. 312; Fla. Att'y Gen. Op. 076-80 (Apr. 8, 1976).

57. FLA. STAT. ch. 403 (1975).

effective date provisions of rules expressed in statutes governing the Game and Fresh Water Fish Commission.⁵⁸ *Alford v. Duval County School Board*,⁵⁹ in contrast, held that since the 1974 APA supersedes only general laws (the only laws compiled in Florida Statutes 1973), the 1974 APA does not supersede the administrative law features of special laws.

G. *Cases Deciding Administrative Law Issues Without Discussing APA*

A number of cases involving administrative law issues have been decided during the survey period without reference to the APA. In one of the cases, the 1974 APA is obviously inapplicable, and the court's failure to mention the inapplicability of the Act is quite understandable; the case involves circuit court review, by certiorari, of the decision of a county manager suspending a police officer.⁶⁰ As indicated above,⁶¹ the 1974 APA does not apply to agencies below the state level, except in a narrow range of situations not present here.

However, it is not so obvious why the courts neglected even to mention the 1974 APA in other cases. *Department of Health and Rehabilitative Services v. Career Service Commission*⁶² applies chapter 110, Florida Statutes with regard to procedures in personnel disputes. *Myers v. Askew*⁶³ sustains the validity of prison discipline proceedings. *Jackson v. Department of Health and Rehabilitative Services*⁶⁴ reviews the action of a hearing officer in a matter involving a recipient of Aid to Families with Dependent Children. *State ex rel. Martinez v. Department of Commerce*⁶⁵ reviews an order of the Industrial Relations Commission on a claim for unemployment compensation benefits. *Hialeah Park, Inc. v. Board of Business Regulation*⁶⁶ reviews the Board's award of racing dates, and cites *De*

58. FLA. STAT. § 372.021 (1975).

59. 324 So. 2d 174 (Fla. 1st Dist. 1975).

60. *Metropolitan Dade County v. Mingo*, 339 So. 2d 302 (Fla. 3d Dist. 1976).

61. See text accompanying notes 26-28 *supra*.

62. 335 So. 2d 611 (Fla. 2d Dist. 1976).

63. 338 So. 2d 1128 (Fla. 4th Dist. 1976). Jockey disciplinary proceedings have been exempted from the 1974 APA. See text accompanying note 51 *supra*.

64. 339 So. 2d 264 (Fla. 3d Dist. 1976).

65. 339 So. 2d 313 (Fla. 3d Dist. 1976).

66. 339 So. 2d 287 (Fla. 3d Dist. 1976).

*Groot v. Sheffield*⁶⁷ and other old cases as determining the scope of review. The courts in each of the above cases may have had good reason for not applying the 1974 APA. By failing to articulate these reasons, the courts missed an opportunity to amplify the 1974 APA.⁶⁸

IV. RULEMAKING

A. *Determination of Validity of Rule or Proposed Rule by Hearing Examiner*

One of the innovations of the 1974 APA is the provision that authorizes a hearing examiner to determine the validity of a rule or a proposed rule upon application by any substantially affected person.⁶⁹ A number of developments occurred with regard to this provision during the survey period.

1. GROUNDS FOR INVALIDATION

The 1974 APA as originally enacted established two grounds for the invalidation of a rule or proposed rule: that it was an invalid exercise of validly delegated legislative authority; or that it was an exercise of invalidly delegated legislative authority.⁷⁰ The first of these grounds was applied in *Department of Transportation v. Pan American Construction Co.*,⁷¹ in which the court sustained a hearing examiner's determination that a rule of the Department, prescribing bituminous coal standards, was an invalid attempt to exercise delegated authority.

The second ground was more controversial, since it placed the hearing examiner in the position of passing on the validity of the

67. 95 So. 2d 912 (Fla. 1957).

68. The following comment of Professor Levinson is neither joined in nor commented upon by his coauthor, Justice England.

Much of the uncertainty could be cleared up by enactment of a reviser's bill, see notes 116 and 195, *infra*, and by promulgation of amended Florida Appellate Rules to conform to the 1974 APA, see notes 139-41, *infra*, and accompanying text. Even without such assistance, the courts should have faced up to the question whether FLA. STAT. § 120.57 (1975) applied in the cases and, if not, why not.

69. FLA. STAT. § 120.54(3) (1975) (determination of validity of proposed rule); FLA. STAT. § 120.56 (1975) (determination of validity of existing rule).

70. *Id.*

71. 338 So. 2d 1291 (Fla. 1st Dist. 1976), *appeal dismissed*, No. 50,457 (Fla., March 8, 1977).

statute upon which an agency's rule was based. The question arose whether any tribunal other than a court had authority to rule on constitutional questions. A negative answer was suggested by *Department of Administration (Personnel Division) v. Department of Administration (Administrative Hearings Division)*.⁷² The case involved review of an administrative hearing on a challenge to a rule which established employment criteria for state employees. The challenger contended that the rule unconstitutionally discriminated among applicants on the basis of sex. The court held that agencies do not possess authority to declare their rules unconstitutional, and the court accordingly denied discovery sought for the purpose of establishing the constitutional infirmity of the rule. In *Department of Revenue v. Young American Builders*,⁷³ the court held that the 1974 APA does not—and could not—provide a remedy for a party who contends that an administrative rule is unconstitutional on its face; this is a judicial function, and the challenger may seek relief in the circuit court.⁷⁴ The judicial problems raised by these cases have now been laid to rest. A 1976 amendment to the 1974 APA deleted the hearing examiner's authority to invalidate a rule on the ground that it was an exercise of invalidly delegated legislative authority.⁷⁵ Invalidation may now be sought only on the ground that the rule or proposed rule is an invalid exercise of delegated legislative authority, in other words, that the rule is *ultra vires*.⁷⁶

72. 326 So. 2d 187 (Fla. 1st Dist. 1976).

73. 330 So. 2d 864 (Fla. 1st Dist. 1976).

74. The following separate comment is made by Professor Levinson and is neither joined in nor commented upon by the coauthor, Justice England. Case law has traditionally held that hearing examiners may not decide challenges against the constitutionality of statutes or rules; see 1 AM JUR. 2d, *Administrative Law* § 185 (1962). However, the 1974 APA (until amended in 1976) attempted to change the common law approach by expressly authorizing hearing examiners to decide a certain type of constitutional question, subject, of course, to judicial review. In my view, the legislature has just as much authority to confer this power upon hearing examiners as the well-accepted power to decide other questions of law, always subject to judicial review. Accordingly, I cannot agree with the conclusions reached in the cases cited in notes 72 and 73 *supra*.

75. FLA. STAT. § § 120.54, .56 (Supp. 1976) (amending Fla. Stat. §§ 120.54(3)(a), .56(1)(b) (1975)).

76. This is also one of the grounds for judicial review under the 1974 APA, FLA. STAT. § 120.68(12) (a) (1975), and would be a common law ground for a judicial declaration of invalidity in proceedings under the Declaratory Judgment Act, preserved in 1975 amendment to 1974 APA, FLA. STAT. § 120.73 (1975). The Joint Administrative Procedures Committee reports that in 1975 slightly more than 8 percent of all rules it reviewed lacked or exceeded statutory authority. See ANNUAL REPORT, *supra* note 46, at 4.

2. DISCOVERY

Department of Administration (Personnel Division) v. Department of Administration (Administrative Hearings Division),⁷⁷ also held that discovery under the 1974 APA was generally available in proceedings before hearing examiners to determine the validity of a rule or of a proposed rule. Discovery there was allowed in part, but denied to the extent its purpose was to establish the unconstitutionality of a rule.

3. COPIES AND NOTICE

The 1976 amendments to the 1974 APA made some housekeeping-type changes in the provisions on hearing examiner determinations of the validity of rules or proposed rules.⁷⁸ The Division of Administrative Hearings must now send copies of the application for such a determination to the agency whose rule (or proposed rule) is being challenged, as well as to the Department of State and to the Joint Administrative Procedures Committee. The Division must also send copies of the hearing examiner's decision to the Department of State and to the Committee. The agency whose rule or proposed rule has been declared invalid must then give notice in the *FLORIDA ADMINISTRATIVE WEEKLY*.

B. Agency Rulemaking Authority

The 1974 APA states that administrative agencies have no inherent rulemaking authority.⁷⁹ Consistent with that pronouncement, but without reference to it, is *Porterfield v. State Board of Dentistry*.⁸⁰ The court in that case invalidated, as being without statutory authorization, a rule of the Board which set behavioral or moral qualifications for dental laboratory registrants.

A 1976 amendment to the 1974 APA permits an agency to adopt rules necessary to the proper implementation of a statute prior to the effective date of the statute, but the rules may not be enforced until the statute upon which they are based becomes effective.⁸¹

77. 326 So. 2d 187 (Fla. 1st Dist. 1976). See also text accompanying note 72 *supra*.

78. FLA. STAT. § § 120.54, .56 (Supp. 1976) (amending FLA. STAT. § § 120.54(3)(c), .56(2)-.56(3) (1975)).

79. FLA. STAT. § 120.54(13) (1975).

80. 334 So. 2d 344 (Fla. 1st Dist. 1976).

81. FLA. STAT. § 120.54(14) (Supp. 1976) (amending FLA. STAT. § 120.54(13) (1975)).

C. Requirement That Agencies Adopt Rules

If a statute requires an agency to adopt rules for the implementation of a certain program, the courts do not favor agency attempts to implement the program by ad hoc determinations without rule-making. Thus in *Lavers v. Department of Legal Affairs*,⁸² the court held that the Department could not properly issue a cease and desist order under the "Little FTC" Act,⁸³ since the Department had not first issued the rules required by the Act.

In *Thompson v. State*,⁸⁴ the court construed a 1974 statute which authorizes the Division of Law Enforcement of the Department of Criminal Law Enforcement to conduct investigations (1) under appropriate rules and regulations adopted by the Department, (2) by written order of the Governor, or (3) by direction of the legislature acting by concurrent resolution.⁸⁵ The court held that the 1974 APA provisions on rulemaking apply only to the first of these categories, so that the Department must adopt rules before attempting to exercise authority in reliance upon this portion of the statute. With regard to the second category, the court held that the statute did not intend to make the rule making provisions of the 1974 APA apply, since the statute refers to "written order" of the Governor. Further, the court questioned whether the legislature could have made the 1974 APA applicable to the Governor even if the legislature had so desired, since the subject-matter relates to the Governor's constitutional responsibility to see that the laws are faithfully executed. With regard to the third category, the court noted the obvious, that the 1974 APA does not apply to the legislature, and the legislature would therefore not be obliged to engage in rulemaking before adopting a concurrent resolution pursuant to the Act.⁸⁶

82. 326 So. 2d 80 (Fla. 1st Dist. 1976).

83. FLA. STAT. § 501.201-.213 (1975).

84. 342 So. 2d 52 (Fla. 1976).

85. FLA. STAT. § 943.04(2)(a) (1975).

86. The following opinion expressed by Professor Levinson is neither joined in nor commented upon by the coauthor, Justice England.

Citizens deserve as much protection from the risk of arbitrary actions of the Governor, as from any other type of official action, especially in situations where it is obvious the Governor will necessarily delegate his responsibilities to staff members to a considerable extent. If the 1974 APA does not reach the Governor because of the separation of powers, it would seem highly desirable for the Governor, by executive order, to establish standards for the exercise of his own constitutional powers. I have urged this approach elsewhere; see

In *Straughn v. O'Riordan*,⁸⁷ the Department of Revenue had used informal "guidelines" but had failed to promulgate rules pursuant to the 1974 APA for its enforcement of the bonding requirements prescribed for sales tax dealers. As a result, the court invalidated a bonding requirement that the Department had imposed upon an individual sales tax applicant. The arbitrary and variant policies of Department personnel, described in the court's opinion, illustrate the risk inherent in agency action in specific situations without prior rulemaking.⁸⁸

D. *Proceedings Under Section 120.57 During Rulemaking*

The 1974 APA provides "notice-and-comment" procedure for rulemaking, except that an agency shall conduct an adjudicatory hearing under section 120.57 to the extent that a party timely asserts that his substantial interests will be affected in the proceedings and demonstrates that rulemaking procedures would not adequately protect those interests.⁸⁹

In *Bert Rogers Schools of Real Estate v. Florida Real Estate Commission*,⁹⁰ the court held that an agency must give a party an opportunity to demonstrate that "notice-and-comment" rulemaking procedures (called "input" rulemaking by the court) would not adequately protect his substantial interests, and the agency must then exercise its discretion to determine whether the party has

Levinson, *supra* note 1, at 623; Levinson, *Presidential Self-Regulation through Rulemaking: Comparative Comments on Structuring the Chief Executive's Constitutional Powers*, 9 VAND. J. TRANSNAT'L. L. 695, 699-700 (1976).

87. 338 So. 2d 832 (Fla. 1976). See also text accompanying note 31 *supra*.

88. The national literature on administrative law indicates an increasing emphasis on the desirability of agencies establishing general standards by rulemaking, in advance of applying any standards in specific situations. Some cases have required such a procedure, as a condition of the validity of agency action in specific situations. See, e.g., Administrative Conference of the United States, Recommendation No. 71-3, 1 C.F.R. § 305. 71-3 (1974); K. C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 59, 216 (1969); Davis, *Administrative Law Surprises in the Ruiz Case*, 75 COLUM. L. REV. 823, 827 n. 27 (1975) (including citations to cases requiring rulemaking as a pre-condition of agency action in specific situations); Leventhal, *Principled Fairness and Regulatory Urgency*, 25 CASE W. RES. L. REV. 66 (1974); Levinson, *Presidential Self-Regulation Through Rulemaking: Comparative Comments on Structuring the Chief Executive's Constitutional Powers*, 9 VAND. J. TRANSNAT'L. L. 695, 719-22 (1976). See also *Plant City v. Mayo*, 337 So. 2d 966, 974-75 (Fla. 1976), commenting on the preferability of rulemaking for general changes in the treatment of utility company expenses.

89. FLA. STAT. § 120.57 (1975).

90. 339 So. 2d 226 (Fla. 4th Dist. 1976).

successfully demonstrated his need for an adjudicatory hearing under section 120.57. The agency's exercise of discretion is subject to judicial scrutiny.

A 1976 amendment to the 1974 APA clarifies it to provide that if the agency determines that an adjudicatory hearing under section 120.57 is needed in the course of rulemaking, the agency shall suspend rulemaking, convene a separate proceeding under section 120.57, and after its completion resume rulemaking.⁹¹

E. Model Rules

The 1974 APA requires the Administration Commission to promulgate one or more sets of model procedural rules, which shall apply in proceedings for which an agency has no other properly promulgated procedural rules.⁹² In *Broward County Classroom Teachers Association v. Public Employees Relations Commission*,⁹³ the court held that the Commission can use the model rules which appear in the Administrative Code as the basis to investigate alleged unfair labor practices, even though the agency has not adopted specific rules to deal with that subject.

F. Legislative Oversight of Agency Rules

The Joint Administrative Procedures Committee, consisting of three members of each house of the legislature, was created by the 1974 APA with power to review all proposed agency rules and to issue advisory opinions as to their validity.⁹⁴ In its report for 1975, the Committee stated that it had reviewed 4,248 rules during the year, of which over 95 percent contained errors and over 8 percent either exceeded or lacked statutory authority.⁹⁵ Following the release of this report, attempts were made to strengthen the powers of the Committee, with varying success.

91. FLA. STAT. § 120.54(16) (Supp. 1976).

92. FLA. STAT. § 120.54(9) (1975).

93. 331 So. 2d 342 (Fla. 1st Dist. 1976).

94. FLA. STAT. § 11.60 (1975).

95. ANNUAL REPORT, *supra* note 46, at 3.

96. FLA. STAT. § 120.545 (Supp. 1976) (a compilation and revision of provisions previously contained in other sections of the 1974 APA).

1. AMENDMENT OF APA SECTION ON LEGISLATIVE OVERSIGHT

The section on legislative oversight in the 1974 APA was revised in 1976.⁹⁶ The changes appear relatively minor in scope but generally strengthen the power of the legislative branch over the exercise of power delegated to the executive. The Committee *may* review any existing rule and *shall* review all proposed rules. If the Committee objects to a rule or proposed rule, the Committee shall notify the agency within five days. The agency's time for reacting to the objection remains thirty days if the agency is headed by an individual, but is increased to forty-five days if the agency is headed by a collegial body. Detailed provisions deal with notice and publication of an agency's reaction to the Committee's objections. If an agency elects to amend or repeal an existing rule as the result of a Committee objection, the agency shall complete the process within ninety days after giving notice in the *FLORIDA ADMINISTRATIVE WEEKLY*. The major thrust of the provision remains the same as before—the Committee's powers are advisory only—but the consequence of Committee action is given wider public dissemination.

2. ATTEMPTED CONSTITUTIONAL AMENDMENT

The 1976 legislature proposed a constitutional amendment for submission to the electors at the November 1976 general election.⁹⁷ The proposal would have authorized the legislature, by concurrent resolution, to nullify any administrative agency rule on the ground that the rule is without or in excess of delegated legislative authority. Under the proposal, the legislature could have provided by law for the suspension of agency rules on the same ground, but a majority vote of the Governor and Cabinet could have deferred the suspension until the full legislature could act. Failure of the legislature to disapprove the suspension at the next regular legislative session would then automatically reinstate the rule. The 1976 legislature also passed an implementing statute, contingent upon the adoption of the proposed constitutional amendment at the November referendum. This statute, which was vetoed by the Governor,⁹⁸ is discussed below.⁹⁹

97. CS/S.J.R.s Nos. 619 and 1398, filed in Office of Secretary of State June 10, 1976.

98. FLA. S.B. 1384, 1976 Regular Session, vetoed June 29, 1976.

99. See section IV, F, 3 *infra*.

Before the November election, litigation was instituted to strike the proposed constitutional amendment from the ballot on the ground, among others, that it had not been properly adopted by the legislature. In *Smathers v. Smith*,¹⁰⁰ the challenge was rejected and the amendment was permitted to go before the people. In the November election, the proposal was defeated by a vote of 1,210,001 to 729,400.¹⁰¹

3. ATTEMPTED LEGISLATION TO IMPLEMENT CONSTITUTIONAL PROPOSAL

In the bill passed in anticipation of the constitutional amendment, but vetoed by the Governor, the Joint Administrative Procedures Committee would have had the power to suspend any agency rule found to be without or in excess of delegated legislative authority.¹⁰² The statute tracked various other provisions of the proposed constitutional amendment.

In his veto message, the Governor vigorously criticized both the proposed constitutional amendment and its implementing statute as representing "an experiment in government foreign to our tradition of checks and balances, supplanting the role of the judiciary and moving the legislative branch far into the arena of executive administration of law. The amendment would be inconsistent with the basic structure of the Florida Constitution."¹⁰³

G. *Time for Filing Proposed Rules with Department of State*

The 1974 APA requires an agency to file proposed rules with the Department of State twenty-one days after public notice of proposed rulemaking, or after a public hearing if the hearing extends beyond the twenty-one days.¹⁰⁴ A 1976 amendment requires an agency to file not less than twenty-one nor more than forty-five days after public notice, or not more than ten days after conclusion of the final public hearing if the hearing extends beyond forty-five days.¹⁰⁵

100. 338 So. 2d 825 (Fla. 1976).

101. Certification of votes delivered to Justice England by Bruce A. Smathers, Secretary of State, dated November 12, 1976.

102. FLA. S.B. 1384, *supra* note 98 at 19.

103. Veto message of Governor Askew (June 29, 1976), at 3.

104. FLA. STAT. § 120.54(10)(b) (1975).

105. FLA. STAT. § 120.54(11)(b) (Supp. 1976) (amending FLA. STAT. § 120.54(10)(b) (1975)).

H. *Withdrawal and Modification of Proposed Rules*

Proposed rules are "adopted" under the 1974 APA upon being filed with the Department of State, and they become "effective" twenty days after filing, or on a later date specified in the rule or required by statute.¹⁰⁶ A 1976 amendment¹⁰⁷ adds that after giving public notice of proposed rulemaking, but before adoption of the rule, an agency may withdraw the rule by giving public notice. It may modify the rule to the extent the modifications are supported by the record of public hearings held on the rule,¹⁰⁸ or are technical in nature and do not affect the substance of the rule, or are in response to objections made by the Joint Administrative Procedures Committee. After adoption, but before the effective date, a rule may be modified or withdrawn only in response to an objection by the Committee, or may be modified for the sole purpose of extending the effective date by not more than sixty days when the Committee is in the process of considering an objection to the rule. After the effective date, a rule may be repealed or amended only through regular rulemaking procedures.

I. *Economic Impact Statement*

The Economic Impact Disclosure Act of 1975 (passed in 1976 by overriding a veto),¹⁰⁹ includes the requirement that an economic

106. FLA. STAT. § 120.54(11) (1975).

107. FLA. STAT. § 120.54(11)(a) (Supp. 1976) (amending FLA. STAT. § 120.54(11) (1975)).

108. As to what constitutes the "record" in rulemaking proceedings see FLA. STAT. § § 120.54(5)(b), .68(5)(b) (Supp. 1976).

The 1976 amendment requires a rule modification, under the described circumstances, to be supported by the record of a public hearing. This appears to apply even if no party requested an evidentiary hearing under section 120.57 in the context of the rulemaking proceedings. Thus, where no evidentiary hearing is held, the record of a non-evidentiary rulemaking proceeding under section 120.54 must provide "support" for a rule modification. The 1976 amendment does not insert any provisions into the judicial review section of the 1974 APA which would help the courts establish a standard of review in such situations. Some guidance may be found in federal cases dealing with so-called "hybrid rulemaking." For recent discussions, see *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976); *Amoco Oil Co. v. Environmental Protection Agency*, 501 F.2d 722 (D.C. Cir. 1974); *Mobil Oil Corp. v. Federal Power Comm'n*, 483 F.2d 1238 (D.C. Cir. 1973); *International Harvester Co. v. Federal Power Comm'n*, 478 F.2d 615 (D.C. Cir. 1973); Fitzgerald, *Mobil Oil Corp. v. Federal Power Commission and the Flexibility of the Administrative Procedure Act*, 26 AD. L. REV. 286 (1974); Wright, *Court of Appeals Review of Federal Regulatory Rulemaking*, 26 AD. L. REV. 199 (1974).

109. 1976 Fla. Laws, ch. 76-1 (creating FLA. STAT. § § 286.25-.35).

impact statement be prepared and remain part of the record in all rulemaking proceedings under the 1974 APA.

V. DETERMINATIONS OF SUBSTANTIAL INTERESTS

A. *Conflict Between Hearing Examiner and Agency*

Under the old Act, an agency was not bound to adopt the fact findings contained in a hearing examiner's recommended order; in other words, there was no presumption in favor of the correctness of the hearing examiner's findings.¹¹⁰ The 1974 APA made a significant change by prohibiting the agency from rejecting or modifying the hearing examiner's findings of fact unless the agency first determines, from a review of the complete record, and states with particularity in its order, that the hearing examiner's findings of fact are not based upon competent substantial evidence, or that the proceedings on which the findings were based do not comply with essential requirements of law.¹¹¹ Further, while an agency may accept or reduce the recommended penalty in a recommended order, it may not increase it without a review of the entire record.

In the survey period each of the four district courts of appeal considered the import of this new provision on fact finding and each concluded that the 1974 APA required that findings of fact made by hearing examiners be given binding effect on the agency whose action was being challenged.¹¹² In each of the four cases, the agency had changed findings of fact, increased a penalty or altered the disposition recommended by the hearing examiner, and in each case the district court reversed the agency's action as being unsupported by the administrative record developed by the hearing examiner.

B. *Special Status of Workmen's Compensation Determinations by Industrial Relations Commission*

Workmen's compensation determinations are made by judges of industrial claims, subject to review by the Industrial Relations

110. For a recent case applying pre-1975 law, see *Megill v. Board of Regents of State of Florida*, 541 F.2d 1073, 1080 (5th Cir. 1976).

111. FLA. STAT. § 120.57(1)(b) 9 (1975).

112. *Venetian Shores Home & Property Owners v. Ruzakawski*, 336 So. 2d 399 (Fla. 3d Dist. 1976); *Bolinger v. Department of Admin.*, 335 So. 2d 568 (Fla. 1st Dist. 1976); *Austin v. Gordon*, 333 So. 2d 118 (Fla. 2d Dist. 1976); *Campbell v. Department of Transp.*, 326 So. 2d 66 (Fla. 4th Dist. 1976).

Commission, and in turn reviewable by certiorari in the supreme court.¹¹³ These proceedings are governed by chapter 440 of the Florida Statutes.¹¹⁴ However, since the judges of industrial claims and the industrial relations commissioners hold offices created by statute rather than by the constitution, the judges and the commission are "agencies" within the 1974 APA and much, although not all, of that Act applies to workmen's compensation proceedings.¹¹⁵ These proceedings are also governed by the Workmen's Compensation Rules of Procedure which were drafted by the Commission and voluntarily submitted to and approved by the supreme court "to the extent authorized in the constitution."¹¹⁶ Legislative authority for supreme court approval of rules of practice and procedure governing the Commission and the judges was conferred in 1975.¹¹⁷

Workmen's compensation determinations by the Industrial Relations Commission are reviewable by certiorari in the supreme court.¹¹⁸ The court has developed a distinctive line of authority regarding the respective roles of the judges of industrial claims, the Industrial Relations Commission, and the supreme court. Recent decisions in workmen's compensation matters have tended, to an

113. For recent bibliography on the impact of the 1974 APA on workman's compensation determinations, see note 2 *supra*.

114. FLA. STAT. ch. 440 (Supp. 1976).

115. Levinson, *supra* note 1, at 636-37, 679-81.

116. *In re Florida Workmen's Compensation Rules of Procedure*, 285 So. 2d 601, 602 (Fla. 1973). A reviser's bill drafted in 1976 would have stricken the procedural portions of chapter 440, leaving the 1974 APA as the only applicable procedural statute. The reviser's bill was not enacted. See Slepian, *Attorney's Fees*, 50 FLA. B. J. 508 (1976). And see Davis, *Workmen's Compensation*, 50 FLA. B. J. 567 (1976), announcing reorganization of "Friends of 440," an organization apparently dedicated to preserving the procedural provisions of FLA. STAT. ch. 440 for the governance of the Industrial Relations Commission and judges of industrial claims.

117. FLA. STAT. § 440.29(3) (Supp. 1976) (amending FLA. STAT. § 440.29 (1975) adding § 440.29(3)).

The following opinion expressed by Professor Levinson is neither joined in nor commented upon by the coauthor, Justice England.

I continue to regard the judges of industrial claims and the industrial relations commissioners as administrative agencies, not courts. The constitutional power of the supreme court, to promulgate rules of practice and procedure for all courts, does not, in my opinion, authorize the court to prescribe or approve rules of practice and procedure for the judges of industrial claims, or the industrial relations commission or any other administrative agencies. Further, the legislature has no constitutional authority to confer such jurisdiction upon the court. If the legislature wishes to excuse the judges of industrial claims and the industrial relations commissioners from compliance with all or any part of the 1974 APA, the legislature has ample authority to do so, but only by enacting a statute which could also set forth the procedures to be followed by these agencies.

118. FLA. CONST., art. V, § 3(b)(3); FLA. STAT. § 440.27 (1975).

increasing degree, to treat the Commission as the head of an administrative agency with only limited powers to review the fact findings of its hearing examiners, namely, the judges of industrial claims. In order to make that approach workable, the court has also insisted that adequate findings of fact either be included in the orders of the judges or made available to the Commission after their review.¹¹⁹

C. *Division's Hearing Examiners Not Required in Certain Situations*

The 1974 APA exempted certain agencies from utilizing hearing examiners from the Division of Administrative Hearings.¹²⁰ A 1976 amendment extended the exemption to two additional types of hearings: those involving student disciplinary suspensions or expulsions which are conducted by educational units; and hearings by the Public Employees Relations Commission for determining appropriate bargaining units.¹²¹

D. *Agency Expertise*

During the period surveyed, the courts began the development of parameters for administrative expertise in section 120.57 proceedings. In *Plant City v. Mayo*¹²² the court distinguished between accounting technology with respect to customer billing in the electric utility industry, on the one hand, and economic benefit-detriment theories for electrical power transmission technology, on the other. As to the former, which was essentially uncontroverted and had been the subject of practical experience in prior Public Service Commission proceedings, the court concluded that fact-finding proceedings were unnecessary since the subject matter fell within the expertise of the Commission. With respect to the latter, however, the court held to the contrary. Finding that a resolution of fact could

119. The most influential recent case decided before enactment of the 1974 APA is *Pierce v. Piper Aircraft Corp.*, 279 So. 2d 281 (Fla. 1973). Post-1974 cases include *Vargas v. Americana of Bal Harbor*, No. 48,251 (Fla. Nov. 24, 1976); *Chicken 'N' Things v. Murray*, 329 So. 2d 302 (Fla. 1976); *Grillo v. Big "B" Ranch*, 328 So. 2d 429 (Fla. 1976); *Brown v. Clifford Shover Bldg.*, 328 So. 2d 838 (Fla. 1976); *Schafer v. St. Anthony's Hospital*, 327 So. 2d 221 (Fla. 1976); *Mahler v. Lauderdale Lakes Nat'l Bank*, 322 So. 2d 507 (Fla. 1975); *Scholastic Systems, Inc. v. LeLoup*, 307 So. 2d 166 (Fla. 1974).

120. FLA. STAT. § 120.57(1)(a) (1975).

121. FLA. STAT. §§ 120.57(1)(a) 6,7 (Supp. 1976) (amending FLA. STAT. § 120.57(1)(a) (1975)).

122. 337 So. 2d 966 (Fla. 1976). See also text accompanying note 14 *supra*.

not be derived from limited and controversial testimony under the guise of administrative expertise, the court remanded a franchise fee allocation dispute for the development of a factual record sufficient to support agency action. In *Broward County Traffic Association v. Mayo*¹²³ the court rejected a contention that the Public Service Commission possessed administrative expertise as to inflationary factors on the basis of which a rate increase could be awarded to motor vehicle common carriers.

E. Agency Head

*City of Titusville v. Florida Public Employees Relations Commission*¹²⁴ held that one member of a collegial body could not act alone in a way which would constitute final agency action under the 1974 APA.¹²⁵ *Board of Regents, University of Florida v. Heuer*¹²⁶ applied the 1974 APA provision that a hearing examiner is not needed when the agency head conducts the hearing.¹²⁷

F. Notice

In *Plant City v. Mayo*¹²⁸ the court approved a standard form of notice given by the Public Service Commission in connection with proposed utility rate hearings, over the objections of persons who claimed that it was inadequate to provide notification of major policy shifts which might be adopted by the Commission. In contrast, the court held in *Florida Interconnect Telephone Co. v. Public Service Commission*¹²⁹ that the Commission gave inadequate notice of proposed agency action on a tariff change when it announced in the FLORIDA ADMINISTRATIVE WEEKLY that its regularly scheduled Monday conference would consider those matters ready for decision, and other related matters.

A 1976 amendment of the 1974 APA provides that in student discipline hearings, the 14-day notice requirement may be waived

123. 340 So. 2d 1152 (Fla. 1976).

124. 330 So. 2d 733 (Fla. 1st Dist. 1976).

125. See FLA. STAT. §§ 120.52(2),(3) (1975).

126. 332 So. 2d 626 (Fla. 1st Dist. 1976).

127. FLA. STAT. § 120.57(1)(a) 1 (1975).

128. 337 So. 2d 966 (Fla. 1976). See also text accompanying notes 14, 122 *supra*.

129. 342 So. 2d 811 (Fla. 1976).

by the agency head or hearing examiner, without consent of the parties.¹³⁰

G. Record

In *Austin v. Gordon*¹³¹ the court held that an agency cannot go outside the record of proceedings developed by the hearing examiner for the purpose of finding facts supportive of its intended action.

A 1976 amendment to the 1974 APA declares that the record of an agency proceeding no longer includes communications by advisory staff if such communications are public records.¹³²

H. Discovery

*Department of Highway Safety and Motor Vehicles v. Career Service Commission*¹³³ sustained the validity of the 1974 APA provisions on discovery¹³⁴ against an attack contending that their adoption violated the constitutional rulemaking role of the supreme court.¹³⁵

I. Time When Agency Proceeding Commences

A number of early decisions under the 1974 APA addressed the problems of transition from the old Act.¹³⁶ In the course of resolving these matters, the courts had occasion to pinpoint the time when an agency proceeding commences.

In *Department of Highway Safety and Motor Vehicles v. Career Service Commission*¹³⁷ a peripheral aspect of the court's decision was the holding that an agency proceeding "commences" when a complaint or petition is "filed" with the agency, and not when the event prompting the complaint occurred. In *Chung-Ling Yu v. Criser*¹³⁸ the court held that the agency proceeding "commenced"

130. FLA. STAT. § 120.57(1)(b)2 (Supp. 1976) (amending FLA. STAT. § 120.57(1)(b)2 (1975)).

131. 333 So. 2d 118 (Fla. 2d Dist. 1976).

132. FLA. STAT. § 120.57(1)(b)5g (Supp. 1976) (amending FLA. STAT. § 120.57(1)(b) 5g (1975)).

133. 322 So. 2d 64 (Fla. 1st Dist. 1975).

134. FLA. STAT. § 120.58(1)(b) (1975).

135. FLA. CONST. art. V, § 2(a).

136. See section II *supra*.

137. 322 So. 2d 64 (Fla. 1st Dist. 1975).

138. 330 So. 2d 198 (Fla. 1st Dist. 1975), *cert. denied*, 342 So. 2d 1100 (Fla. 1976).

when a stipulation was entered by which all parties agreed that a professor's grievance against the educational institution from which he had been discharged would be conducted in a faculty hearing.

VI. JUDICIAL REVIEW

A. *Form of Action*

The 1974 APA states that judicial review of agency action shall be taken by a petition for review.¹³⁹ This term is unknown to the Florida Appellate Rules or to the constitution, but is consistent with the provisions contained in the 1972 revision of the judiciary article of the constitution. These provisions authorize the legislature, by general law, to confer upon the supreme court, the district courts of appeal and the circuit courts the power of direct review of administrative action.¹⁴⁰ Although the supreme court has not yet changed the Florida Appellate Rules so as to provide for the petition for review, the courts have accommodated the intention of the 1974 APA within existing appellate rules.¹⁴¹

In *Yamaha International Corp. v. Ehrman*¹⁴² the District Court of Appeal, First District, announced that the Florida Appellate Rules would be considered as modified by the 1974 APA. That decision was quickly followed by other cases which accepted petitions for review brought from a variety of administrative actions.¹⁴³

Several appellate decisions during the survey period, applying a 1975 amendment to the 1974 APA,¹⁴⁴ have held that the circuit courts are a proper alternate forum for declaratory action challenging agency action.¹⁴⁵ The amendment was enacted in order to resolve

139. FLA. STAT. § 120.68(2) (1975).

140. FLA. CONST. art. V, § 3(b)(7) (supreme court), 4(b)(1) (district courts of appeal), 5(b) (circuit courts).

141. The delay of over two years in promulgating needed amendments to the Florida Appellate Rules is attributable in part to confusion regarding the scope of revisions which were being proposed to all of the appellate rules. Controversy over the new rules package in 1976 delayed the report of the Rules Committee of The Florida Bar to the supreme court, which in turn caused this important aspect of the bar's project to bog down.

142. 318 So. 2d 196 (Fla. 1st Dist. 1975).

143. *Lewis v. Career Serv. Comm'n*, 332 So. 2d 371 (Fla. 1st Dist. 1976); *City of Titusville v. Public Employees Relations Comm'n*, 330 So. 2d 733 (Fla. 1st Dist. 1976).

144. 1975 Fla. Laws, ch. 75-191 (creating, FLA. STAT. § 120.73 (1975)).

145. *Department of Revenue v. Crisp*, 337 So. 2d 404 (Fla. 2d Dist. 1976); *Department of Revenue v. McDonald*, 336 So. 2d 372 (Fla. 1st Dist. 1976); *Department of Revenue v. Estero Bay Dev. Corp.*, 336 So. 2d 479 (Fla. 2d Dist. 1976) *cert. denied*, No. 50285 (Fla.,

disputes which had arisen as to the availability of declaratory relief in the circuit courts.¹⁴⁶

B. *Type of Agency Action Subject to Judicial Review*

Cases were decided during the survey period regarding the type of agency action subject to judicial review under both the old and the new APAs. The contrast is significant.

In *Humana of Florida, Inc. v. Keller*¹⁴⁷ petitioner alleged that the Secretary of Health and Rehabilitative Services had failed to hold a hearing as required by law. The court held that petitioner could seek relief in circuit court by mandamus, prohibition or injunction under the old Act, but could not obtain certiorari review in the district court of appeal because that form of action would lie only to review the results of a quasi-judicial administrative hearing. In this case there had been no such hearing. Along similar lines, *Von Stephens v. School Board of Sarasota County*¹⁴⁸ held that certiorari review in the district court of appeal was available under the old Act only with regard to the quasi-judicial orders of administrative agencies; other agency action was reviewable by original proceedings in circuit court. The court held that a school board had not acted quasi-judicially in holding a meeting at which it rejected a school principal's application for transfer; agency action is not quasi-judicial if predicated upon a unilateral hearing without notice, opportunity to cross-examine, formal findings of fact, or entry of a formal order stating findings.

The first cases interpreting the 1974 APA indicate that the courts take a broad view of the types of agency action now subject to judicial review. *Department of Administration (Personnel Division) v. Department of Administration (Administrative Hearings Division)*¹⁴⁹ accepted review of a hearing examiner's ruling on the validity of a rule, and *Laborers International Union v. Public Em-*

March 2, 1977); *Department of Revenue v. University Square, Inc.*, 336 So. 2d 371 (Fla. 1st Dist. 1976), *cert. denied*, 342 So. 2d 1101 (Fla. 1976); *Office of Public Defender v. Hunter*, 323 So. 2d 316 (Fla. 1st Dist. 1976); *Jacobson v. Thiessen*, 320 So. 2d 25 (Fla. 1st Dist. 1976).

146. Levinson, *supra* note 1, at 678.

147. 329 So. 2d 420 (Fla. 1st Dist. 1976).

148. 338 So. 2d 890 (Fla. 2d Dist. 1976). *See also* *City of Pompano Beach v. Daniels*, 327 So. 2d 849 (Fla. 4th Dist.), *cert. denied*, 336 So. 2d 1181 (Fla. 1976), holding that the city's decision to discharge an employee is not subject to review by certiorari, where the city charter and code do not require notice and hearing.

149. 326 So. 2d 187 (Fla. 1st Dist. 1976).

*ployees Relations Commission*¹⁵⁰ accepted review of an order denying intervention in a collective bargaining proceeding. However, an order by the Public Employees Relations Commission calling for an election for a certain collective bargaining unit is not a final order subject to judicial review, according to two district courts of appeal.¹⁵¹ The judicially reviewable final order will be the certification by the Commission after the election, and parties will then be able to obtain review of all aspects of the certification, including the propriety of the order calling for the election.¹⁵² In *Florida Interconnect Telephone Co. v. Public Service Commission*¹⁵³ the supreme court held that the Commission, by permitting a new tariff to take provisional effect without objection, did not render a "final order" subject to judicial review under the 1974 APA.

C. Standing

In *Plant City v. Mayo*¹⁵⁴ the court determined that persons who had the opportunity to appear before an agency but failed to do so had no standing to seek review of agency action, but that a person eligible to participate in the agency proceeding who failed to do so, but sought timely reconsideration of agency action before the agency itself, would be permitted to seek judicial review of the agency's action.

D. Time For Filing Petition

The 1974 APA does not specify the time within which a petition for review shall be filed. It states that "[r]eview proceedings shall be conducted in accordance with the Florida Appellate Rules,"¹⁵⁵ and this evidently leaves it to the appellate rules to establish the time for filing. Until such time as the supreme court amends the

150. 336 So. 2d 450 (Fla. 1st Dist. 1976).

151. *Panama City v. Public Employees Relations Comm'n*, 333 So. 2d 470 (Fla. 1st Dist. 1976); *School Board of Sarasota County v. Public Employees Relations Comm'n*, 333 So. 2d 95 (Fla. 2d Dist. 1976).

152. A similar approach was adopted for interim rate increases awarded utility companies by the Public Service Commission. *Citizens of Florida v. Mayo* (Southern Bell Tel. & Tel. Co.), 322 So. 2d 911 (Fla. 1975); *Citizens of Florida v. Mayo* (Florida Power Corp.), 316 So. 2d 262 (Fla. 1975); *Citizens of Florida v. Mayo* (Florida Power & Light Co.), 314 So. 2d 781 (Fla. 1975).

153. 342 So. 2d 811 (Fla. 1976). See also text accompanying note 24 *supra*.

154. 337 So. 2d 966 (Fla. 1976). See also text accompanying note 41 *supra*.

155. FLA. STAT. § 120.68(2) (1975).

rules so as to make express provision for petitions for review, case law has established a thirty-day time limit for filing petitions for review by adaptation from the existing rules on certiorari review of administrative action.¹⁵⁶ This adaptation was announced by the District Court of Appeal, First District, in *Yamaha International Corp. v. Ehrman*,¹⁵⁷ which was in turn adopted by the supreme court in *Shevin ex rel. State v. Public Service Commission*.¹⁵⁸

In *Riley-Field Co. v. Askew*¹⁵⁹ the court held that review of an agency rule can be sought within thirty days after the rule becomes effective, rather than thirty days after the rule is filed in the office of the Secretary of State. At the time of publication, however, this decision was subject to a rule nisi in prohibition issued by the supreme court.¹⁶⁰ In *Broward County v. Administration Commission*,¹⁶¹ decided under the old Act, the court held that the time for rehearing in an agency tolls the thirty day period in which judicial review must be sought.¹⁶²

E. Stay

In *Lewis v. Career Service Commission*¹⁶³ the court held that a petition for certiorari to review an order of the Career Service Commission does not automatically result in a stay of the Commission's action. The court reached this result by applying the 1974 APA's provision for a discretionary stay,¹⁶⁴ rather than the automatic stay provision which appears in the Florida Appellate Rules.¹⁶⁵ Further, *Ziers v. Purdy*¹⁶⁶ held that in the situations where a stay may be

156. FLA. APP. R. 4.1, 4.5(c)(1).

157. 318 So. 2d 196 (Fla. 1st Dist. 1975). The same court developed this concept further in *Department of Highway Safety & Motor Vehicles v. Adams*, 338 So. 2d 542 (Fla. 1st Dist. 1976), and *Mick v. State Bd. of Dentistry*, 338 So. 2d 1297 (Fla. 1st Dist. 1976).

158. 333 So. 2d 9 (Fla. 1976).

159. 336 So. 2d 383 (Fla. 1st Dist. 1976).

160. *Florida Administration Comm'n v. District Court of Appeal*, No. 50,242 (Fla. Dec. 3, 1976).

161. 321 So. 2d 604 (Fla. 1st Dist. 1975).

162. See *Fox v. Florida Land & Water Adjudicatory Comm'n*, 327 So. 2d 56 (Fla. 1st Dist.), cert. denied, 336 So. 2d 1181 (Fla. 1976), under the old Act, in which the court held that the three day extension of time for mailing which appears in the Florida Appellate Rules was not available with respect to the review of administrative action under a statute which did not provide a like time deferral.

163. 332 So. 2d 371 (Fla. 1st Dist. 1976).

164. FLA. STAT. § 120.68(3) (1975).

165. FLA. APP. R. 5.12(1).

166. 324 So. 2d 132 (Fla. 3d Dist. 1975).

secured either from the agency or the reviewing court, as is usually the case, the preferable course of action is to seek a stay in the administrative agency in the first instance.

A 1976 amendment to the 1974 APA makes two changes in the provision dealing with stays.¹⁶⁷ First, "if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that supersedeas would constitute a probable danger to the health, safety or welfare of the state."¹⁶⁸ Second, if the agency or the court grants a stay in any proceeding, the order granting the stay "shall specify the conditions upon which the stay or supersedeas is granted."¹⁶⁹

F. Record

*Plant City v. Mayo*¹⁷⁰ held that evidence not presented to an administrative agency cannot be brought before a reviewing court, while *Pasco County School Board v. Public Employees Relations Commission*¹⁷¹ held that the record for appellate review may not be supplemented with materials which were not appropriate as parts of the record in the administrative hearing, such as tape recordings which underlie a transcript or notes made by agency personnel during the course of a proceeding.

G. Standards For Review

In *Citizens of Florida v. Mayo (Gulf Power)*¹⁷² the court noted that the judicial test of a Public Service Commission interim rate award is the traditional test applicable to trial-type hearings involving disputed questions of fact—whether the Commission's order is supported by competent and substantial evidence.¹⁷³ Further, this

167. FLA. STAT. § 120.68(3) (Supp. 1976) (amending FLA. STAT. § 120.68(3) (1975)).

168. *Id.*

169. *Id.*

170. 337 So. 2d 966 (Fla. 1976).

171. 336 So. 2d 483 (Fla. 1st Dist. 1976). The same court issued *per curiam* orders to prepare the record on review in three other cases, on the basis of this case. *Panama City v. Public Employees Relations Comm'n*, 338 So. 2d 1284 (Fla. 1st Dist. 1976); *Amalgamated Transit Union, Local 1464 v. Public Employees Relations Comm'n*, 338 So. 2d 1285 (Fla. 1st Dist. 1976); *University of South Fla. College of Medicine Faculty Ass'n. v. Public Employees Relations Comm'n*, 338 So. 2d 1286 (Fla. 1st Dist. 1976).

172. 333 So. 2d 1 (Fla. 1976).

173. The same standard of review is described in FLA. STAT. § 120.68(10) (1975), and was

test must be applied to the evidence that was before the Commission at the time it entered the interim rate order. The court may not consider evidence adduced in subsequent permanent rate proceedings before the Commission as a basis on which to justify the earlier interim award. Under the statutory scheme for interim rates, if the Commission first suspends a rate schedule filed by a utility and then lifts the suspension, the Commission order lifting the suspension must state with particularity the facts which were developed to overcome the Commission's initial decision to suspend the effectiveness of the new rates. The holdings of this case were reaffirmed in *Maule Industries, Inc. v. Mayo*.¹⁷⁴ Although both *Gulf Power* and *Maule Industries* involve proceedings commenced before the effective date of the 1974 APA, and although both cases involve the "file and suspend" procedure established by another law that remains in effect despite adoption of the 1974 APA,¹⁷⁵ the cases may be regarded as having some relevance to the standards of judicial review of factual decisions of administrative agencies.¹⁷⁶

H. Remedies

The 1974 APA provides a variety of judicial remedies for defects, omissions and other errors in administrative action.¹⁷⁷ Although not identifying the 1974 APA as the basis for their action in every case, the courts have exercised their discretion on review in a number of ways. In *Austin v. Gordon*¹⁷⁸ the court struck findings which were unsupported in the record and, on that basis, reversed the administrative action of the agency. In *Richardson v. Florida State Board of Dentistry*¹⁷⁹ the court held the Board's findings of fact and conclusions supporting discipline were not supported by the record and must be set aside. The court also remanded for a less harsh imposition of discipline with respect to the one finding of

applied in *Richardson v. Florida State Bd. of Dentistry*, 326 So. 2d 231 (Fla. 1st Dist. 1976), which case was followed in *Greenberg v. Florida State Bd. of Dentistry*, 341 So. 2d 770 (Fla. 1977).

174. 342 So. 2d 63 (Fla. 1976).

175. See discussion of the "file and suspend" procedure, in text accompanying notes 24-25 *supra*.

176. See FLA. STAT. § 120.68(10) (1975).

177. FLA. STAT. § 120.68(13) (1975).

178. 333 So. 2d 118 (Fla. 2d Dist. 1976).

179. 326 So. 2d 231 (Fla. 1st Dist. 1976).

misconduct which had record support. In *Ziers v. Purdy*¹⁸⁰ the court dismissed a petition for review for non-compliance with the Florida Appellate Rules.

VII. MISCELLANEOUS

In addition to the 1976 legislative developments that are included in the foregoing discussion, other amendments to the 1974 APA are noted here.

A. Subpoena

A subpoena may not be issued regarding legislative duties.¹⁸¹

B. Licensing

License applications shall be dealt with by the agency promptly, within time limits stated in the 1976 amendments.¹⁸²

C. Public Access

A list of governmental agency forms and instructions shall include the title of each, with a statement of the manner in which it may be obtained without cost.¹⁸³ People requesting agendas shall pay the reasonable cost. The agency shall give notice of meetings, hearings and workshops in the same manner as notice of rulemaking. All rules shall be indexed within ninety days.¹⁸⁴

D. Publication

The FLORIDA ADMINISTRATIVE WEEKLY shall contain a summary and index of all rules—not of proposed rules, as previously worded.¹⁸⁵ Annual subscription to the WEEKLY is increased from not more than \$5 to \$25.¹⁸⁶ The Department of State shall furnish, without charge, seven sets of Florida Administrative Code and FLORIDA

180. 324 So. 2d 132 (Fla. 3d Dist. 1975). The appellee failed to move for directed verdict on the insufficiency of the evidence before appealing on the same grounds.

181. FLA. STAT. § 120.58(1)(b) (Supp. 1976) (amending FLA. STAT. § 120.58(1)(b) (1975)).

182. FLA. STAT. § 120.60(2) (Supp. 1976) (amending FLA. STAT. § 120.60(2) (1975)).

183. FLA. STAT. § 120.53(1)(b) (Supp. 1976) (amending FLA. STAT. § 120.53(1)(b) (1975)).

184. FLA. STAT. § 120.53(1)(d) (Supp. 1976) (amending FLA. STAT. § 120.53(1)(d) (1975)).

185. FLA. STAT. § 120.55(1)(c) (Supp. 1976) (amending FLA. STAT. § 120.55(1)(c) (1975)).

186. FLA. STAT. § 120.55(1)(g) (Supp. 1976) (amending FLA. STAT. § 120.55(1)(g) (1975)).

ADMINISTRATIVE WEEKLY to the Joint Administrative Procedures Committee.¹⁸⁷

E. *Declaratory Statement*

An agency shall give notice of a petition for declaratory statement, and of its disposition, in the FLORIDA ADMINISTRATIVE WEEKLY, and shall transmit copies of each petition to the Committee.¹⁸⁸

F. *Division of Administrative Hearings—Funding*

A 1976 amendment repeals provisions of the 1974 APA which established a revolving trust fund into which the Division of Administrative Hearings deposited fees collected from users of its services (billed to agencies on a pro rata basis), and from which the Division paid its expenses.¹⁸⁹ The effect of the repeal is to fund the Division from appropriations, rather than from user charges. The change was recommended by the Division.¹⁹⁰

G. *Ex Parte Communications*

The prohibition against ex parte communications does not apply to advisory staff members who do not testify.¹⁹¹

H. *Incorporation of APA into Other Statutes*

One statute changed the date for repeal of all rules of the Department of Health and Rehabilitative Services and for publication of new rules;¹⁹² the effect was to extend, until January 1, 1977, the effective date of Department rules in effect or filed with the Department of State before July 1, 1975, although the 1974 APA would have caused earlier repeal.¹⁹³ Another statute required that proceedings for cease and desist orders against banks shall be carried out pursuant to the 1974 APA's section 120.57.¹⁹⁴

187. FLA. STAT. § 120.55(3)(a) 4 (Supp. 1976) (amending FLA. STAT. § 120.55(3)(a) (1975)).

188. FLA. STAT. § 120.565 (Supp. 1976) (amending FLA. STAT. § 120.565 (1975)).

189. FLA. STAT. § 120.65 (Supp. 1976) (repealing FLA. STAT. § § 120.65(6),(7) (1975)).

190. Department of Administration, Division of Administrative Hearings, Second Annual Report (for calendar year 1975) (1976), at 10-13.

191. FLA. STAT. § 120.66(1)(b) (Supp. 1976) (amending FLA. STAT. § 120.66(1)(b) (1975)).

192. FLA. STAT. § 20.19(20) (Supp. 1976) (amending FLA. STAT. § 20.19(20) (1975)).

193. FLA. STAT. § 120.72(4)(b) (1975).

194. FLA. STAT. § § 659.561- .563 (Supp. 1976).

I. *Reviser's Bill*

A reviser's bill, originally prepared at the direction of the legislature for the 1975 session and subsequently re-drafted for the 1976 session, would have deleted provisions in numerous chapters of Florida Statutes so as to leave the 1974 APA as the sole administrative procedural statute, except in situations where the legislature expressly required different procedures. The reviser's bill failed to clear the Senate.¹⁹⁵

195. Reviser's Bills were introduced in the House, H.B. 2612 and H.B. 2613 (1976 Sess.) and in the Senate, S.B. 604 and S.B. 1054, having been prepared by the Division of Statutory Revision. A letter dated September 7, 1976 to Justice England from Ernest E. Means, Director of the Division, reports that "The House stood ready to deal with them quickly if the Senate ever dealt with them seriously; but that was not to be, and they died in committee." A letter dated June 2, 1976 from Senator Dempsey Barron, President of the Senate, to Representative Robert Hector, chairman of the Joint Administrative Procedures Committee, expressed the opinion that the Reviser's Bills "change substantive law," contrary to the directions addressed to the reviser by a rider to the 1974 APA, 1974 Fla. Laws ch. 74-310, § 3. Senator Barron therefore asked the Joint Administrative Procedures Committee to review the Reviser's Bills and to report in time for the 1977 legislative session. On the ramifications of the Reviser's Bills with regard to workmen's compensation proceedings, see note 116 *supra*.