

STATE OF FLORIDA

Department of Administration
Division of Administrative Hearings

ROOM 530, CARLTON BLDG.

TALLAHASSEE

32304

January 31, 1979

FIFTH ANNUAL REPORT

This report is submitted to the Administrative Procedure Committee and the Administration Commission in compliance with the requirement of Section 120.70, Florida Statutes, which states:

"Not later than February 1 of each year the division shall issue a written report to the Administrative Procedure Committee and the Administration Commission, including at least the following information:

- (1) A summary of the extent and effect of agencies' utilization of hearing officers, court reporters, and other personnel in proceedings under this act.
- (2) Recommendations for change or improvement in the Administrative Procedure Act or any agency's practice or policy with respect thereto."

Utilization of
Hearing Officers

During calendar year 1978 the Division of Administrative Hearings received 2,553 separate requests for hearings. The requests are broken down by agency as reflected in the attached appendix. This number represents an increase of 10.6% over the number of requests received in calendar year 1977. The four



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years during which the Division of Administrative Hearings has been in operation have shown a steady increase in the number of requests for hearings. A continuation of this trend is expected. With twelve Hearing Officers, including the Director and Assistant Director, the Division is able to provide final hearings within ninety days from receipt by the Division of a request for the assignment of a Hearing Officer. In those situations where extraordinary circumstances demand a quicker hearing, the Division is capable of accommodating the request. It should be noted that in many cases the final hearing does not occur within ninety days of the receipt of a request for the assignment of a Hearing Officer. However, in those cases the extension of time for the final hearing is the result of a request for continuance by one or more of the parties in order that they might have time to fully prepare for complex litigation, to engage in settlement negotiations, or other similar reasons.

The Division is operating very close to its capacity. When the case load increases to the extent that final hearings can not in the ordinary course be held within ninety days, there will need to be an increase in the number of Hearing Officers and support staff in order to provide the timely forum intended by the Administrative Procedure Act. It should be emphasized that ninety days is the maximum period of time within which it is felt the Division should provide a final hearing. In practice the

Division provides final hearings in a shorter time frame if desired by the parties.

Utilization of Court Reporters

As noted in the Fourth Annual Report there are significant expenditures made by agencies on court reporters for administrative hearings. It appears that agencies have become aware that they may use some less expensive mechanism of preserving the testimony of the hearing than a live court reporter. There are many instances, however, when a live court reporter is preferable to mechanical means of preserving the testimony and such expenditures are justified. Consideration should be given to coordinating the hiring of court reporters by agencies so that the state pays the lowest possible fee consistent with good service.

Suggested Amendments to the Administrative Procedure Act

The Administrative Procedure Act of 1974 has been in effect for four full years. It has taken this period for practices under the Act to regularize, and for a significant amount of litigation to culminate in judicial decisions interpreting the Act. The Division and other administrative processes are functioning smoothly. Florida's Administrative Procedure Act has been widely recognized as among the most innovative and progressive in the nation.

Legislative and executive leaders in other jurisdictions, including several states and the Federal Government, are considering revisions to their own administrative procedure acts using the Florida Act as a model. Before profound revisions to the Florida Act are considered, a full opportunity for practices under the Act to become standardized should be allowed.

The administrative hearing process established by Section 120.57(1), Florida Statutes, provides a timely forum for the resolution of disputes between state agencies and members of the public. It is quicker and less expensive to litigate disputes in this forum than before the courts with their already crowded calendars. Questions continue to arise concerning the desirability of amending the act to make a Hearing Officer's order more binding upon the agencies. There are reasonable arguments on both sides of the question. Certainly an agency's regulatory discretion should remain intact. It may be possible in some adjudicatory proceedings, however, to accomplish significant economies of time, money and manpower by rendering the Hearing Officer's order binding upon the parties subject to appeal by either party to the courts. It should be kept in mind that the hearing process is designed as a forum for the resolution of disputes wherein the agency head may himself or herself be an adversary. It could ease the burden on all parties to make the forum final, preserving to all parties the right to correct error before the District Court of Appeal. As

more experience is gained with the implementation of the administrative hearing process these questions should ultimately be addressed and resolved.

The following suggestions for amendments to the Act are based in part upon judicial decisions interpreting the Act, and in part upon experience that the Division has had in administering the Act. First, it is suggested that definite provisions be made respecting the results which should flow from an agency's failure to comport with statutory time limitations. Secondly, it is suggested that where duplicitous administrative and judicial remedies continue to exist, one of the remedies be eliminated. Thirdly, it is suggested that legislative considerations be given to whether greater economy could be achieved by consolidating all agency hearing processes in one body.

Results of an Agency's
Failure to Follow Time
Limitations Set Forth in
the Administrative Procedure Act.

In Section 120.59(1), Florida Statutes (1978 Supp.) it is provided:

"The final order in a proceeding which affects substantial interests shall be in writing or stated in the record and include Findings of Fact and Conclusions of Law separately stated, and it shall be rendered within ninety days:

(a) After the hearing is concluded, if conducted by the agency,

(b) After a recommended order is submitted

to the agency and mailed to all parties, if the hearing is conducted by a hearing officer, or

(c) After the agency has received the written and all material that is authorized to be submitted, if there has been no hearing.

The ninety-day period may be waived or extended with the consent of all parties."

The language of the statute is clear and mandatory. An agency is required to enter its final order within ninety days of the date that pertinent material is provided to it. No penalty or sanction for violation of the time limit is provided, and several agencies have taken a cavalier attitude toward it. In one case an agency entered its final order fifteen months after a recommended order was entered by a Hearing Officer of the Division. Violations of this magnitude have been rare; however, lesser ones have been common.

The courts have held that despite the mandatory language of the statute, no sanction will be applied against an agency unless it is demonstrated that the fairness of the proceeding, or the correctness of the action taken by the agency, is impaired by the violation. City of Panama City v. Public Employees Relations Commission, 364 So.2d 109, 113 (1 DCA Fla. 1978); Jess Parrish Memorial Hospital v. Public Employees Relations Commission, ___ So.2d ___, Case No. GG 463 (1 DCA Fla. Op. filed Nov. 6, 1978); City of Panama City v. Public Employees Relations Commission, 363 So.2d 135, 136 (1 DCA Fla. 1978); G&B of Jacksonville, Inc. v. Department of Business Regulation, Division of Beverage, 362 So.2d 951, 955 (1 DCA

Fla. 1978); Financial Marketing Group, Inc. v. Department of Banking and Finance, Division of Securities, 352 So.2d 524, 525 (3 DCA Fla. 1977).

In some instances the agency action which is late could have an adverse effect upon one or more interested parties who are powerless to prevent the agency from violating the time limitation. Where the agency has conducted the hearing itself, and no adjudication of any kind has occurred, it would be inappropriate to permit the agency's tardiness to impact innocent parties. When, however, a hearing has been conducted by a Hearing Officer of the Division and a recommended order has been entered, it would be appropriate to provide that the recommended order become final if the agency fails to act upon it within the specified ninety days.

Section 120.54(11)(b), Florida Statutes (1978 Supp.) provides that an agency's proposed rule be filed with the Department of State within forty-five days after publication of the proposed rule in the Florida Administrative Weekly. In a rule challenge proceeding filed with the Division in accordance with the provisions of Section 120.56(1), Foster and Kleiser v. Florida Department of Transportation, DOAH Case No. 77-2222R (Order entered March 28, 1978), a Hearing Officer of the Division found that an agency had failed to comply with the time requirement and held the rule invalid. The Court of Appeals reversed. Florida Department of Transportation v. Foster and Kleiser, Inc., ___ So.2d ___

Case No. JJ 443 (1 DCA Fla., Op. filed December 19, 1978). The court held that despite the mandatory language of the statute, the time limitation would have no effect unless it were shown that its violation prejudiced a party who was seeking to invalidate the rule. While the decision has logical appeal, it could result in agencies taking a relaxed view toward the mandatory time limitations set forth in the Administrative Procedure Act. It is suggested that a provision be included in Section 120.54(4) providing that a failure to follow any of the mandatory time limitations in connection with rule making would constitute grounds for declaring the rule invalid.

Elimination of Duplicitous Remedies

The Administrative Procedure Act provides a means for adjudicating administrative disputes. The Act recognizes that the courts also have a profound role to play in the adjudication of such disputes. Section 120.73 provides:

"Nothing in this chapter shall be construed to ... divest the Circuit Court of jurisdiction to render declaratory judgments under the provisions of Chapter 86"

Furthermore, the Act provides for judicial review in the form of appeals from final agency action. Section 120.68.

In enforcing its tax assessments, the Department of Revenue is frequently called upon to resolve disputed issues of fact. The

Department has referred many such cases to the Division for the conduct of hearings. The Division has conducted the hearings, and entered recommended orders which have been forwarded to the Department. The Department has thereupon entered final orders which are directly appealable to the appropriate District Court of Appeal under the provisions of Section 120.68. In a recent case a taxpayer requested a hearing respecting a sales tax assessment. The matter was forwarded to the Division of Administrative Hearings. A hearing was conducted and a recommended order adverse to the taxpayer was entered. NOS Corp. v. Florida Department of Revenue. DOAH Case No. 77-1758, Order entered December 19, 1977. The Department of Revenue thereafter entered a final order adopting the recommended order. No appeal under the provisions of Section 120.68 was taken. Instead, the taxpayer filed an action in Circuit Court under the provisions of Section 212.14(4), Florida Statutes (1977) to determine the validity of the assessment. The Department of Revenue initiated a prohibition proceeding in the First District Court of Appeals; however, the court held that the remedy provided in Section 212.15(4) remains available to a taxpayer despite the fact that a full hearing has been conducted in accordance with the provisions of the Administrative Procedure Act. Department of Revenue v. The Honorable James E. Joanos, ___ So.2d ___, Case No. KK 334 (1 DCA Fla., Op. filed October 16, 1978). The court concluded that the Administrative Procedure Act did not directly, or

by implication, repeal the provisions of Section 212.15(4).

The result of that decision was that a taxpayer could obtain two separate hearings to determine a factual dispute respecting a tax assessment. Such a cumbersome, time consuming and duplicitous mechanism was surely not intended by the Legislature. While the Legislature has repealed that portion of Section 212.15 which directs the taxpayer to the Circuit Court (Laws of Florida, Ch. 78-95), it left intact prior subsection (5) (now subsection (4)) which appears to retain in the Circuit Court similar jurisdiction to resolve such disputes. Section 212.15(4), (1978 Supp.) should either be repealed, or it should be clearly specified in the statute that the remedy is not available if the taxpayer pursues the administrative remedy provided in Section 120.57.

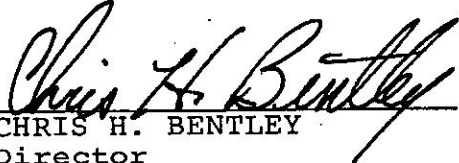
Consolidation of the
Administrative Hearing Process

Section 120.57(1)(a) provides that a Hearing Officer assigned by the Division shall conduct all hearings held in accordance with the section with certain specified exceptions. Several agencies are exempted from this requirement, and utilize their hearing examiners or hearing officers to conduct hearings. It would be appropriate for the Legislature to consider whether greater economy of time and government expenditure could be

realized if all hearing functions, other than hearings conducted by agency heads, were lodged in a single agency.

There are also bodies such as the Career Service Commission and Retirement Commission who, as agency heads, often sit solely for the purpose of conducting hearings. It would be appropriate for the Legislature to consider the economies of that procedure vis-a-vis a procedure whereby the hearings are conducted by a Hearing Officer with the commissions retaining their policy making discretion.

Respectfully submitted


CHRIS H. BENTLEY
Director
Division of Administrative
Hearings

ANALYSIS OF AGENCY REQUESTS FOR HEARING
OFFICERS FOR CALENDAR YEAR 1978

<u>AGENCY</u>	<u>NO. OF CASES</u>
<u>Department of Administration</u>	2
Career Service Commission.....	17
State Energy Office.....	1
Florida Land and Water Adjudicatory Commission.....	4
Division of Personnel.....	5
Division of Retirement.....	9
Division of State Planning.....	<u>1</u>
	39
<u>Department of Agriculture and Consumer Services</u>	<u>17</u>
<u>Broward County Board of County Commissioners</u>	<u>1</u>
<u>Department of Business Regulation</u>	
Division of Alcoholic Beverages and Tobacco.....	119
Division of General Regulation.....	12
Division of Hotels and Restaurants.....	42
Division of Land Sales and Condominiums.....	<u>18</u>
	191
<u>City of Clearwater</u>	<u>2</u>
<u>Department of Commerce</u>	6
Division of Labor.....	10
Division of Prevailing Wages.....	20
Public Employees Relations Commission.....	<u>1</u>
	37
<u>Department of Community Affairs</u>	<u>1</u>
<u>Office of the Comptroller</u>	20
Department of Banking and Finance.....	13
Securities Commission.....	<u>4</u>
	37
<u>Department of Education</u>	3
Alachua County School Board.....	1
Board of Education.....	5
Brevard County School Board.....	1
Broward County School Board.....	8
Citrus County School Board.....	1

	<u>NO. OF</u> <u>CASES</u>
Clay County School Board.....	1
Dade County School Board.....	14
Florida Agricultural and Mechanical University.....	1
Gadsden County School Board.....	2
Hamilton County School Board.....	1
Hendry County School Board.....	1
Hillsborough County School Board.....	1
Jackson County School Board.....	1
Lee County School Board.....	1
Leon County School Board.....	2
Liberty County School Board.....	1
Miami-Dade Community College.....	5
Nassau County School Board.....	1
Orange County School Board.....	4
Palm Beach County School Board.....	1
Pinellas County School Board.....	3
Professional Practices Council.....	10
Board of Regents.....	2
University of Florida.....	3
Vocational, Technical, Trade and Business Schools.....	9
	<u>83</u>
<u>Department of Environmental Regulation.....</u>	<u>152</u>
<u>State Board of Registration for Foresters.....</u>	<u>1</u>
<u>Gadsden County.....</u>	<u>5</u>
<u>Game and Fresh Water Fish Commission.....</u>	<u>4</u>
<u>Department of General Services.....</u>	<u>10</u>
<u>Department of Health and Rehabilitative Services</u>	
Hospitals (Baker Act):	
Anclothe Manor Hospital.....	50
Florida State Hospital.....	381
Hillsborough Community Medical Health Center.....	1
Northeast Florida State Hospital.....	47
North Florida Evaluation and Treatment Center.....	228
South Florida State Hospital.....	507
Veteran's Administration Hospital.....	2
G. Pierce Wood Memorial Hospital.....	47
Broward County Health Department.....	1
Office of Community Medical Facilities.....	21
Office of Entomology.....	3
Division of Health (Miscellaneous).....	122
Office of Licensure and Certification.....	2
Youth Services Program Office.....	6
	<u>1418</u>

	<u>NO. OF CASES</u>
<u>Department of Highway Safety and Motor Vehicles</u>	<u>2</u>
<u>Department of Insurance</u>	<u>21</u>
<u>Interlachen Zoning Board of Adjustment</u>	<u>1</u>
<u>City of Jasper</u>	<u>1</u>
<u>Department of Legal Affairs</u>	<u>4</u>
<u>Department of Natural Resources</u>	<u>2</u>
Northwest Florida Water Management District.....	1
St. John's Water Management District.....	1
South Florida Water Management District.....	3
Southwest Florida Water Management District.....	7
	<u>14</u>
<u>Department of Professional and Occupational Regulation</u>	
Board of Accountancy.....	12
Board of Architecture.....	5
Barber's Sanitary Commission.....	1
Board of Chiropractic Examiners.....	17
Florida Construction Industry Licensing Board.....	26
Board of Cosmetology.....	44
Board of Dentistry.....	10
Board of Dispensing Opticians.....	2
Board of Funeral Directors and Embalmers.....	4
Board of Medical Examiners.....	5
Board of Nursing.....	48
Board of Nursing Home Administrators.....	2
Board of Optometry.....	2
Board of Osteopathic Medical Examiners.....	12
Board of Pharmacy.....	5
Board of Podiatry Examiners.....	1
Board of Professional Engineers and Land Surveyors.....	3
Board of Psychology Examiners.....	3
Florida Real Estate Commission.....	88
Board of Veterinary Medicine.....	1
	<u>291</u>
<u>Department of Revenue</u>	<u>77</u>
<u>Department of State</u>	<u>4</u>
Division of Licensing.....	<u>51</u>
	<u>55</u>
<u>Department of Transportation</u>	<u>89</u>

GRAND TOTAL: 2553