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SURVEY ARTICLES

Administrative Law

by J. Michael Davis*

I. Introduction

The Eleventh Circuit's 1991 administrative law decisions ran the full gamut of administrative issues and included decisions relating to both state and federal administrative agencies. While the majority of the decisions dealt with straightforward application of accepted principles of administrative law, several decisions included complex fact patterns and the application of both federal and state administrative procedures. The resulting decisions were balanced in terms of their treatment of the agencies and parties appearing before those agencies.

II. Deference to Agency Interpretation of Statute

In *Greater Orlando Aviation Authority v. Federal Aviation Administration*,[1] the court determined whether the Federal Aviation Administration ("FAA") had acted arbitrarily and capriciously in its consideration of an application to erect radio towers near a planned airport in the Orlando

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1. 939 F.2d 954 (11th Cir. 1991).

area. The Greater Orlando Aviation Authority, working in concert with the FAA, was developing plans to build two reliever airports in the Orlando area. On June 6, 1989, the Aviation Authority informed the FAA of the proposed location for the reliever airport. However, on April 24, 1989, the FAA received notice from Guy Gannett Publishing Company, which stated that Gannett proposed constructing a six-tower antenna complex in the Orlando area. The FAA had a standard rule of considering proposals on applications on a first-come, first-serve basis. Because the FAA received Gannett's notice before the Aviation Authority's notice, the FAA did not consider the proposed reliever airport submitted by the Aviation Authority when reviewing Gannett's proposal to construct the six-tower antenna complex.[2] On September 21, 1989, the FAA issued a notice that Gannett's proposed towers would not be considered an obstruction under the FAA rules.[3] The Aviation Authority then filed a request for discretionary review that the FAA denied on December 5, 1989.[4]

The Eleventh Circuit held that the FAA's use of the first-come, first-serve rule in considering applications and proposals submitted to the agency was arbitrary and capricious.[5] The court, while acknowledging respect for an "agency's findings and conclusions concerning the interpretation of a statute within the agency's specialized knowledge and expertise,"[6] ruled that the FAA's application of the first-come, first-serve rule frustrated the statutory policy of the Federal Aviation Act.[7] In so holding, the court relied heavily upon a previous case from the Eighth Circuit containing similar facts.[8] Interestingly, the court looked beyond the reasoning provided by the FAA for its interpretation and application of its statutes and regulations and instead looked to the purpose and policy underlying the statute and balanced that against the FAA's reasoning.[9]

In *Johnson v. United States Railroad Retirement Board*,[10] and *Miree Construction Corp. v. Dole*,[11] the Eleventh Circuit also refused to defer to an agency's interpretation of its statute. The court in *Johnson* refused to defer to the Railroad Retirement Board's interpretation of the Railroad Retirement Act[12] because the Board was interpreting not only the Rail-

2. *Id.* at 956-57.
3. *Id.* at 957. *See* 14 C.F.R. § 77 (1991).
4. 939 F.2d at 957-58.
5. *Id.* at 962-63.
6. *Id.* at 958.
7. *Id.* at 962 (citing 49 U.S.C. app. § 1501 (1988)).
8. *Id.* at 960-62. *See* White Industries v. FAA, 692 F.2d 532 (8th Cir. 1982).
9. 939 F.2d at 962-63.
10. 925 F.2d 1374 (11th Cir. 1991).
11. 930 F.2d 1536 (11th Cir. 1991).
12. 45 U.S.C. §§ 231-1347 (1988).

road Retirement Act but also the Social Security Act.[13] Since the Board was interpreting a statute under which the agency did not operate, the Board's decision was not entitled to deference.[14] In *Miree Construction Corp.*, the court also refused to defer to the agency's interpretation of its own statute.[15] In reaching this decision, the court recognized that the Wage Appeals Board of the Department of Labor had issued differing opinions in affirming the agency decision.[16] Because the Board could not arrive at a consensus in its reasoning, the court felt it was not bound by the Board's interpretation.[17]

In a fourth decision in this area, *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*,[18] the court held that an agency's interpretation of its statute was not entitled to deference because the Benefits Review Board sits as "an adjudicator, rather than an administrator."[19]

III. Conclusions of Law

In *Carnes v. Sullivan*[20] and *Brown v. Sullivan*,[21] the court reversed two decisions of the Secretary of Health and Human Services ("the Secretary") that limited or denied benefits to the respective appellants.[22] In *Brown* appellant filed a request for disability benefits based on, among other factors, a back injury. She filed two applications, the first in November 1979, which the agency denied in March 1980. Brown did not appeal that decision, but filed a second application in May 1981, which the agency denied on April 15, 1983. Brown then appealed the denial of her second application to the Eleventh Circuit. The Eleventh Circuit remanded the case to the Appeals Council. The Council overturned the decision of the administrative law judge ("ALJ") and awarded benefits. At a subsequent hearing, the ALJ issued a finding that appellant had been totally disabled as of September 2, 1981. Appellant disagreed and appealed to both the Appeals Council in the district court and subsequently the Eleventh Circuit.[23] In the view of the Eleventh Circuit, the case turned upon a resolution of whether the Secretary had applied the appropriate

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13. 925 F.2d at 1378. *See* 42 U.S.C. §§ 301-1397e (1988).
14. 925 F.2d at 1378.
15. 930 F.2d at 1541.
16. *Id.*
17. *Id.*
18. 933 F.2d 1561 (11th Cir. 1991).
19. *Id.* at 1563 (citing Potomac Elec. Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268 (1980)).
20. 936 F.2d 1215 (11th Cir. 1991).
21. 921 F.2d 1233 (11th Cir. 1991).
22. 936 F.2d at 1220; 921 F.2d at 1237.
23. 921 F.2d at 1235.

standard in evaluating the appellant's claim for disability.[24] The court found that since the decision from the Secretary did not indicate that the Secretary had applied the appropriate standard, the decision had to be reversed and remanded for an award of additional disability benefits.[25]

Interestingly, the court in *Brown* applied the appropriate legal standard and issued a decision, rather than remanding the case to the Secretary for further proceedings. The court held that because the Secretary had not specifically discredited testimony given by appellant, under existing authority in the circuit, appellant's testimony must be accepted as true.[26] Taking the appellant's testimony as true and credible and applying the appropriate legal standard to that testimony, appellant was entitled to additional benefits.[27]

In *Carnes* the court again reversed the Secretary regarding a decision to deny a claim for disability.[28] The court based this decision on its finding that the Secretary had required appellant to produce evidence to meet a legal standard not contained within the agency's regulations.[29] The court relied on a prior decision from the Ninth Circuit containing similar facts.[30]

IV. Collateral Estoppel

In *United States v. Peppertree Apartments*,[31] the court applied a holding reached by the Department of Housing and Urban Development's ("HUD") Board of Contract Appeals in a separate action filed by the United States seeking to recover funds and statutory damages.[32] Peppertree Apartments was one of four multifamily housing projects located in Alabama that was built with proceeds of a loan insured by HUD. HUD determined that appellant Bailes, a managing or general partner in each of the four projects, had made expenditures in violation of the mortgage insurance agreement and consequently barred him from participating in any HUD programs for five years. A hearing was conducted before HUD's Board of Contract Appeals in which the administrative judge found that Bailes had distributed project funds to money market accounts and had not replaced that money while at all times knowing that the distributions

24. *Id.* at 1236.
25. *Id.*
26. *Id.*
27. *Id.*
28. 936 F.2d at 1220.
29. *Id.* at 1219. *See* Listing 10.10(A) and (C) of 20 C.F.R. pt. 404, Subpt. P, App. 1 (1990).
30. 936 F.2d at 1218-19. *See* Pitzer v. Sullivan, 908 F.2d 502 (9th Cir. 1990).
31. 942 F.2d 1555 (11th Cir. 1991).
32. *Id.* at 1558.

violated the agreements. The United States subsequently filed suit in district court to recover the money that had not been returned to the project accounts.[33]

The court applied the test stated in *Pantex Towing Corp. v. Glidewell*,[34] and found: (1) An identity of parties; (2) an identity of issues; (3) an adequate opportunity to litigate the relevant issues in the administrative hearing; (4) the issue was actually litigated; and (5) the issue was necessary to the administrative decision.[35] Accordingly, the court held that the doctrine of collateral estoppel precluded the relitigation of the factual issues that had been considered by HUD's Board of Contract Appeals.[36]

On the state level, in *Steadham v. Sanders*,[37] the court, following the holding in *University of Tennessee v. Elliott*,[38] refused to give preclusive effect to the factual findings of an Alabama County Commission.[39] In *Steadham* a former county employee filed a claim against his county commission, contending that the elimination of his position was due to political activity on the part of the ex-employee and not legitimate financial considerations as the commission maintained.[40] Alabama law required that a claim against a county could not be brought until a claim had first been presented to the county commission.[41] The county commission ruled against the ex-employee, who then filed an action in federal district court under 42 U.S.C. § 1983.[42] The county moved for summary judgment, contending that plaintiff was precluded from relitigating the issue in federal court because the county commission had already considered the matter.[43]

In *Elliott* the Supreme Court held that federal courts will give the same preclusive effect to a state agency's factfinding as the findings would be entitled in that state's courts, assuming the state agency acts in a judicial capacity and provides an adequate opportunity to litigate disputed issues of fact.[44] Applying the Supreme Court's holding in *Elliott*, the Eleventh Circuit found that under Alabama law the governing body of a county, in

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33. *Id.*
34. 763 F.2d 1241 (11th Cir. 1985).
35. 942 F.2d at 1558-60.
36. *Id.* at 1560.
37. 941 F.2d 1534 (11th Cir. 1991).
38. 478 U.S. 788 (1986).
39. 941 F.2d at 1538.
40. *Id.* at 1535.
41. *Id.* at 1536. *See* ALA. CODE § 6-5-20 (1975).
42. 42 U.S.C. § 1983 (1988).
43. 941 F.2d at 1535-36.
44. 478 U.S. at 799.

reviewing a claim, does not do so in a judicial capacity.[45] The court further found that under Alabama law, the findings of county commissioners are not given preclusive effect and as such the court refused to afford preclusive effect to the county's ruling.[46] The court then discussed in great detail the county's contention that its factual findings warranted preclusive effect.[47]

The county pointed to several Alabama decisions which held that a county commission's decisions could not be overturned on appeal unless they were arbitrary, capricious, or a gross abuse of discretion.[48] The court rejected the county's claim, finding that the cases cited by the county concerned issues in which the character of the action taken by the county dealt with action in which the county was the final authority.[49] For these cases, a definite standard of judicial review was already established by statute.[50]

In a second state decision, *JSK v. Hendry County School Board*,[51] the court applied the full faith and credit statute[52] to overturn a district court finding that gave full faith and credit to the decision of the Florida Department of Administrative Hearings.[53] *Hendry County* dealt with the appeal of an Individualized Education Plan ("IEP"), that the school board had prepared for JSK under the requirements of the Education for All Handicapped Children Act ("the Act").[54] The parents of JSK appealed the IEP prepared for JSK for 1985 to the Florida Department of Administrative Hearings, which rejected the 1985 IEP.[55] That decision was appealed to the Florida District Court of Appeal for the Second Circuit, which reversed the decision of the Department of Administrative Hearings and remanded the case to the Department "to approve the plan unless other factors were developed at the rehearing to show that the plan was inappropriate."[56] The Department held a remand hearing at which new evidence was admitted and the IEP was found to be appropri-

45. 941 F.2d at 1536.
46. *Id.*
47. *Id.* at 1537-38.
48. *Id.* at 1537 (citing Black v. Pike County Comm'n, 375 So. 2d 255 (Ala. 1979); Peterson v. Jefferson County, 372 So. 2d 839 (Ala. 1979); Custred v. Jefferson County, 360 So. 2d 285 (Ala. 1978)).
49. *Id.* These cases concerned licensing and permit issues, not direct claims against the county.
50. *Id.*
51. 941 F.2d 1563 (11th Cir. 1991).
52. 28 U.S.C. § 1738 (1988).
53. 941 F.2d at 1574.
54. *Id.* at 1564-65. *See* 20 U.S.C. §§ 1400-1485 (1988).
55. 941 F.2d at 1565.
56. *Id.* at 1566.

ate. In 1986 the school board prepared a new IEP for JSK which was also appealed and ultimately resulted in trial in federal district court concerning the appropriateness of not only the 1986 IEP but also the 1985 IEP. The district court dismissed the claims regarding the 1985 IEP on the ground that the court had to extend full faith and credit to the decision of the Florida appellate court and remanded the decision of the Department of Administrative Hearings.[57]

The Eleventh Circuit determined that the district court erred in giving full faith and credit under 28 U.S.C. § 1738[58] to the decision concerning the 1985 IEP.[59] The court reasoned that while section 1738 did require the district court to give full faith and credit to " '[t]he records and judicial proceedings of any [state] court" this did not apply to the order that was issued by the Department of Administrative Hearings on remand.[60] The court reviewed 20 U.S.C. § 1415(e),[61] which provides that any party aggrieved by an administrative decision under the Act can bring a separate civil action in any state or federal district court at which time the court can render a decision based upon a preponderance of the evidence.[62] Therefore, the court ruled that while the decision of the Florida District Court of Appeal was entitled to full faith and credit, the inquiry did not end with that decision.[63] Instead, the court considered the subsequent action taken by the administrative agency in the remand hearing and reviewed the Act to determine if the statute gave preclusive effect to administrative findings.[64] The court held that the Act did not give preclusive effect to administrative decisions and thus the court determined that it was not required to give preclusive effect to the remand decision of the Florida Department of Administrative Hearings regarding the 1985 IEP.[65]

V. TIMING OF APPEAL

In *Greater Orlando Aviation Authority v. Federal Aviation Administration*,[66] the court allowed appellant to proceed with his appeal although he filed the notice of appeal well beyond the appropriate deadline.[67] The

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57. *Id.* at 1566-67.
58. 28 U.S.C. § 1738 (1988).
59. 941 F.2d at 1567.
60. *Id.* (quoting 28 U.S.C. § 1738 (1988)).
61. 20 U.S.C. § 1413(e) (1988).
62. 941 F.2d at 1568. The Act also provides for hearings to challenge an IEP before state agencies and in state and federal courts. *See* 20 U.S.C. § 1415(b), (c) (1988).
63. 941 F.2d at 1567.
64. *Id.* at 1567-69.
65. *Id.* at 1569.
66. 939 F.2d 954 (11th Cir. 1991).
67. *Id.* at 959.

court ruled that appellant had met the standard enunciated in 49 U.S.C. App. § 1486(a),[68] which allows for the filing of appeal beyond the statutory deadline only on a showing of reasonable grounds.[69] The court found that appellant had stated such reasonable grounds by showing that the actions of the FAA had been confusing and thus had led to uncertainty as to the appropriate avenue and timing for such an appeal.[70] Thus, procedural errors on the part of the agency provided a basis for allowing the out of time appeal to be considered.

VI. AGENCY SUBPOENA

In *Equal Employment Opportunity Commission v. Kloster Cruise, Ltd.*,[71] the court followed established precedent and held that a district court's role in an administrative subpoena enforcement proceeding is limited and the only inquiry that is appropriate is whether the evidence sought is material and relevant to the lawful purpose of the agency.[72] The Equal Opportunity Employment Commission ("EEOC") was attempting to gain documents from Kloster, a Bermudian corporation that owned and operated Bahamanian registered cruise ships out of Miami, Florida.[73] Two past employees of Kloster maintained that they had been fired in violation of the Civil Rights Act of 1964, Subchapter VI—Equal Employment Opportunities.[74] In the course of investigating the charges, the EEOC subpoenaed documents from Kloster. The district court declined to enforce the subpoena finding that Title VII of the Civil Rights Act did not apply to foreign flagged cruise ships.[75] The Eleventh Circuit reversed, but did not decide whether Title VII of the Civil Rights Acts applied to foreign flag ships.[76] The court reasoned that the only appropriate inquiry in a proceeding to enforce an administrative subpoena is a plausible argument by the agency concerning its jurisdiction and a showing that the evidence or information sought is " '"not plainly incompetent or irrelevant to any lawful purpose" of the Agency.' "[77]

68. 49 U.S.C. app. § 1486(a) (1988).
69. 939 F.2d at 958-59.
70. *Id.* at 960.
71. 939 F.2d 920 (11th Cir. 1991).
72. *Id.* at 922.
73. *Id.* at 921.
74. 42 U.S.C. §§ 2000e-17 (1988).
75. 939 F.2d at 921-22.
76. *Id.* at 922.
77. *Id.* (quoting EEOC v. Fremont Christian School, 34 Fair Empl. Prac. Case. (BNA) 1036, 1038, 1982 WL 433 (N.D. Cal. 1982)).

VII. Decision Committed to Agency Discretion

In *Horton Homes, Inc. v. United States*[78] and *Southern Research Institute v. Griffin Corp.*,[79] the court adhered to the doctrine that it would not overturn agency decisions committed to the discretion of the agency. *Horton Homes* dealt with a dispute with the Internal Revenue Service ("IRS") regarding an abatement of interest on an income tax deficiency.[80] A provision in the tax code provided that the IRS could abate an assessment of interest on a deficiency that in whole or in part was attributable to the IRS in performing a ministerial act.[81] Appellants maintained that the IRS unjustifiably delayed in reaching an agreement, pursuant to which appellants agreed to pay certain tax deficiencies, and therefore the IRS should abate the interest appellant was required to pay.[82] The court analyzed the agency's decision under section 701 of the Administrative Procedure Act ("APA")[83] to determine whether the APA precluded judicial review or whether the action by the IRS in this instance had been committed to agency discretion by law.[84] Under the first prong, the court, citing *Heckler v. Chaney*[85] and *Block v. Community Nutrition Institute*,[86] reviewed the express language of the IRS statute in question and the legislative history of the statute.[87] The court determined that as written, discretionary acts of the IRS in the area of interest abatement are not subject to judicial review.[88] The court was persuaded by the legislative history of the statute and the use of the term "may" in the statutory provision in question.[89]

Under the second prong of APA section 701, the court held that the action of the IRS in this instance was not subject to review since there was no meaningful standard against which the court could judge the agency's exercise of discretion.[90] The court found that neither the statute nor the IRS regulations defined the parameters of a "delay" caused by the IRS.[91] Thus, the court had no meaningful standard to determine whether the agency had abused its discretion since it was impossible to

78. 936 F.2d 548 (11th Cir. 1991).
79. 938 F.2d 1249 (11th Cir. 1991).
80. 936 F.2d at 549.
81. *Id. See* 26 U.S.C. § 6404(e)(1) (1988).
82. 936 F.2d at 550.
83. 5 U.S.C. § 701 (1988).
84. 936 F.2d at 550-51.
85. 470 U.S. 821 (1985).
86. 467 U.S. 340 (1984).
87. 936 F.2d at 551-52.
88. *Id.*
89. *Id.*
90. *Id.* at 552-54.
91. *Id.* at 553.

determine if or when a "delay" had occurred.[92] Accordingly, the court found that under APA section 701 the decision of the IRS to abate interest is one that is committed to agency discretion and is not subject to judicial review.[93]

In *Southern Research Institute*, the court ruled that certain actions taken by the government in the area of licenses and patents were not subject to review under the APA.[94] Specifically, the Southern Research Institute maintained that it was entitled to a transfer of certain patent rights under the law regarding the ability of federal agencies to transfer patent rights for inventions made in connection with the federal government or with governmental assistance.[95] The court, again relying on *Heckler*, held that the statute in question did not contain any requirements or standards that the court could evaluate to determine the circumstances under which the government should or should not transfer a patent.[96] Accordingly, because there were no standards that the court could review, the court could not determine whether the government's refusal to transfer the patent was arbitrary or capricious.[97]

VIII. PRIMARY JURISDICTION

In *Taffett v. Southern Co.*,[98] the court refused to apply the doctrine of primary jurisdiction to uphold the dismissal of several claims brought against the Southern Company.[99] The primary jurisdiction doctrine, as enunciated in *United States v. Western Pacific Railroad*,[100] stands for the position that whenever "enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special confidence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."[101] The Southern Company sought to have the case dismissed under the primary jurisdiction doctrine, arguing that the claims raised against it should be pursued with state public service commissions and not with the federal courts.[102] The court refused to accept the Southern Company's position due to its conclusion that the claims brought

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92. *Id.* at 554.
93. *Id.*
94. 938 F.2d at 1254-55.
95. *Id.* at 1250. *See* 35 U.S.C. §§ 200-212 (1988).
96. 938 F.2d at 1254.
97. *Id.* at 1254-55.
98. 930 F.2d 847 (11th Cir. 1991).
99. *Id.* at 854.
100. 352 U.S. 59 (1956).
101. *Id.* at 64.
102. 930 F.2d at 854.

against the Southern Company did not involve rate making issues cognizable before a state public service commission, and instead involved claims properly considered within the courts.[103] The court further ruled that the primary jurisdiction doctrine would not apply because a state and not a federal agency was being used as a basis for invoking the doctrine.[104] In essence, the court held that the primary jurisdiction doctrine would apply in the context of a federal agency since "abstention by the federal courts allows that agency to develop uniform policies which in turn produce even-handed, uniform results."[105] However, the court went on to rule that, "where an issue lies within the domain of agencies created by the various states, uniformity is neither expected nor prized."[106] Thus, the court found that the primary jurisdiction doctrine could not be used as a basis for dismissing the claims brought against the Southern Company.[107]

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103. *Id.* Plaintiffs alleged that the Southern Company had committed fraud and violated the Racketeer Influenced & Corrupt Organizations Act (RICO), 28 U.S.C. §§ 1961-1968 (1988), due to certain accounting practices. 930 F.2d at 850.

104. 930 F.2d at 854.

105. *Id.*

106. *Id.*

107. *Id.*