

073-387—October 16, 1973

DEPARTMENT OF NATURAL RESOURCES
ADMINISTRATIVE PROCEDURE—REVIEW OF WATER
MANAGEMENT DISTRICT RULES

To: Edmund S. Whitson, Jr., Representative, 55th District, Clearwater

Prepared by: John P. Ingle III, Assistant Attorney General

QUESTIONS:

1. Does the language of §373.026(7), F. S., stating that the Department of Natural Resources "shall review, and may rescind, modify, or approve, any policy, rule, regulation, or order of a water management district. . . to insure compliance with the provisions and purposes of this chapter" make such review mandatory and a precondition to its effectiveness, or merely permissive when such review is desired by the department or is requested by an interested party?

2. What procedures should be followed by interested parties and the governor and cabinet as head of the Department of Natural Resources to carry out such review if it is mandatory?

3. What procedures should be followed by an interested party in requesting such review and by the governor and cabinet as the head of the Department of Natural Resources in carrying out such review if it is permissive?

4. What is the scope of review by the governor and cabinet; should there be a full *de novo* hearing, or should the review proceed on the basis of the record below?

SUMMARY:

The Department of Natural Resources may review the policies, rules, regulations, and orders of water management districts. The review is not automatic nor necessarily a prerequisite to the effectiveness of the rules or orders, but may be invoked by the department or by an interested party. Until more specific regulations governing such review are adopted by the department, the provisions of Ch. 120, F. S., and Ch. 16-1, F.A.C., should be utilized to the extent they are applicable.

The language in question is found in §373.026, F. S. (§5, part I, Ch. 72-299, Laws of Florida, the Water Resources Act of 1972), entitled "General powers and duties of the department [of Natural Resources]." Subsection (7) thereof states that the department is authorized:

To exercise general supervisory authority over all water management districts. The department may exercise any power herein authorized to be exercised by a water management district. The department shall review, and may rescind, modify, or approve, any policy, rule, regulation, or order of a water management district, except those policies, rules, or regulations which involve only the internal management of the district, to insure compliance with the provisions and purposes of this chapter.

It is clear that the Department of Natural Resources has the power to review an order of a water management district. It is not clear from the quoted language, however, whether the review is to be automatic and a precondition to the effectiveness of a district's order, or whether the review is mandatory only when invoked *sua sponte* by the department or by the filing of an appeal by an interested party. Since the intent of the legislature is not clear from the quoted language, we must examine the other provisions of the Water Resources Act, as amended.

Section 2 of part I, Ch. 72-299, Laws of Florida [§373.016(3), F. S., Declaration of Policy], states in the last sentence, "[T]he department may exercise any power herein authorized to be exercised by a water management district; however, to the greatest extent practicable, such power should be delegated to the governing board of a water management district." This policy would seem to be opposed to an automatic review by the department of every act of the governing board of a district. A delegation of power would be relatively meaningless if every exercise of the power had to be approved by the delegator before becoming effective.

Section 4 of part I of Ch. 72-299, *supra* [§373.023 (2), F. S.], as amended by Ch. 73-190, Laws of Florida, provides that no state or local government agency (which includes water management districts) may enforce any rule, order, etc., affecting the waters of the state until such rule, order, etc., has been *filed* with the department. Filing is a simple, ministerial act that may be accomplished by mail. Review and approval, on the other hand, are discretionary acts calling for analysis and the exercise of judgment. It would have been quite simple to add the words "and approved by" after the words "filed with," but the legislature did not do so in setting prerequisites to the enforcement of orders. Under the maxim of *expressio unius est exclusio alterius*, it should be presumed that the omission was deliberate.

An examination of some of the powers delegated by the legislature to the water management districts reinforces the impression that they are to be relatively autonomous. They can make contracts, sue and be sued, hire employees (§373.083(1), F. S.), issue orders to implement or enforce any of the provisions of the act or regulations thereunder (§373.083(2), F. S.), build works (§373.087, F. S.), grant permits to inject ground water and buy and move water (§373.106, F. S.), adopt and enforce regulations to effectuate their powers (§373.113, F. S.), issue cease and desist orders (§373.119, F. S.), issue subpoenas (§373.126(2)(a), F. S.), obtain injunctions to enforce orders and regulations (§373.136, F. S.), condemn real property for certain purposes (§373.139, F. S.), obtain criminal warrants (§373.603, F. S.), and obtain the assistance of all prosecutors and peace officers in enforcing the act and its rules (§373.609, F. S.). The granting of powers as extensive as those recited above is inconsistent with the theory that the districts are powerless to act unless and until approval of the department is obtained.

This leaves the question of how the review by the department may be initiated, since the review is not automatic. Since the department has broad supervisory powers over the districts and may exercise any of the powers of the district, it is logical to assume that an interested party aggrieved by such a rule, order, etc., could request the department to review the rule, order, etc.

I conclude, therefore, that pending legislative or judicial clarification, the review by the department of the policies, rules, regulations, or orders of water management districts mentioned in §373.026(7), F. S., is not automatic, nor is it a precondition to the effectiveness of the rules, orders, etc. Such review may, however, be initiated either by the filing of an appeal by an interested party, or by the department on its own motion. Your first question is answered accordingly. Your second question is therefore not applicable.

The act does not mandate any particular procedure to be followed by the department in carrying out such review. The department does have the power to "Adopt, promulgate, and enforce such regulations as may be necessary or convenient to administer the provisions of this chapter." Section 373.043, F. S. Therefore, the department could adopt any rules it deemed necessary to establish a procedural framework for such review, so long as the rules were consistent with Ch. 120, F. S., the Administrative Procedure Act.

The department has not yet adopted specific regulations addressed to these matters. Until it does so, the provisions of Ch. 120, F. S., and the rules of procedure in administrative hearings of the Department of Natural Resources, found in Ch. 16-1, F.A.C., should be utilized to the extent applicable. Your third question is answered accordingly.

As to the scope of review, the statute in question limits the review to "insur[ing] compliance with the provisions and purposes of this chapter." Section 373.026(7), F. S. I read this as limiting the department's scope of review to a determination of whether the rule, order, etc., under review is consistent with the provisions and purposes expressed in Ch. 373, F. S. Only upon a finding by the department that the rule, order, etc., under review was in violation of Ch. 373, or was inconsistent with the purposes of Ch. 373, would there be grounds for a rescission or modification of the district's rule, order, etc. Also, since the district would ordinarily have held a public hearing pursuant to notice, as mandated by Ch. 120, *supra*, and §§373.113, 373.126, and 373.146, before issuing its rule, order, etc., it might be unnecessary for the department to duplicate this effort by having a *de novo* hearing on the matter. Review could ordinarily proceed on the basis of the record below. However, in exceptional cases, the department could consider the matter *de novo*.

073-388—October 16, 1973
(See also 073-388A)

WORKMEN'S COMPENSATION

CHANGES EFFECTED BY NEW LEGISLATION

To: Thomas H. Johnson, Senator, 28th District, West Palm Beach

Prepared by: Sharyn Smith, Assistant Attorney General

QUESTIONS:

1. What are the effects of Ch. 73-127, Laws of Florida?
2. What effect does the repeal of §440.09(4), F. S., have upon Ch. 73-125, Laws of Florida?
3. If a firefighter were to suffer a heart attack while off duty, would the provisions of Ch. 73-125 allow this to be compensated under the provisions of Ch. 440, F. S.?

SUMMARY:

The repeal of §440.09(4), F. S., which reduced disability retirement compensation awarded employees of the state, a political subdivision thereof, or a quasi-public body therein by the amount of any award of workmen's compensation benefits has no effect upon the provisions of Ch. 73-125, Laws of Florida. Chapter 73-125, which contains the presumption that any condition or impairment of health of any Florida municipal county, port authority, special tax district, or fire control district fireman caused by tuberculosis, heart disease, or hypertension resulting in death or disability shall be presumed to have been accidental and suffered in the line of duty, merely authorizes governing bodies of municipalities, counties, port authorities, special tax districts, and fire control districts to negotiate life and disability insurance contracts which shall include such presumption. This presumption does not apply to claims for workmen's compensation benefits, nor does it modify the Workmen's Compensation Law.

AS TO QUESTION 1:

Chapter 73-127, Laws of Florida, amended and repealed certain sections of the Workmen's Compensation Law, Ch. 440, F. S. Section 440.02(1)(b)2. was amended at §1, Ch. 73-127, to define "employment" as all private employments in which one or more employees are employed by the same employer. Under former §440.02(1)(b)2., employment was defined to include all private employments in