IN THE SUPREME COURT OF FLORIDA

WILLIAM N. TAYLOR, M.D.,

Petitioner,

vs. Case No. 69,343

DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF MEDICAL EXAMINERS,

Respondent.

On Review Of A Certified Question
Of Great Public Importance From
The First District Court of Appeal

INITIAL BRIEF OF PETITIONER WILLIAM N. TAYLOR, M.D.

Julian Clarkson
Michael L. Rosen
HOLLAND & KNIGHT
Post Office Drawer 810
Tallahassee, Florida 32302
(904) 224-7000

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Other Authorities

INTRODUCTION

This case is before the Court for review of a decision certified by the First District Court of Appeal as having passed upon a question of great public importance. Taylor v. Department of Professional Regulation, Board of Medical Examiners, 11 F.L.W. 1825 (Fla. 1st DCA Aug. 18, 1986) [A1-16].[1] By a 2-1 decision, in which each of the three judges below filed a separate opinion, the district court granted the motion of the Department of Professional Regulation ("DPR") to dismiss an appeal taken by the petitioner here, William N. Taylor, M.D. (hereinafter referred to as "Dr. Taylor"), from an amended Final Order of the Board of Medical Examiners ("the Board"). The certified question was stated by the district court as follows:

> Does an administrative agency exercising its quasi-judicial power in a license revocation proceeding have the inherent authority to change or modify its final order within a reasonable time after filing it so that the time for taking an appeal begins to run from the date of filing the amended order?

This Court has jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

---

[1]Pursuant to Florida Rule of Appellate Procedure 9.220, this brief is accompanied by an Appendix, which includes a copy of the district court's decision and other pertinent portions of the record. References to the Appendix are signified herein as [A ___]. References to other portions of the record before the district court are signified as [R ___].

STATEMENT OF THE CASE AND FACTS [2]

This case originated with the filing of an Administrative Complaint in June 1983 by the Department of Professional Regulation, Board of Medical Examiners, charging Dr. Taylor with alleged violations of Chapter 458, Florida Statutes, and seeking to take disciplinary action against him [R 1-4]. After Dr. Taylor requested a formal hearing pursuant to section 120.57(1) [R 5] and a DOAH hearing officer was assigned to the case, a "dual venue" administrative hearing was conducted on successive days in two different locations [R 12-601]. On the first day, DPR presented its case at Pensacola [R 12-165] in the absence of Dr. Taylor, who was representing himself without the assistance of counsel. On the following day the hearing moved to Clearwater, where Dr. Taylor presented his defense against the charges [R 166-268].

After the hearings were concluded and proposed recommended orders had been submitted by Dr. Taylor and by DPR[3] [R 602-10; 611-27], the hearing officer on February 4, 1985 entered his Recommended Order [R 628-34], finding that while DPR had

---

[2]Although the statement of the facts set forth in the district court's majority opinion is accurate and acceptable, a more thoroughly developed description of the proceedings below may facilitate the Court's understanding and resolution of the certified question.

[3]It is noteworthy that in its proposed recommended order, DPR admitted its failure to prove that Dr. Taylor is unable to practice medicine with reasonable skill and safety [R 626]. In addition, DPR's proposed recommended penalty was that Dr. Taylor's license be suspended for only six months, followed by a period of supervised probation [R 626-27].

established some of the alleged violations, all but one of the acts charged and proven had occurred before Dr. Taylor was licensed to practice medicine in July of 1982. Because the one post-licensure charge involved no violation of the law, but merely the prescribing of a non-controlled substance (trisorlin, which the hearing officer found to be "a suntan enhancer" [R 633; R 38-39]) for himself in October of 1982, the hearing officer concluded that the only actions of Dr. Taylor which could constitute violations of Chapter 458 occurred before the Board obtained disciplinary jurisdiction over him [R 633]. Accordingly, on the authority of Farzad v. Department of Professional Regulation, 443 So.2d 373 (Fla. 1st DCA 1983) (indicating that the Board lacked disciplinary jurisdiction prior to licensing), and based on the finding that DPR had failed to prove its allegations regarding post-licensure misconduct or unfitness to practice, the hearing officer recommended that the Board take no action against Dr. Taylor and that the administrative complaint be dismissed [R 633-34].

On April 13, 1985, the hearing officer's Recommended Order came before the Board for consideration [R 644-716].[4] Dr. Taylor was present, again representing himself without counsel [R 646]. DPR's counsel asked the Board to adopt the hearing offi-

---

[4]Both parties filed exceptions to the Recommended Order. DPR accepted the hearing officer's findings of fact, but disagreed with his legal conclusion that the Board lacked jurisdiction to discipline Dr. Taylor for pre-licensure conduct [R 635-38]. Dr. Taylor took exception to the hearing officer's findings of fact regarding the alleged pre-licensure violations [R 639-43].

cer's findings of fact, which reflected no violations by Dr. Taylor after he became licensed, and admitted: "I don't think the evidence in this case shows that . . . [Dr. Taylor] is unable to practice medicine with skill and safety." [R 655-56.] DPR's counsel nonetheless urged the Board to overturn the hearing officer's conclusions of law and to impose punishment on Dr. Taylor for his pre-licensure conduct [R 656].[5]

After hearing from Dr. Taylor, the Board voted to adopt the hearing officer's findings of fact, but rejected his conclusion based on Farzad that the Board lacked jurisdiction to discipline Dr. Taylor for alleged violations which occurred prior to his licensure [R 692-95]. Although DPR conceded and the hearing officer found there had been no proof that Dr. Taylor is unable to practice safely and with reasonable skill, the Board's discussion of the penalty to be imposed was focused primarily on the question of his present capacity rather than his pre-licensure conduct [R 692, 696-97, 699]. At the conclusion of the hearing the Board voted to suspend Dr. Taylor's license indefinitely, but to stay the suspension pending Dr. Taylor's submission of two psychiatric evaluations prior to the next Board meeting [R 713-15].

---

[5]Counsel for DPR also argued to the Board that it could impose disciplinary penalties against Dr. Taylor for allegedly falsifying his license application, notwithstanding that Dr. Taylor was never charged with any such offense--a fact specifically noted by the hearing officer in his Recommended Order [R 633]--and that it was raised for the first time in DPR's exceptions to the Recommended Order.

The Board next considered the case at its June 1, 1985 meeting [R 717-49]. The two psychological reports were received, were found to be "all normal," and showed that Dr. Taylor "appears to be healthy, well adjusted and able to practice." [R 723-24.] Nonetheless, at the end of the meeting, the Board on a 6-3 vote decided to impose as a penalty an indefinite suspension which would be stayed, three years' probation with required semi-annual appearances before the Board, a $1,000 fine, and a waiver of confidentiality [R 743-46].

The Board filed its original Final Order on June 26, 1985 [A 17-18]. Although otherwise consistent with the conclusions and positions adopted by the Board at the end of its June 1 meeting, the Final Order incorrectly stated that Dr. Taylor's license "shall be placed on probation for five years." [A 17.] The record discloses no reason for the insertion of five years rather than three years for the period of probation as approved by the majority vote of the Board, and it can only be assumed that this was a clerical error by the person who prepared the original Final Order.

The certificate of service on the Final Order reflects that a copy was sent by certified mail to Dr. Taylor, who was still not represented by counsel, at an address in Sarasota, Florida [A 18]. For reasons not clear from the record, however, Dr. Taylor (who then resided at an address in Palm Harbor) did not receive the Final Order until July 13, at which time he immediately wrote to the Board's chairman requesting that the period

of probation be corrected from five years to three years. Dr. Taylor, who is not an attorney, advised the Board:

> I have received on this day your FINAL ORDER in my case. There is an important error in this FINAL ORDER with regards to the length of probationary period. The period at the hearing was discussed and established to be three (3) years, not five years as in the FINAL ORDER.
>
> Please respond by correcting the Final Order and then filing the corrected FINAL ORDER. I hope to receive this corrected FINAL ORDER and I am requesting to reserve my period of appeal until I receive it.

[A 19 (emphasis in original).] The letter reflects on its face that it was "sent via certified mail on July 15, 1985."

In accordance with Dr. Taylor's request, the Board on August 8 entered an Amended Final Order which corrected the length of the probation period from five years to three years and incorporated all other provisions of its original Final Order, including the notification to Dr. Taylor of his right to appeal "within thirty (30) days of the date this order is filed." [A 20-21.] A copy of the Amended Final Order was furnished to Dr. Taylor, who thereafter obtained counsel and filed a Notice of Administrative Appeal on September 6, 1985, within thirty days after the filing of the Amended Final Order [A 22].

After Dr. Taylor's initial brief was filed in the district court, DPR moved to dismiss the appeal as untimely [A 23-26]. It was undisputed that the Board's original Final Order of June 26 was erroneous; that Dr. Taylor requested correction promptly upon receipt and within the thirty-day period for appeal of that order; and that Dr. Taylor filed his appeal within thirty

days after the Board entered its Amended Final Order of August 8 correcting the original error. Nonetheless, DPR contended that Dr. Taylor was required to file his appeal within thirty days of the original Final Order, because his request for correction of that order was an unauthorized motion which did not suspend "rendition" so as to toll the time for appeal.[6]

By order dated December 11, 1985, the district court directed Dr. Taylor to show cause why DPR's motion to dismiss the appeal should not be granted [A 27]. On December 20, Dr. Taylor filed a response arguing that the appeal should not be dismissed because, under the circumstances, his letter requesting the Board to correct the error in its original Final Order should be treated in substance as a timely and authorized motion to alter or amend, which effectively suspended rendition and tolled the time for appeal until thirty days after the filing of the Amended Final Order. Dr. Taylor also argued, inter alia, that dismissal of the appeal would be a deprivation of due process, and that it would be senseless, wasteful, and overly technical to hold that an erroneous or mistaken order could not be corrected by the agency but could only be rectified by taking an appeal. DPR thereafter filed a reply in support of its motion to dismiss.

---

[6]DPR also asserted that even if the Board had the power to enter the Amended Final Order, the correction of the probation period from five years to three years was an "immaterial" change because Dr. Taylor, while challenging the jurisdiction of the Board to discipline him for pre-licensure conduct, did not specifically attack the probation period as an independent point on appeal. This argument, which Dr. Taylor maintains is utterly meritless, was not discussed or decided by the district court.

On August 18, 1986, the district court rendered its decision, with a majority of the divided panel ruling that the appeal must be dismissed as untimely on the authority of Systems Management Associates, Inc. v. Department of Health and Rehabilitative Services, 391 So.2d 688 (Fla. 1st DCA 1981). In recognition "that this result is unduly harsh," and based on the sentiments expressed both in a specially concurring opinion and in an extensive dissent, the district court certified the question as one of great public importance. [A 1-16.] Thereafter, Dr. Taylor filed a timely notice invoking the jurisdiction of this Court to review the district court's decision and resolve the certified question.

SUMMARY OF THE ARGUMENT

It is not necessary for the Court to give an unqualified affirmative answer to the certified question or to overrule Systems Management in order to afford Dr. Taylor relief from the harsh result reached below, because the issue presented here is narrower than that framed by the district court. The district court's discussion addresses the generalized question of whether an agency has inherent authority to "change or modify" a final order "within a reasonable time after filing." In this case, however, the precise issue is whether an aggrieved party's request for correction of a clerical error or mistake in the agency's final order -- as opposed to a motion to rehear or reconsider the substance of the agency's decision -- should be treated as an "authorized and timely" motion which suspends "rendition" if it is filed within the thirty-day period for taking an appeal.

There is a significant difference between the power to correct clerical errors and the power to make substantive modifications in an order. It is generally recognized that agencies, like courts, have inherent power to correct erroneous orders so as to conform to the record, but cannot reconsider the wisdom of their decisions without specific authority to entertain motions for rehearing or reconsideration. This Court has long recognized and consistently reaffirmed the inherent power of administrative bodies exercising quasi-judicial functions to amend their orders for the purpose of correcting mistakes, provided there was no

prejudice to the parties and the order had not been appealed so as to pass out of the agency's control.

Consistent with that precedent, and with considerations of fundamental fairness and judicial economy, this Court should recognize the inherent power of an agency to correct its own final orders where, as here, (a) the order contains a clerical error or mistake and thus does not reflect the true decision of the agency, (b) the aggrieved party requests correction of the error promptly and within the thirty-day period for appeal, and (c) the agency can enter an amended order correcting the mistake within a short period without prejudice to any party or the public. Under these limited circumstances, the request for correction of the final order (not for rehearing or reconsideration of the decision) should be treated as an "authorized" (by decisional law) and "timely" (before an appeal is filed or the time for appeal has lapsed) motion to amend, which effectively suspends rendition until disposition of the request. Such treatment will benefit the administrative/judicial process and will afford relief from the patently unfair results reached in this case, without causing undue confusion or delay.

ARGUMENT

Because An Administrative Agency Exercising Quasi-Judicial Functions Has The Inherent Power to Modify Its Orders For The Purpose Of Correcting An Inadvertent Clerical Error, A Request For Such Correction Made Before Expiration Of The Time For Appealing The Original Erroneous Order Constitutes An Authorized Motion Which Suspends Rendition Until Entry Of the Amended Final Order

Although the district court framed the certified question broadly, encompassing the generalized issue of whether an administrative agency has inherent authority to "change or modify" a final order "within a reasonable time after filing," it is apparent that the precise factual circumstances of this case do not require the Court to reach so far. The real question here, and the only one which this Court need answer, is whether an aggrieved party's request for correction of an inadvertent clerical mistake in an agency's final order, when submitted before the expiration of the thirty-day period for filing an appeal, should be treated as an "authorized and timely motion . . . to alter or amend" which suspends "rendition" until entry of the amended final order.[7] In the context of this case,

---

[7]Florida Rule of Appellate Procedure 9.110(b) requires that a notice of appeal to review final orders of administrative agencies must be filed "within 30 days of rendition of the order to be reviewed." Rule 9.020(g) defines "rendition" as follows:

> (g) Rendition (of an order): the filing of a signed, written order with the clerk of the lower tribunal. Where there has been filed in the lower tribunal an authorized and timely motion for new trial or rehearing, to alter or amend, for judgment in accordance with prior motion for directed verdict,

concepts of fundamental fairness and considerations of judicial economy mandate an affirmative answer to that question.

It is of critical importance to the proper resolution of this case to recognize here, as did Judge Zehmer in his dissenting opinion below, that there is a significant difference "between the power to correct clerical errors and the power to make substantive modification to an order." 11 F.L.W. at 1827. The distinction between requests to modify an administrative order for purposes of correcting a clerical error or mistake, and motions for rehearing or reconsideration seeking to change the agency's decision, has been generally recognized:

> Apart from, or without reference to, statutory authority therefor, and subject to some restrictions and limitations, it has been held that an administrative agency may correct or amend its orders . . . .
>
> An order may be corrected to actually conform to the record; and an administrative body may make changes as to clerical errors which do not change the form and substance of a decision or order. So, also, it has been held that mistakes may be corrected . . . .
>
> An application for modification of a decision, however, cannot be made the occasion for a complete review of the case . . . to determine whether there had been error in the original decision, nor can it be the occasion for a reevaluation of the original evidence. Thus, the power to correct inadvertent ministerial errors may not be used as a guise for changing previous

---

> notwithstanding verdict, in arrest of judgment, or a challenge to the verdict, the order shall not be deemed rendered until disposition thereof.

(Emphasis added.)

> decisions because the wisdom of those decisions appears doubtful . . . .

73A C.J.S., Public Administrative Law and Procedure § 163 (1983) (emphasis added).

While there is a split of authority on the question of whether administrative agencies have the power to rehear or reconsider their orders in the absence of specific authorization under a statute or rule, there appears to be general agreement that agencies possess inherent power to correct clerical errors and errors arising from mistake or inadvertence. See generally 2 Am.Jur.2d, Administrative Law § 521 at p. 329, and § 524 at p. 336; Annotation, 73 ALR 2d 939 at 941 n. 3 and 951-52. This limited power of administrative agencies to alter final orders even without express statutory authority has been acknowledged by Florida courts. See Davis v. Combination Awning & Shutter Co., 62 So.2d 742, 745 (Fla. 1953); Richter v. Florida Power Corp., 366 So.2d 798, 800 (Fla. 2d DCA 1979).

This Court long ago recognized, and has consistently reaffirmed, the inherent authority of an administrative tribunal exercising quasi-judicial powers to correct its own orders under circumstances even less compelling than those presented here. As the Court observed in State ex rel. Burr v. Seaboard Air Line Ry. Co., 93 Fla. 104, 111 So. 391, 392 (1927):

> The law is also well settled that the railroad commission, like a court, may of its own motion or by request correct or amend any order still under its control without notice and hearing to parties interested, provided such parties cannot suffer by reason of the correction or amendment, or if the matters corrected and amended were embraced in testimony taken at a previous hearing.

See also, e.g., Alterman Transport Lines, Inc. v. Yarborough, 276 So.2d 34, 37 (Fla. 1973); Leonard Bros. Transfer & Storage Co. v. Douglass, 32 So.2d 156, 158 (Fla. 1947); Borden Co. v. Andrews, 162 So.2d 906, 908 (Fla. 2d DCA 1964); Boyd v. Southeastern Telephone Co., 105 So.2d 889, 893-94 (Fla. 1st DCA 1958), cert. discharged, 114 So.2d 1 (Fla. 1959).[8]

Of particular relevance here are the principles enunciated in Mills v. Laris Painting Co., 125 So.2d 745 (Fla. 1960), where the Court addressed the question of whether a deputy commissioner in a worker's compensation proceeding could vacate or modify a prior order on the basis of a mistake. While recognizing that no such procedure was authorized by statute, the Court unanimously upheld the inherent power of the deputy commissioner "to do what it will with its orders erroneously entered, provided it takes such action before the time allowed for appeal from such order has expired." 125 So.2d at 747.

---

[8]The Boyd decision was later distinguished by the First District on the ground that it involved a temporary order, which was still under the agency's control at the time it entered the amended order. Revell v. Florida Department of Labor and Employment Security, 371 So.2d 227, 230 (Fla. 1st DCA 1979). In Revell, however, the court was dealing with a motion for rehearing "to consider new and additional evidence," not a request to correct a clerical error in the order. Moreover, the court did not attempt to explain how the temporary order/final order distinction could be reconciled with this Court's pronouncements in State ex rel. Burr and Leonard Bros., which were also cited as authority for the inherent power of a quasi-judicial body to correct or amend its orders. It can hardly be doubted that an agency, like a court, has inherent authority to reconsider prior interlocutory orders before the proceedings are concluded. See Vey v. Bradford Union Guidance Clinic, Inc., 399 So.2d 1137, 1138 (Fla. 1st DCA 1981).

Elaborating on this point, the Court in Mills explained:

> "* * * It has frequently been held that administrative agencies have inherent or implied power, comparable to that possessed by courts, to rehear or reopen a cause and reconsider its action or determination therein, where the proceeding is in essence a judicial one." It is also generally recognized that the power to rehear or reconsider must be exercised before an appeal from the original order of the administrative body has been lodged or before such order has become final by lapse of time without a timely appeal.

125 So.2d at 748. The Court concluded that since the vacation of the original order was authorized, "the statutory time for appeal would begin from the date copies of the new or modified order are mailed to the parties and a stay would, in effect, result." Id. (emphasis added).

This Court has most recently reaffirmed the inherent power and duty of an agency to modify erroneous orders in Reedy Creek Utilities Co. v. Florida Public Service Commission, 418 So.2d 249 (Fla. 1982). In Reedy Creek, the Public Service Commission had entered an order on July 21, 1980, approving the utility's calculation of a refund to its customers which had been directed by the Commission. Subsequently, upon discovering that the calculations made by the utility were improper or erroneous, the Commission on October 3, 1980 issued a Supplementary Order correcting the amount of the refund.

On appeal, the utility argued that the Commission had no authority to issue the amended refund order some two and one-half months after its original order and that such action

violated the doctrine of "administrative finality." This Court nonetheless affirmed, recognizing that "[t]he power of the Commission to modify its orders is inherent by reason of the nature of the agency and the functions it is empowered to perform." 418 So.2d at 253. While cautioning that "[t]his inherent authority to modify is not without limitation,"[9] the Court held that the doctrine of "administrative finality" did not prevent the Commission from acting to correct its earlier error within two and one-half months, concluding:

> When the Commission determined that it had erred to the detriment of the using public, it had the inherent power and the statutory duty to amend its order to protect the customer.
>
> An underlying purpose of the doctrine of finality is to protect those who rely on a judgment or ruling. We find that Reedy Creek did not change its position during the lapse of time between orders, and suffered no prejudice as a consequence.

418 So.2d at 253-54.

The foregoing authorities provide ample support for the inherent power of an administrative agency to correct its final orders where, as here, it is undisputed that (a) the original order contained a clerical or ministerial error, so that the

---

[9]The Court cited People's Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966) and Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979), as examples of cases in which the Commission had exceeded its inherent authority. As the majority opinion observed, "Peoples Gas System and Austin Tupler dealt with orders amended four years and two years respectively after their inception and 'administrative finality' had attached." 418 So.2d at 253.

order did not properly embody the decision of the agency as reflected by the record; (b) the injured party, who was acting without the assistance of counsel,[10] called the error to the agency's attention and requested correction promptly upon receiving the original order and within the 30-day period for appealing that order; (3) the agency granted the request to correct the error, entering an amended final order approximately three weeks after being advised of the mistake and only six weeks after the original order had been filed; (4) the amended final order advised the affected licensee that he had a right to appeal "within thirty (30) days of the date this order is filed"; (5) a notice of appeal was filed within thirty days of the amended final order; and (6) there has been no allegation or suggestion of prejudice to the public or to any party as a consequence of the short delay occasioned by entry of the amended final order.

The district court judges acknowledged the manifest unfairness of the result reached below and were openly sympathet-

---

[10]Because the Board and DPR knew that Dr. Taylor was a non-lawyer and did not have the benefit of legal counsel, it is manifestly unjust for them to take advantage of that fact by (a) failing to advise him of their opinion that the 30-day period was already running; (b) proceeding to grant his request by entering the Amended Final Order after the 30-day period had expired; and (c) permitting him to file his notice and incur the expense of having the record and initial brief prepared before asserting that the appeal should be dismissed because it was technically "untimely." In this regard, it should be noted that the appellate rules are expressly intended "to implement the public policy of Florida that appellate procedures operate to protect rather than thwart the substantive legal rights of the people by . . . eliminating unnecessary technical procedures which have at times frustrated the cause of justice." See Introductory Note to Florida Rules of Appellate Procedure.

ic to the relief sought by Dr. Taylor, but they did not consider the authorities discussed above. Rather, the majority and specially concurring opinions below concluded that dismissal of the appeal was required based on the authority of Systems Management Associates, Inc. v. Department of Health and Rehabilitative Services, 391 So.2d 688 (Fla. 1st DCA 1981). Systems Management involved a rule challenge proceeding under section 120.56. After the DOAH hearing officer entered an order constituting final agency action on March 27, 1980, the petitioner filed a Motion for Reconsideration on April 7, 1980. That motion was denied by the hearing officer on April 16, 1980, and the petitioner filed its notice of appeal thirty days later on May 16, 1980. The agency then moved to dismiss the appeal as untimely because it was not filed within thirty days of the hearing officer's original March 27 order.

In granting the motion to dismiss, the First District in Systems Management referred to the definition of "rendition" under Florida Rule of Appellate Procedure 9.020(g), and recognized that "a motion for rehearing must be both timely and authorized in order to fall within the tolling provision of Rule 9.020(g)." 391 So.2d at 689. The court initially observed that there was no statutory provision or rule of administrative procedure expressly authorizing a hearing officer to entertain a motion for reconsideration in a rule challenge proceeding. Rejecting the contention that such authority could arise from the deletion of former rule language which had expressly prohibited rehearing or reconsideration, the court reasoned:

> The omission does not create a rule authorizing a petition for rehearing. Even if we construed the omission as authorizing such a motion, we would then be confronted with the problem of timeliness. How long would a litigant have to file a petition for rehearing to an administrative order when no time limit is specified? If we adopted this view, every administrative order would remain open for an indeterminate period for the filing of a petiton for rehearing. There would be no finality to any administrative order to which a petition for rehearing was not filed, or, at best, there would be an open question of timeliness of the filing of such a motion under many varying circumstances. The appellate court's jurisdiction should not hinge upon such uncertainty.

Id. at 690.

The court in Systems Management also expressed the view that authority to rehear or reconsider an order could not be conferred by implication:

> It should not be necessary to tell a litigant that he cannot toll the finality of an order by filing a motion for rehearing. Unless a rule affirmatively grants the right, he should know that it does not exist. Further, the use of the word "authorized" in Rule 9.020(g) implies that some affirmative language contained in a rule, and not mere silence, is required before such a motion will affect the rendition of an order to which it is addressed.

Id. Accordingly, the court concluded that since the notice of appeal was not filed within thirty days after the March 27 order, "we do not have jurisdiction of the appeal, and it must be dismissed as untimely." Id.

Based on the decision in Systems Management, the district courts have held that the question of whether a motion for rehearing or reconsideration will operate to suspend rendi-

tion of an agency's order depends upon the existence of a statute or rule specifically authorizing the agency to entertain such motions. Compare Department of Corrections v. Career Service Commission, 429 So.2d 1244, 1245-46 (Fla. 1st DCA 1983) (motion for rehearing tolled rendition where agency rule authorized rehearing), with Garcia v. Department of Professional Regulation, 443 So.2d 278, 278-79 (Fla. 3d DCA 1983) (motion for reconsideration did not toll appeal period because it was not specifically authorized by statute or rule).

To the extent that Systems Management requires specific authority by statute or rule for motions to rehear or reconsider an agency's final order on substantive grounds, there is no need to disturb that decision in order to resolve this case in Dr. Taylor's favor. Dr. Taylor did not ask the Board to rehear his case or to reconsider its decision; he merely requested that the Board correct its final order to rectify a clerical error, so that the order would properly reflect the Board's decision and be consistent with the record. While the relative wisdom of requiring a uniform rule by which all agencies are allowed to revisit the merits of their decisions may be fairly debatable, the necessity for a mechanism by which mistakes can be caught and corrected is manifest.

DPR's contention that Dr. Taylor could not seek to have the Board's original Final Order amended before taking the appeal is contrary to the settled policy that a lower tribunal should be given the opportunity to correct its own mistakes. It is senseless to suggest that parties must appeal an order that

contains an obvious clerical mistake when the agency could, with a minimum of delay and difficulty, amend the order so that the parties and the appellate court will not be required to waste time on an unnecessary issue. In some cases, a party's decision on whether to appeal or to accept the ruling may depend on the outcome of its request to correct the original order.

Under DPR's theory and the district court's decision, such a party would nonetheless be required to file a notice of appeal, pay the filing fees and record preparation costs, and proceed with the appeal without knowing whether the order would be amended. This is the very kind of "unnecessary technical procedure" that the rules are designed to eliminate. At least one appellate court in Florida has suggested that even in the absence of a specific administrative rule, "notions of due process and fundamental fairness require that a procedure for setting aside a final order be available for use in appropriate situations." Tall Trees Condominium Association, Inc. v. Division of Florida Land Sales and Condominiums, 455 So.2d 1101, 1103 (Fla. 3d DCA 1984). Given the circumstances of this case, it would be a denial of due process and fundamental fairness, and would certainly frustrate the cause of justice, to deny Dr. Taylor appellate review of the Board's action imposing disciplinary penalties against him.

The fact that a motion to amend the agency's final order is not specifically authorized by statute or rule should not pose an obstacle, because nothing in Rule 9.020(g) prevents such a motion from being "authorized" by decisional law. As

previously discussed, this Court has long acknowledged the principle that administrative agencies have inherent authority to modify their orders under extraordinary circumstances, including situations where the original order was erroneous or mistaken. Based on that line of decisions, and particularly Mills and Reedy Creek, this Court can and should recognize that a motion to amend which seeks only the correction of a mistake in an agency order is an "authorized" motion within the meaning of Rule 9.020(g).

Notably in this regard, the First District itself has recognized that where agencies are provided general adjudicatory powers under the Administrative Procedure Act, such power "necessarily implies" certain incidental authority -- even absent a specific statute or rule -- "to aid administrators in the orderly operation of internal agency practice, thereby providing greater flexibility to them in achieving fair and well-reasoned adjudications." Hall v. Career Service Commission, 478 So.2d 1111, 1112-13 (Fla. 1st DCA 1985). In ruling that agencies have implied authority to grant extensions of time, the court distinguished its prior decision in Systems Management as follows:

> [I]f we had held in Systems Management that the agency possessed the implied power to consider motions for reconsideration filed after an agency's final order, such holding would have had the effect of enlarging the jurisdictional time for filing a notice of appeal, contrary to the provisions of Florida Rule of Appellate Procedure 9.110(b), when no explicit authorization existed for so doing. In the case at bar, the motion for extension of time, filed before the rendition of an agency's final order, in no way impinges upon the jurisdiction of an appellate court.

478 So.2d at 1113 (emphasis in original).

In the context of the present case, the First District's concern in Systems Management and in Hall with the timing of the motion to amend and its effect on the jurisdiction of the appellate court is unwarranted. This Court stated in Mills that the inherent power of the agency to modify a prior order based on a mistake "must be exercised before an appeal from the original order of the administrative body has been lodged or before such order has become final by lapse of time without a timely appeal." Likewise, the First District has upheld the efficacy of an amended final order in a worker's compensation case as tolling rendition where the prior order was withdrawn and the amended order was entered within the thirty-day period. Zahorian v. State Department of Transportation, 436 So.2d 355 (Fla. 1st DCA 1983).

As noted by Judge Zehmer below, however, the controlling consideration should not be whether the agency took the requested corrective action by actually entering the amended final order within the thirty-day period. If the request to correct the erroneous order is treated as an authorized motion under Rule 9.020(g), then the determinative issue is whether it was filed with the agency before the time for taking an appeal had lapsed. Since a party such as Dr. Taylor obviously has no control over the speed with which the agency acts after it has received the request for correction, it should only be necessary that the agency's inherent power be invoked by a proper motion filed within the thirty-day period, not that the agency's power actually be exercised within that time.

In short, if a party is aggrieved by a clerical error or mistake in a final agency order, and that party requests the agency to rectify the problem within thirty days, then such request should be treated as a timely and authorized motion to amend, which operates to suspend rendition until the agency either enters an amended final order or denies the request -- i.e., "until disposition thereof." While it is clear that once a notice of appeal has been filed the agency is divested of jurisdiction to amend an order previously entered, e.g., State Department of Administration v. Fleck, 414 So.2d 610 (Fla. 1st DCA 1982), there is no sound reason to deny an agency the authority to correct its own mistakes if the error is brought to its attention before an appeal is filed and before the time for taking an appeal has lapsed.

Recognition of the right to seek correction of an erroneous agency order before an appeal is filed, and to have the thirty-day period commence only upon the disposition of such a motion, in no way contravenes the spirit of the rules. The express purpose of limiting the kinds of motions which postpone rendition is "to prevent deliberate delaying tactics." See Committee Notes to Rule 9.020(g). It is highly unlikely that a motion to amend which seeks only the correction of a clerical error would or could be employed as a delaying tactic, because in the typical case, as here, the party adversely affected will want prompt review of the agency's order and the agency itself will respond to the request within a very short period after being

apprised of the mistake.[11] Manifestly, the benefits to be derived from a recognition of the agency's authority to correct its own errors far outweigh the threat of delay.

---

[11]Of course, the Court could ensure against the use of such a motion as a delaying tactic simply by holding that if the motion is denied by the agency and the reviewing court finds no error or inconsistency with the record as alleged in the motion, it will be deemed unauthorized and will be treated as ineffective to suspend rendition, so that the appeal would be subject to dismissal if not filed within thirty days of the original order.

CONCLUSION

Based on the foregoing arguments and authorities, it is clear that there exists sufficient judicial precedent and practical justification for holding that an administrative agency has inherent power to correct clerical errors or mistakes in its own final orders, where the motion to amend is filed before the appeal period has expired. While the district court majority perhaps understandably felt bound by their own precedent to dismiss Dr. Taylor's appeal, the separate opinions written below convey a clear and unmistakable message that those judges would, if placed in the position of this Court, reach a different result. Indeed, they have virtually invited this Court to fashion appropriate relief.

Fortunately, relief from the patent unfairness of the result reached below can be afforded without giving an unqualified affirmative answer to the certified question so as to sanction a generalized right to move for rehearing or reconsideration of agency orders. Rather, the Court need only recognize that agencies have inherent authority to correct clerical errors or mistakes in their own orders, and that the request of an affected party for correction of such errors will, if filed within the time for appealing the order, be treated as an authorized and timely motion which suspends rendition under Rule 9.020(g) until disposition of the motion. Considerations of due process, fundamental fairness, and judicial economy dictate that the district court's decision be quashed and this case remanded with directions to reinstate Dr. Taylor's appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail to H. Reynolds Sampson, Esquire, Department of Professional Regulation, 130 North Monroe Street, Tallahassee, Florida 32301, this 13th day of October, 1986.

Julian Clarkson
Michael L. Rosen
HOLLAND & KNIGHT
Post Office Drawer 810
Tallahassee, Florida 32302
(904) 224-7000

Attorneys for Petitioner