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## THE IMPACT OF THE PROPOSED MODEL RULES ON AGENCIES AND STANDARDS FOR AGENCY EXEMPTIONS

ROBERT L. SHEVIN\*

### I. INTRODUCTION

The procedural scope of the new Florida Administrative Procedure Act is very expansive. The application of the model rules of procedure will significantly affect governmental agency proceedings. While model rules are new to Florida, the states of Oregon and Michigan have adopted such rules and those state governments have continued to operate effectively. The initial question raised by all agencies is whether their actions are within the purview of the Act and the model rules. Agency is defined in section 120.52<sup>1</sup> to include, among others, each state officer, all state departments, boards, commissions, regional planning agencies, districts and authorities, and each other unit of government in the state. The two basic exceptions to this broad definition are counties and municipalities to the extent they are not made expressly subject to this act by law or judicial decision, and the Governor exercising executive powers derived from the constitution.

The Administration Commission has been delegated the authority to adopt model rules of procedure which will apply to any agency that has not adopted, prior to January 1, 1975, a specific rule covering the subject matter.<sup>2</sup> Staff preparation of the model rules has been done by my own staff and the Division of Administrative Hearings for presentation to the Administration Commission. The most surprising aspect of staff preparation has been the lack of agency input into the development of the model rules. Except for five agencies, there have been virtually no comments from agencies.

### II. FUNCTION OF THE RULES

The model rules should assist in achieving procedural safeguards for both the agencies and the public. The model rules are to be rules of procedure, which are defined in section 120.53<sup>3</sup> to encompass organization, practice, procedure and notice of agency action. While

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\* Attorney General of Florida.

1. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.52).

2. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.54(9)).

3. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.53).

there has been some comment that the model rules should be merely a guide for presentation of evidence, it would appear that the legislature keyed the model rules to the four basic requirements of section 120.53, entitled "Adoption of rules of procedure and public inspection."<sup>4</sup>

One of the key points of the Act is that no rule may be validly adopted without a public hearing or the agency's providing the affected persons with an opportunity to present argument and evidence on all issues under consideration. Thus, if the agency does not provide a public rule hearing, it must continually circulate the proposed rule to affected persons when any change has been made to the rule after receipt of evidence or argument. This legislative method of effectively demanding a public hearing is in accord with recent United States Supreme Court decisions that require the application of due process guarantees to administrative and summary proceedings.

### III. A UNIFORM STRUCTURE

Part VI of the model rules introduces a defined structure to agency proceedings when a person's substantial interests are affected. To date, many people have approached adjudicative hearings with some awe because of the nebulous ways in which the agencies acted. Questions continually arose under the old Act of how to respond administratively to agency action. The model rules resolve these significant issues by providing definite procedures by which the interests of substantially affected persons are determined. These procedures include conferences, administrative determinations, formal proceedings, informal proceedings, and agency review of recommended orders. Two new administrative procedural provisions have also been implemented to provide for an individual to be represented by a class action type of proceeding and to apply the discovery rules of the Florida Rules of Civil Procedure<sup>5</sup> to administrative decisions affecting substantial interests.

The application of these procedural standards to administrative proceedings should not restrict or impede agency action. Adherence to these procedural safeguards should limit reversal by appellate review and, where appropriate, the agency can proceed in an "informal proceeding." The informal proceeding will apparently not be a full hearing involving factual determinations but a proceeding generally based on interpretations of law.

This hearing structure adopted by the legislature and proposed to

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4. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.53).

5. FLA. R. CIV. P. 1.280-410.

be implemented by the Administration Commission through model rules should elevate the quality and quantity of administrative hearings, and should alleviate the burden of circuit courts to a significant extent by the transfer of "agency action proceedings" from a judicial nature to a quasi-judicial nature.

The model rules do not attempt to define terms such as "affected persons," "substantial interests," and "interested parties," but leave this task to judicial and quasi-judicial decisions. The model rules do, however, provide notice of administrative provisions in the Florida Administrative Weekly. This rule is in accord with the legislative intent to provide uniformity and structure in state administrative proceedings.

#### IV. MODIFICATIONS AND EXEMPTIONS

Another aspect of the model rules is the question of whether the Administration Commission has the authority to amend the model rules after filing with the Department of State. Although the Act states that no agency has inherent rulemaking authority, and section 120.54(9)<sup>6</sup> merely provides for filing of the model rules 90 days after October 1, the Commission appears to have such authority in sections 20.31,<sup>7</sup> 120.53(1),<sup>8</sup> and 120.54(9),<sup>9</sup> Florida Statutes. Subsequent to January 1, 1975, the model rules are binding on all agencies and an agency may, with the Administration Commission's permission, modify the rules.

An agency may petition for an exemption from the new Act and to modify the model rules as applicable to that agency. Both decisions are ultimately that of the Administration Commission with final review by the legislature. For both exemption and modification proceedings, the model rules provide for the new Division of Administrative Hearings to make recommendations to the Commission. The three grounds for modification of model rules are provided in section 120.54(9)<sup>10</sup> with the Commission retaining wide discretion under "the most efficient operation of the agency" standard.

Similarly, the Commission is granted the discretionary authority to exempt agencies, but only after the agency establishes alternative procedures which are consistent with the intent and purpose of the Act. Any agency exemption from the Act by the Commission expires 90 days after adjournment of the legislature. The agency may

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6. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.54(9)).

7. FLA. STAT. § 20.31 (1973).

8. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.53(1)).

9. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.54(9)).

10. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.54(9)).

petition for another exemption if the legislature did not act to provide remedial legislation. The Commission, however, is limited to granting a specific exemption twice if the legislature does not act. The failure of the legislature to act in two sessions is an apparent legislative decision not to agree with the Commission determination.

#### V. CONCLUSION

Although the Act needs some amendments to make all provisions consistent, it is a legislative effort to afford procedural rights in administrative hearings in a manner that does not defeat agency action. I believe the Commission must respect this legislative declaration and grant modifications or exemptions only when the specific statutory grounds have been clearly met. An agency petitioning for an exemption, by law, bears a heavy burden.