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RULEMAKING INNOVATIONS UNDER THE NEW ADMINISTRATIVE PROCEDURE ACT

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I. INTRODUCTION

With the exception of judges of industrial claims and unemployment compensation appeals referees (curious exemptions since neither have rulemaking authority) the rulemaking provisions of section 120.54¹ apply to all agencies as that term is defined in the Florida Administrative Procedure Act (APA). The procedures are different and in many ways more complex and time consuming than those under the old APA. But simply because procedures are different is no reason to despair, to wring our hands, and to beg for exemption. There are many problems with the APA, but most can be resolved so that a reasonable and practical solution results.

II. NOTICE PROVISIONS

Notice must be given 21 days in advance of the time an agency intends to act—that is adopt, amend or repeal a rule. The statute prescribes the content of the notice and also identifies certain persons who are entitled to receive notice *by mail*: the Administrative Procedures Committee, all persons named in the proposed rule and all persons who requested to receive notice. In addition, notice must be published in the Florida Administrative Weekly. Nothing is said about mailing notices to all persons affected or regulated or interested. And yet the constant cry is raised that Agency X or Agency Y will go bankrupt paying postage because their rules affect consumers or retailers or every person in the state. I submit that the legislature perceived this problem and invited each agency to address it in a manner consistent with the letter and spirit of the APA, but also consistent with sound fiscal principles, in this language contained in section 120.54 (1)(a): “The agency shall give such notice to those particular classes of persons to whom the intended action is directed as prescribed by rule.”² I suggest that the language means each agency may adopt rules

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

identifying the classes of people affected by the various types of proposed action and also identify by rule reasonable methods of notifying those people: newspaper notice, wire service notice, public service spots on the electronic media, letters to trade associations, etc. The people and the methods will vary from agency to agency.

III. PROCEEDINGS UNDER THE ACT

What happens after notice is given? Any one of a number of things happen. Let's consider them one at a time. The simplest thing that can happen is *nothing*. It must be clearly understood that few things happen automatically under the APA. Generally, the Act simply guarantees the opportunity to know and to be heard if someone requests to know or to be heard. Therefore, under the new APA if no one requests a hearing within 14 days of publication of notice, no hearing need be held. If no hearing is requested, the agency may file the proposed rule with the Secretary of State 21 days after publication of notice. The rules adopted by filing are effective 20 days later.

Someone who is affected by the proposed rule may request an opportunity to present evidence and argue policy before the agency. If such a request is received by the agency within 14 days after publication of notice, the agency must make such an opportunity available. In my opinion the opportunity contemplated by section 120.54(2)³ is a public hearing of the legislative fact gathering type. This section 120.54(2) hearing is not to be confused with the third thing that can happen within 14 days of the publication of notice. Under section 120.54(3)⁴ a person "substantially affected" by a *proposed* rule may petition the Division of Administrative Hearings for an administrative determination of the validity of the proposed rule. Only two grounds for challenge are allowed: (1) the proposed rule is an invalid exercise of validly delegated legislative authority (*ultra vires*); or (2) the proposed rule is a valid exercise of invalidly delegated legislative authority. A section 120.54(3) proceeding is to be conducted in the same manner as a section 120.57⁵ proceeding. It should be apparent that the scope of this proceeding is very narrow indeed, limited to the resolution of either or both of the legal questions identified above. It should also be clear that a proceeding under section 120.54(3) is not a legislative fact gathering type hearing, but is essentially an adversary proceeding designed for the speedy resolution of questions of law. Of course, the decision of the hearing officer is subject to judicial review.

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

4. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.54(3)).

5. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.57).

An identical proceeding is established in sections 120.56(2) and (3)⁶ to challenge the validity of *rules* on the same grounds: ultra vires and invalid legislative delegation. So if one wishes to challenge a proposed rule, the appropriate procedure is set forth in section 120.54(3).⁷ If one wishes to challenge a rule, the same procedure is followed, but it is set forth in section 120.56(2) and (3).⁸

The fourth, and I think final, thing that can possibly happen before the proposed rule is adopted is that a "substantially affected" person will request that a section 120.57⁹ proceeding be convened to protect his substantial interests. This request may be made any time before the conclusion of a section 120.54(2) proceeding.

IV. INITIATIVE PROVISION

There is an interesting provision in section 120.54(4)¹⁰ which enables persons to prod agencies into action. This is the so-called initiative provision of the Act. Under it a person regulated by an agency or a person having a substantial interest in an agency rule may petition the agency to adopt, amend or repeal a rule. Not later than 30 calendar days after the date of filing the petition, the agency must either initiate rulemaking proceedings under this Act or deny the petition with a written statement of its reasons for the denial. In addition, any person regulated by an agency or any person having a substantial interest in a rule may petition the agency to provide the minimum public information that is required by section 120.53.¹¹

Section 120.53 requires each agency to adopt rules of description of organization, rules of practice and rules of procedure, and rules regarding the scheduling of meetings, hearings and workshops. If any agency fails to adopt the rules required by section 120.53, a person regulated by that agency or a person having a substantial interest in those agency rules may petition the agency for the information that is required by section 120.53 and/or request that the agency comply with the mandate of section 120.53 by filing such rules of description, practice, procedure, and scheduling with the Secretary of State. Under this provision, I submit that the general public has a substantial interest in the minimum public information required by section 120.53.

6. Fla. Laws 1974, ch. 74-310, § 1 (§§ 120.56(2), (3)).

7. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.54(3)).

8. Fla. Laws 1974, ch. 74-310, § 1 (§§ 120.56(2), (3)).

9. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.57).

10. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.54(4)).

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

V. INVOLVEMENT OF THE ADMINISTRATIVE PROCEDURES COMMITTEE

Another innovation in rulemaking that was created by the new APA is the Administrative Procedures Committee (APC). It is a joint legislative committee having three members from the senate and three members from the house. The APC is charged in section 11.60(2)¹² with the responsibility of maintaining a continuous review of the statutory authority on which each administrative rule is based and of advising agencies whenever "repeal, amendment, holding of a court of last resort or other factor eliminates or significantly changes such authority." The APC is expected to generally review agency action and the operation of the Administrative Procedure Act. The APC is to report annually to the legislature and to recommend needed legislation and other appropriate action. In addition to these tasks, the APC plays a role in the rulemaking proceedings of section 120.54. I refer you to sections 120.54(10)(a) and (b).¹³

In addition to giving the APC notice of intended agency action at least 21 days before such action, the adopting agency must *file* a copy of the proposed rule with the APC 21 days prior to the intended action. As a practical matter, both notice and the text of the proposed rule will likely be mailed to the APC in the same envelope. After the final hearing, if one is requested, or after the time for requesting has lapsed, the adopting agency should communicate any changes in the proposed rule to the APC. The APC will then examine the proposed rule to determine whether in its opinion the proposed rule is within the agency's statutory authority. If the APC believes the agency has exceeded its authority it must communicate that fact to the adopting agency in a statement specifying with particularity the basis for its opinion. The adopting agency can then: (1) modify the rule to meet APC objections; (2) withdraw the rule entirely; or (3) refuse to modify the rule. If the agency refuses to modify, the rule is nevertheless adopted upon filing and effective 20 days later. The APC may publish its objections to the rule in the Florida Administrative Weekly.

If the agency modifies the rule to meet the APC's objections, the modified rule is to be "re-submitted in the matter set forth above," according to section 120.54(10)(2).¹⁴ It is unclear from the language and the context whether that means re-submitted to the APC or whether it means that the whole process must begin again from notice. One can imagine a situation where no affected person requested a section

12. Fla. Laws 1974, ch. 74-310, § 2 (§ 11.60).

13. Fla. Laws 1974, ch. 74-310, § 1 (§§ 120.54(10)(a), (b)).

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

120.54(2) fact gathering hearing because he was satisfied with the proposed rule as circulated. Under the same circumstances, a substantially affected person might not request a section 120.54(3) administrative determination of the validity of the proposed rule because as circulated the proposed rule presented no issue of ultra vires in his opinion. However, the proposed rule that was subsequently modified might trouble both classes of people. Because both a fact gathering hearing and an administrative determination of validity must be requested within 14 days of publication of notice, neither request could conform to the statutory time constraints unless notice were given anew on a modified proposed rule.

Assuming my hypothetical situation, I am not prepared to argue at this time that the whole process must begin again. If modification to meet APC objections causes the process to begin anew, should modification after a section 120.54(2) public hearing cause the same results? What about staff modification between the time notice is published and the time the proposed rule is adopted? Since one who is able to maintain a section 120.54(3) proceeding to challenge a proposed rule would have standing to raise the same arguments and litigate the same issue after the rule was adopted under sections 120.56(2) and (3), there may be no harm. Certainly one who could request a section 120.54(2) proceeding would have standing to petition for the amendment or repeal of a rule under section 120.54(4). Since it appears that alternative, adequate remedies are available to affected persons and substantially affected persons, I am not inclined at this point to construe the ambiguous statutory language to require an adopting agency to do a time consuming, expensive, useless act.

VI. RULES FOR PETITIONING FOR DECLARATORY STATEMENTS

There is one other provision concerning rulemaking which I want to address briefly. I spoke earlier of the section 120.54(3) counterpart for challenging the *validity* of rules that is in section 120.56(2) and (3). That provision is only one part of section 120.56. You will note that section 120.56(1) directs each agency to adopt a procedure "for the filing and prompt disposition of petitions for declaratory statements as to the applicability of any statutory provision or of any rule or order of the agency."¹⁵ For some reason this section seems to have gone unnoticed and unappreciated by many. Some have treated section 120.56 only in terms of (2) and (3), ignoring (1) entirely. Others, while recognizing that (1) contemplates something other than the proceeding of (2) and

15. Fla. Laws 1974, ch. 74-310, § 1 (§ 120.56(1)).

(3), nevertheless read the "substantially affected" language of (2) as applying to (1). I submit that (1) is a completely separate and distinct section and should be read apart from sections (2) and (3). I further would submit that this is an invitation to agencies to use some imagination to design simple, expeditious procedures whereby people can learn whether a particular rule or order or statutory provision applies to them without going through the full-blown adjudicatory proceeding provided by section 120.57.