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Krajenta v. Division of Workers' Compensation, 376 So. 2d 1200 (Fla. 2d Dist. Ct. App. 1979)

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Administrative Law—EMERGENCY RULEMAKING IN FLORIDA— *Krajenta v. Division of Workers' Compensation,* 376 So. 2d 1200 (Fla. 2d Dist. Ct. App. 1979).

Florida's Administrative Procedure Act (APA)[1] lays the statutory foundation for agency rulemaking. It provides two methods for the adoption of agency rules: one for emergency situations and one to be used under normal circumstances.[2] The major differences between the two rulemaking procedures are in the requirements for notice and for affording an opportunity for public hearing.[3] Normally, the agency must publish its intended action in the *Florida Administrative Weekly* and notify the Joint Administrative Procedures Committee twenty-one days before a rule becomes effective.[4] When the emergency rulemaking procedures apply, however, no prior notice or publication is required. The emergency rule is effective upon filing with the secretary of state.[5] Normal rulemaking procedures also permit persons affected by proposed rules other than those which relate exclusively to organization, procedure, or practice to request a public hearing. The pendency of the hearing delays the effective date of the rule.[6] No comparable hearing procedure is available to persons affected by an emergency rule.[7] Due to these differences, the normal rulemaking procedure is substantially more time-consuming than the emergency rulemaking process.

Emergency rulemaking is not without its procedural safeguards, however. As a prerequisite to implementation of an emergency rule, the agency must publish specific facts supporting a finding of immediate danger to the public health, safety, and welfare.[8] Furthermore, the agency must publish a statement that the procedures used in adopting the emergency rule were "fair under the circumstances and necessary to protect the public interest."[9]

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1. FLA. STAT. ch. 120 (1979).
2. FLA. STAT. § 120.54 (1979).
3. *Id.* § 120.54(1) (notice), (3) (opportunity for public hearing) (1979). The standing required to present evidence during rulemaking is considerably less stringent than that required to challenge an already-adopted rule. *See* School Board of Orange County v. Blackford, 369 So. 2d 689 (Fla. 1st Dist. Ct. App. 1979).
4. FLA. STAT. §§ 120.54(11), .545 (1979).
5. *Id.* § 120.54(9) (1979). An emergency rule can become effective at a date later than filing if the rule so specifies.
6. *Id.* § 120.54(3) (1979).
7. *Id.* § 120.54(9) (1979).
8. *Id.*
9. *Id.* The procedures also must at least provide the procedural safeguards required by other statutes and the state and federal constitutions. *Id.*

Perhaps in response to the relaxed procedural safeguards in the provisions for emergency rulemaking, agencies are often lax in their efforts to allege the requisite public danger when promulgating emergency rules. Consequently, when an emergency rule reaches the courts for review, the agency findings of emergency are rigorously evaluated.[10] *Krajenta v. Division of Workers' Compensation*[11] was no exception to this practice. As in most cases arising out of emergency rules, one of the issues in *Krajenta* was whether the agency had adequately shown an immediate danger to the public.

On November 2, 1978, Edward Krajenta was injured during the course of his employment as a baker. Approximately nine months later, he filed a claim for workers' compensation benefits with the Division of Labor. Two days prior to Krajenta's filing, however, authority for implementing Florida's Workers' Compensation Law had been transferred from the Division of Labor to a newly-created Division of Workers' Compensation (the Division).[12]

Immediately upon its creation the new Division adopted its rules of procedure in the form of an emergency rule.[13] The Division's emergency rule required a claim to be more specific than those previously filed with the Division of Labor.[14] Krajenta's claim, filed in accordance with the old rules, lacked the required specificity. The claim was rejected for failing to meet the informational requirements contained in the Division's emergency rule.[15] Krajenta petitioned the Second District Court of Appeal to review the rejection of his claim. He alleged that the agency had improperly adopted the emergency rule which required the new information,[16]

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10. Judicial requirements for strict compliance with mandated procedure should be distinguished from judicial imposition of additional procedural requirements. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) precipitated much debate on this issue. *See* 28 CATHOLIC UNIV. L. REV. 411 (1979); 28 DEPAUL UNIV. L. REV. 171 (1979).

11. 376 So. 2d 1200 (Fla. 2d Dist. Ct. App. 1979).

12. Ch. 79-400, 1979 Fla. Laws 2017 (codified at FLA. STAT. ch. 44 (1979)).

13. Emergency Rule 38 FER 79-4 (summarized at FLA. AD. WEEKLY, Aug. 3, 1979, at 26). The emergency rule contained 16 sections dealing with everything from "Original Reports to be Filed," to "Destruction of Obsolete Records."

14. The Division alleged that the revised Workers' Compensation Act necessitated the more specific claims. The revised act required a claim to include information so as to put the Division and the employer on notice with respect to the identity of the parties and the specific compensation benefit sought. The "old" act had only required information necessary to put the Division and the employer on notice with respect to the identity of the parties and the general nature of the claim. 376 So. 2d at 1201-02.

15. 376 So. 2d at 1201.

16. Petition for Review of Non-final Administrative Action at 4, Krajenta v. Division of

and that the agency had denied him substantive and procedural due process in refusing to accept a claim filed in accordance and compliance with the prior rules for an injury predating adoption of the emergency rule.[17]

Before the court could address the validity of the rule it had to address the Division's claim that Krajenta had failed to exhaust his administrative remedies.[18] According to the Division, the legislature had provided a specific and adequate administrative remedy by which to challenge emergency rules. A failure to exhaust this administrative remedy prevented a judicial determination as to the validity of an emergency rule.[19]

The issue of whether administrative review of an emergency rule is a prerequisite to challenging it in court had been decided previously in *Postal Colony Co. v. Askew*.[20] In *Postal Colony*, the court held that failure to proceed in a rule challenge proceeding before the Division of Administrative Hearings did not constitute a failure to exhaust administrative remedies.[21]

The *Postal Colony* court based its finding on three provisions in the APA. Two provisions specified that failure to administratively challenge nonemergency rules did not constitute failure to exhaust administrative remedies.[22] The third provision, relating to emergency rules, provided that an "agency's findings of immediate danger, necessity, and procedural fairness shall be judicially review-

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Workers' Compensation, 376 So. 2d 1200 (Fla. 2d Dist. Ct. App. 1979) [hereinafter cited as Petition].

17. *Id.* at 7.

18. Motion to Dismiss and Memorandum of Law in Opposition to Petitioner's Petition for Review of Non-final Administrative Action at 1, Krajenta v. Division of Workers' Compensation, 376 So. 2d 1200 (Fla. 2d Dist. Ct. App. 1979) [hereinafter cited as Motion to Dismiss]. The Administrative Procedure Act provides two methods by which an emergency rule may be challenged. A party adversely affected may challenge the emergency rule by petition to the district court of appeal, FLA. STAT. §§ 120.54(9)(a)3, .68(1) (1979), or, any substantially affected person, may seek an administrative determination of whether a rule is a valid exercise of delegated authority before the Division of Administrative Hearings. FLA. STAT. § 120.56(1) (1979). When the challenged rule is an emergency rule the administrative proceeding is expedited. FLA. STAT. § 120.56(4) (1979).

19. Motion to Dismiss at 2. Krajenta chose to file suit rather than to amend his claim because to file a more specific claim, as required by the revised statute and the implementing emergency rule, allegedly required him to obtain information from the employer which was unavailable absent discovery proceedings. Unfortunately, such discovery proceedings are dependent upon filing of a valid claim. Petition at 3.

20. 348 So. 2d 338 (Fla. 1st Dist. Ct. App. 1977).

21. *Id.* at 339.

22. FLA. STAT. § 120.54(4)(d) (1979); Ch. 75-191, § 5, 1975 Fla. Laws 368 (current version at FLA. STAT. § 120.56(5) (1979)).

able."[23] Reading these sections in pari materia the court concluded that failure to administratively challenge emergency rules did not constitute failure to exhaust administrative remedies.

Using *Postal Colony* as persuasive precedent and remarking on the speed with which emergency rules are adopted, the *Krajenta* court found that emergency rules are directly reviewable by the courts.[24] The *Krajenta* court then noted that the Division's statement of immediate danger to the public was predicated on the assumption that all rules promulgated by the former Division of Labor for administration of the workers' compensation program had terminated along with the existence of that division. According to the new Division, the resulting absence of rules and the infeasibility of quickly adopting permanent rules would prevent it from administering the Workers' Compensation Law. Consequently, a public danger existed.[25]

The court disagreed with the Division's assumption. It believed that the prior rules remained in effect. The court questioned whether the Division was in fact a new agency or merely an old agency renamed.[26] Nevertheless, the court found that the absence of rules on the day the Division was created did not constitute an emergency.[27] Consequently, the Division's procedural rules were not adopted in accordance with the statutory provisions for emergency rulemaking and were invalid.[28] The court accordingly directed the Division to accept Krajenta's claim under the rules which were effective prior to the reorganization.[29]

The *Krajenta* decision was foreshadowed by earlier challenges to

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23. Ch. 74-310, § 1, 1974 Fla. Laws 952 (current version at FLA. STAT. § 120.54(9)(a)3 (1979)).

24. 376 So. 2d at 1202 (citing Times Publishing Co. v. Department of Corrections, 375 So. 2d 304 (Fla. 2d Dist. Ct. App. 1979) which in turn relied on *Postal Colony*). The administrative determination of the validity of a rule is limited to determining whether the rulemaking action was an invalid exercise of delegated legislative authority. FLA. STAT. § 120.56 (1979). Consequently, Krajenta alleged that an administrative proceeding would not provide an adequate remedy. Petitioner's Reply Memorandum at 2, Krajenta v. Division of Workers' Compensation, 376 So. 2d 1200 (Fla. 2d Dist. Ct. App. 1979).

25. 376 So. 2d at 1203. The Division noted that under normal rulemaking proceedings it would have to wait at least 21 days in order to meet the notice requirements, and that requests for public hearings were also a possibility. Motion to Dismiss at 7.

26. 376 So. 2d at 1203.

27. *Id.*

28. *Id.* at 1201. Krajenta also had argued that the emergency rule could not be applied to claims arising prior to August 1, 1979, but the court, by finding the rule invalid, was not required to address the issue of retroactivity. *Id.* at 1202.

29. *Id.* at 1203.

agency emergency rulemaking.[30] While it is difficult to discern a clear-cut policy or a statement of law from the cases preceding *Krajenta,* the courts have been resolute in striking down those emergency rules which are not adopted in strict compliance with the Administrative Procedure Act's emergency rulemaking provisions.[31]

In *Times Publishing Co. v. Department of Corrections,*[32] the company challenged the adequacy of the Department's conclusion that an immediate danger existed to the public if media access to death row inmates was not limited during the pendency of an execution.[33] The Department of Corrections had issued a short statement alleging that its rule was necessary to maintain prison security when an execution was imminent.[34]

In response to the rule challenge, the Department attempted to supplement its conclusion that an emergency existed by providing the court with affidavits from the Florida State Prison Superintendent and the Department Secretary.[35] Although the court indicated that the information in the affidavits may have been sufficient to substantiate the agency's action, the court nonetheless

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30. *See* Times Publishing Co. v. Department of Corrections, 375 So. 2d 307 (Fla. 1st Dist. Ct. App. 1979); Times Publishing Co. v. Department of Corrections, 375 So. 2d 304 (Fla. 2d Dist. Ct. App. 1979); Florida Home Builders Ass'n v. Division of Labor, 355 So. 2d 1245 (Fla. 1st Dist. Ct. App. 1978); Postal Colony Co. v. Askew, 348 So. 2d 338 (Fla. 1st Dist. Ct. App. 1977).

31. 376 So. 2d at 1202. In addition to challenging the alleged emergency, these rules may be challenged on their allegations of procedural fairness. Although the courts have invited such a challenge, none has been made. *See* Times Publishing Co. v. Department of Corrections, 375 So. 2d 307, 309 n.3 (Fla. 1st Dist. Ct. App. 1979).

32. 375 So. 2d 304 (Fla. 2d Dist. Ct. App. 1979).

33. *Id.* at 305. Emergency Rule 33 FER 79-1 (summarized at FLA. AD. WEEKLY, June 15, 1979, at 14) provided that when a death warrant was issued, all regularly scheduled media interviews with death row offenders would be cancelled until after such warrant was executed, expired, or was stayed for a period that would definitely exceed its expiration date. The effect of the emergency rule was to suspend, during the period of an outstanding warrant, the operation of the Department's permanent rule, FLA. ADMIN. CODE R. 33-15.02(c), which provided for final interviews with inmates sentenced to death on the Wednesday prior to the execution date. 375 So. 2d at 306. At the time the emergency rule was promulgated no death warrant was outstanding. The week following promulgation, however, two warrants were signed by the Governor. *Id.* at 305.

34. 375 So. 2d at 305.

35. *Id.* at 306. The affidavit of Florida State Prison Superintendent David H. Brierton recited his experience and difficulties during the time of the Spenkelink execution in May 1979, and why he felt that the emergency rule was necessary for the security of the prison. The affidavit of Department Secretary Louie Wainwright stated that he had considered the recommendations of Superintendent Brierton, and that based upon his knowledge of prison security needs, he felt that the rule was necessary to avoid a serious security problem at the prison. *Id.*

found the Department's emergency rule to be invalid since the reasons and facts relied upon by the Department *at the time it adopted* the emergency rules did not substantiate its finding of an immediate danger to the public health, safety, or welfare.[36]

Three weeks after the second district court's decision in *Times Publishing*, the Department of Corrections again attempted to adopt the same emergency rule.[37] The new promulgation relied upon a statement which included facts contained in the affidavits furnished in the previous litigation.[38] The first district court held that the Department had stated specific facts and reasons sufficient to show the necessity to adopt an emergency rule restricting media access to the general death row population during the short time an unexecuted death warrant is outstanding.[39] As to the specific prisoners whose executions were imminent, however, the court found that the Department's statement of facts and reasons was still inadequate since, rather than a brief interruption in their access to the media, those awaiting execution were barred forever from media access.[40] Noting that the Department had been at liberty to begin normal rulemaking procedures but had not done so, the court stated that an " '[e]mergency created wholly by an agency's failure to take timely action cannot justify extraordinary suspensions or extensions of the statutory schedule.' "[41]

In *Postal Colony* the Governor and Cabinet, acting as the Administration Commission, attempted to adopt an emergency rule to provide comprehensive land development regulations for the Green Swamp area of critical state concern.[42] The statutory provisions regarding the creation of such areas required that land development regulations for areas of critical state concern must become effective within one year of the designation or the designation

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36. *Id.* The court based its opinion that the emergency must exist prior to or at the time of promulgation of the rule on the provision that "the agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public." FLA. STAT. § 120.54(9)(a)3 (1979). The court held that in issuing affidavits *after* the promulgation, the Department had not complied with these requirements. 375 So. 2d at 306.

37. Times Publishing Co. v. Department of Corrections, 375 So. 2d 307, 308 (Fla. 1st Dist. Ct. App. 1979).

38. *Id.* at 311-12.

39. *Id.* at 310.

40. *Id.* The court also held that the Department would not be allowed to extend the life of emergency rules, normally valid for only 90 days, by tacking one invalid rule to another. *Id.* at 311.

41. *Id.* at 311 (quoting *Postal Colony*, 348 So. 2d at 342).

42. 348 So. 2d at 339.

would lapse.[43] In an effort to avoid lapse of the year-old designation of critical state concern[44] the Administration Commission tried to adopt land development regulations by emergency rule.[45] It alleged that if the Green Swamp area was not protected by such a designation, an immediate danger would exist to the water supply for central Florida.[46] The court found that the emergency was not created by a contamination of wetlands or by other development which may have been threatening to the water supply, "but rather by an avoidable administrative failure to make the necessary regulations effective within the time allowed."[47]

In finding that the delay caused by the time-consuming nature of the permanent rulemaking procedure could not justify the adoption of an emergency rule, the *Krajenta* holding is also similar to that of *Florida Home Builders Association v. Division of Labor.*[48] There, the Division of Labor had proposed a permanant rule which established standards to govern the approval of apprenticeship programs. The proposed rule had been challenged in an administrative proceeding and its adoption was thereby delayed. The Division of Labor then attempted to adopt the challenged rule as an emergency rule and Florida Home Builders Association filed a petition for judicial review.[49] Before finding that petitioners lacked standing to challenge the emergency rule,[50] the court noted that an

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43. Ch. 72-317, § 5, 1972 Fla. Laws 1162 (current version at FLA. STAT. § 380.05(9) (1979)).

44. FLA. ADMIN. CODE R. 22F-5 (designating Green Swamp as an area of critical state concern).

45. 348 So. 2d at 340. *See* FLA. ADMIN. CODE E.R. 22 FER-75-1 to 30. The Administration Commission's normal rulemaking proceedings were delayed by a rule challenge proceeding so that the rules adopted June 17, 1975, could not be filed until after the proceeding was concluded on Friday, June 27. The rules were filed with the secretary of state the following Monday with an effective date four days after the designation lapsed. 348 So. 2d at 343.

46. 348 So. 2d at 342.

47. *Id.* The court limited its holding by continuing, "When as here the legislature has clearly specified the consequence of delay, emergency created wholly by an agency's failure to take timely action cannot justify extraordinary suspensions or extensions of the statutory schedule." *Id.*

48. 355 So. 2d 1245 (Fla. 1st Dist. Ct. App. 1978).

49. *Id.* at 1246.

50. *Id.* at 1247. A provision of the Division of Labor's emergency rule provided that a program applicant could file a written request with the Bureau of Apprenticeship, requesting that no action be taken on its application pursuant to the emergency rule. Agency action would then be held in abeyance until the Division's final and permanent rules were adopted. A majority of the court, over a strong dissent by Judge Booth, ruled that licensing applicants who are permitted by the provisions of the emergency rule to exempt themselves from its application, have no standing as adversely affected parties to obtain judicial review. *Id.*

agency whose permenant rulemaking has been temporarily blocked by a rule challenge may resort to emergency rulemaking only when the delay actually creates an emergency. Delay alone, though, will never justify allegations of an emergency.[51]

The most direct impact of the *Krajenta* decision will be in the area of "sunset" legislation under which regulatory agencies must be reestablished by the legislature at least every six years.[52] Reestablished agencies will not be able to use emergency rulemaking to reinstate their rules of practice and procedure. *Krajenta* makes it clear that following any change to agency functions, the full panoply of procedural safeguards found in the "normal" rulemaking procedures must be used by the agency in adopting any new rules of practice or procedure.

More generally, *Krajenta* and its predecessors indicate that an agency's claim of imminent public danger will be closely scrutinized by the courts. Neither agency inaction nor changes in agency function alone will adequately support a claim of immediate danger to the public sufficient to validate the adoption of emergency rules.[53] Despite the relaxed procedural safeguards in emergency rulemaking, the courts recognize the need to insure that agency decisionmaking is not arbitrary.[54] In *Krajenta,* the Division stepped beyond the applicable boundaries in attempting to adopt its emergency rule. The trend begun by *Times Publishing, Postal Colony,* and *Florida Home Builders* is becoming clear: the mere absence of rules, whether caused by the delay inherent in normal rulemaking or by agency inaction, will never by itself create an emergency sufficient to support promulgation of emergency rules.

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51. *Id.* at 1246.

52. FLA. STAT. § 11.61(6) (1979).

53. In spite of the emergency rulemaking requirements that an immediate danger must exist to the public health, safety, or welfare prior to adoption of an emergency rule, 276 emergency rules were adopted by agencies in 1979. JOINT ADMINISTRATIVE PROCEDURES COMM. ANNUAL REPORT, January 1, 1979 to December 31, 1979, at 6-8.

54. For a thorough discussion of the role of agency procedure in the context of the federal APA see Hahn III, *Procedural Adequacy in Administrative Decisionmaking: A Unified Formulation, Part I,* 30 AD. L. REV. 467 (1978).