



THE FLORIDA LEGISLATURE



JOINT ADMINISTRATIVE PROCEDURES COMMITTEE

Supplement to Report on Unadopted Rules *FEBRUARY 2007*

**Senator Michael S. "Mike" Bennett, Chair
Representative Greg Evers, Vice - Chair
Senator M. Mandy Dawson
Senator Don Gaetz
Representative D. Alan Hays
Representative Scott Randolph**

SUPPLEMENT TO REPORT ON UNADOPTED RULES

SUMMARY

The Administrative Procedure Act should be amended to address the use of unadopted rules by creating more incentives for agencies to adopt rules and for affected persons to challenge unadopted rules. Since the Act became law in 1974, the Legislature has always expressed its preference that agencies adopt their policies through the rulemaking process. An extended study by the committee confirmed that the application of unadopted rules by agencies is a legitimate concern. Current provisions of the Act do not penalize agencies for failing to adopt rules and offer little inducement to challenge such failure. The committee evaluated the relative merits of several proposals for amending the Act. The approach most likely to achieve a fair balance between the interests of agencies and those persons affected by the use of unadopted rules is to amend the provisions of the Act relating to unadopted rule challenges and attorney's fees. The proposed amendments will have minimal impact on those agencies that are following the existing rule adoption requirements of the Act.

BACKGROUND

Overview of 2006 Report

In the summer of 2005, the committee staff began a study of the use of unadopted rules by agencies. The committee had received several reports of agencies applying policies that had not been adopted pursuant to the rulemaking requirements of chapter 120, the Administrative Procedure Act (APA). The staff was authorized to determine whether the use of unadopted rules was more generally a concern and, if so, to explore possible legislative solutions. As part of the study, the views of private practitioners, administrative law judges, agency attorneys, and other legislative staff were requested. There was no consensus among those consulted as to the extent of the problem with unadopted rules or possible reasons for the problem. However, several possible approaches to address the issue of unadopted rules in the future were suggested. These included amending chapter 120 to clarify the definition of a "rule," amending the rule adoption procedures of the Act, and strengthening the unadopted rule challenge provisions of the Act.

The results of the study indicated that, while the use of unadopted rules has a significant impact on Florida's citizens, the underlying cause of the problem and the appropriate means to address it were not yet clear. Additional time was needed to continue to monitor the use of unadopted rules and explore possible legislative approaches. In February 2006, the committee staff presented a report¹ which concluded that the Act

¹ Joint Administrative Procedures Committee, *Report on Unadopted Rules, February 2006*.

should not be amended in the 2006 session to address unadopted rules. The report recommended that staff continue to identify unadopted agency rules, analyze the reasons that the rules have not been adopted, and consider possible legislative changes to the Act.

Current Provisions of Chapter 120

Since Florida's modern Administrative Procedure Act was enacted, the Legislature consistently has expressed its preference that agencies adopt their policies through the rulemaking procedures of the Act. Since 1974, a rule essentially has been defined as an agency statement of general applicability that implements, interprets, or prescribes law or policy.² Agency policy that meets this definition but has not been adopted according to the requirements of chapter 120 is an "unadopted rule." The APA was designed to encourage public involvement in the administrative process by requiring public notice of agency policy and providing the opportunity to participate in the development of that policy. Adopting rules through the procedures set out in the Act also ensures legislative oversight of the exercise of authority delegated to the agencies. Over the years, the courts have sometimes interpreted provisions of the APA to expand the discretion of agencies to determine whether certain policy statements should be adopted as rules, which may have contributed to increased use of unadopted rules.³

The Act has been amended several times to reassert the Legislature's preference for rulemaking. In 1991, the Legislature created section 120.535, which stated that "[r]ulemaking is not a matter of agency discretion," and required agencies to adopt their policies through rulemaking as soon as "feasible and practicable."⁴ It was intended to ensure that all agency rules would be adopted through the rulemaking procedures of the Act, except for a few specific exceptions. Along with section 120.535, the 1991 Legislature enacted section 120.57(1)(b)15., which authorized agencies to rely on unadopted policy if the agency could "prove up" the policy when it was applied.

Although section 120.535 was intended to ensure that agencies adopted their policies as rules, some viewed the 1991 legislation as lacking sufficient incentives to compel agency rulemaking because agencies were not penalized for failing to initiate rulemaking proceedings.⁵ Agencies could continue to rely on unadopted policy statements in subsequent adjudicatory proceedings during the rulemaking process. In addition, attorney's fees could be awarded only where the agency failed to initiate rulemaking to adopt a statement or policy found to be in violation of section 120.535(1).

The Act was substantially reorganized in 1996, and several provisions relating to unadopted rules were amended. Attorney's fees and costs could be awarded to a person

² Section 120.52(15), F.S. (2006).

³ *Department of Revenue v. Novoa*, 745 So. 2d 378 (Fla. 1st DCA 1999); *Department of Highway Safety and Motor Vehicles v. Schluter*, 705 So. 2d 81 (Fla. 1st DCA 1998); *McDonald v. Department of Banking and Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977).

⁴ Section 120.535(1), F.S. (1991). (Note: Section 120.535(1) was renumbered as 120.54(1) in 1996.)

⁵ Stephen T. Maher, *Administrative Procedure Act Amendments: The 1991 and 1992 Amendments to the Florida Administrative Procedure Act*, 20 Fla. St. U. L. Rev. 367 (1992).

who successfully challenged the agency's failure to adopt a policy as a rule, although the agency could avoid the costs by initiating rulemaking before the administrative law judge issued a final order on the challenge.⁶ The Legislature also specifically described the elements that an agency must "prove up" to apply an unadopted rule in a substantial interest hearing, which are similar to the standards applied in rule challenge proceedings.⁷ The provisions of chapter 120 related to challenging unadopted rules are essentially unchanged since 1996.

FINDINGS

To help determine the scope of unadopted rules, the committee staff surveyed the web sites of approximately 28 agencies and documented more than 130 instances of agency policy statements that appear to meet the definition of a rule but have not been adopted pursuant to the requirements of chapter 120. In some cases, agencies disagreed that the statements identified are in fact unadopted rules. In other cases, agencies agreed to initiate the rulemaking process to adopt the statements as rules. While the examination of agency web sites was in no way exhaustive, the number of instances that were documented served to verify that the use of unadopted rules is indeed a problem. Other examples of unadopted rules reported to the committee or encountered in the course of rule review also provided evidence of a legitimate concern.

Several suggested proposals for amending the Act to address the increasing use of unadopted rules were evaluated. The first proposal was simply to amend the definition of a "rule" to codify judicial interpretations of the term, or to broaden or narrow the scope of required rulemaking. Since the 1991 amendments to the Act, there have not been a sufficient number of judicial decisions construing what is and is not a rule to arrive at a workable definition. Without more cases applying the existing statutory definition, it is difficult to comprehensively identify the types of policy statements that do and do not constitute a rule and to develop statutory criteria to precisely describe them. At this point, it seems more useful to increase the incentives for affected persons to file challenges and incentives for agencies to follow the current rulemaking requirements. This approach is likely to result in a greater number of administrative challenges and court decisions, which may provide more precise judicial distinctions, aiding any later legislative reconsideration of the definition of a "rule," if necessary.

A second proposal was to amend the rule adoption procedures of chapter 120 to create separate categories of rules that would be exempt from some or all of the current rulemaking requirements. These categories might include procedural rules, rules deemed to be noncontroversial, agency guidelines, or interpretive rules that are binding on the agency but not on the public. Creating one or more new categories of rules would complicate the rulemaking process without providing any clear remedy for the current failures to follow requirements. New questions inevitably would arise as to the proper

⁶ Section 120.56(4), 120.595(4), F.S. (1996).

⁷ Section 120.57(1)(e), F.S. (1996).

boundary of each category and the appropriate treatment of each type of rule in various circumstances. The Act would require significant revision to precisely define each category of rule – a task at least as difficult as clarifying the single term “rule,” as alluded to above. In addition, the problem of adequate incentives to comply with the procedures for each category would still have to be addressed. This proposal is likely to be more burdensome for agencies than current requirements with no obvious impact on the problem of unadopted policies.

The third proposal was to amend the unadopted rule challenge provisions of the Act to create incentives for agencies to adopt rules and for affected persons to challenge unadopted rules. This approach is the most likely to achieve the goal of more agency policies adopted as rules with the benefit of public participation and legislative oversight.

RECOMMENDATION

The Administrative Procedure Act should be amended to address the growing problem of unadopted agency rules. The current statute provides little incentive for agencies to adopt policy statements as rules until a rule challenge is filed, as there is no “penalty” for failing to adopt the rule earlier. The current statute also provides no incentive for an affected person to spend time and money challenging an unadopted rule, since the challenged policy can still be applied to the person if the agency subsequently initiates rulemaking. Similarly, attorney’s fees and costs are awarded to the petitioner only if a final order is issued, not if the agency initiates rulemaking. The rule challenge provisions of section 120.56(4), the “prove up” provisions of section 120.57(1)(e), and the attorney’s fees provisions of section 120.595(4) should be amended to balance the interests of agencies and those persons affected by the use of unadopted rules.

Section 120.56(4) should be amended to provide that once a challenge to an unadopted agency statement is filed, the agency must discontinue all reliance upon the statement or a substantially similar statement until the rule challenge is dismissed, the agency adopts the statement as a rule, the final order finds that the petitioner failed to prove that the statement meets the definition of a rule, or the final order finds that rulemaking is not feasible or practicable under section 120.54(1)(a). The agency should be allowed to rely upon the statement during the proceeding only if the administrative law judge determines that the inability of the agency to apply the statement would constitute an immediate danger to the public health, safety or welfare. The current provisions of the statute provide that an agency may continue to apply a challenged unadopted statement until a final order determines that the statement is a violation of section 120.54(1)(a). Under the recommended amendment to this section, an agency could no longer avoid an adverse ruling simply by initiating the rulemaking process. The immediate relief from application of an agency statement alleged to meet the definition of a rule would provide an incentive for citizens affected by such statements to file challenges, and an incentive for agencies to adopt policy statements as rules before they are applied, consistent with the intent of the Act. The adverse effect of a temporary moratorium on the application of agency policy statements subsequently determined by the administrative law judge not to

be rules would be mitigated by the provisions for emergency situations and by existing attorney's fees provisions designed to deter the filing of any proceeding for an improper purpose.

Section 120.57(1)(e) should be amended to repeal the existing "prove up" provisions and provide that agency action that determines the substantial interests of a party may not be based on a statement that violates section 120.54(1)(a). Agency policy that constitutes an unadopted rule should not be enforced in a section 120.57 proceeding when the agency fails to prove that rulemaking is not feasible or practicable. However, the statute should be amended to clarify that adopted rules and applicable statutes can always be applied to the facts at issue.

The recommended amendment of section 120.57(1)(e) is intended as a reformulation of the "prove up" option codified in the 1991 amendments to the Act as an alternative method of establishing agency policy. Early case law granted agencies the option of engaging in "policy by adjudication" but described such a "prove up" option as an incentive to rulemaking, as it was thought that development of policy through the adjudicatory process would be burdensome to agencies. However, when the precursor to section 120.57(1)(e) was enacted in 1991, instead of requiring an agency to prove up the facts at issue in the course of adjudication as an alternative to adopting policy statements by rule, the statute permitted an agency to prove up the agency policy contained in an unadopted statement. Under the recommended legislation, an agency may still forego rulemaking as long as the agency proves up the facts or conduct at issue in each adjudicatory proceeding, rather than proving up the unadopted policy itself. The agency would be required to demonstrate that a given fact situation was governed by existing rules or statutes. These suggested amendments would end the inconsistency that has existed between sections 120.56(4) and 120.57(1)(e) while also recognizing the ability of an agency to apply "policy by adjudication," so long as it does not rely upon policy statements meeting the definition of a rule.

Amending the attorney's fees provisions of section 120.595(4) will make the unadopted rule challenge provisions of section 120.56(4) more effective by allowing the award of attorney's fees and costs to the petitioner, unless the proceeding is dismissed or the administrative law judge determines that the unadopted policy is not a rule. Under current attorney's fees provisions, an agency may avoid the imposition of costs simply by initiating the rulemaking process when a challenge is filed. The recommended amendment will serve as an incentive for persons to challenge unadopted rules, and an incentive for agencies to adopt policy statements as rules before a challenge is filed.

The proposed amendments to chapter 120 are intended to encourage agencies to engage in rulemaking. These amendments will have no serious adverse effect on those agencies that are following the existing requirements of the Act. If an agency is not applying unadopted policy in its dealings with the public, it will be only minimally impacted by the recommended legislation. On the other hand, when an agency does apply unadopted rules, the recommended amendments will encourage affected persons to challenge the agency's actions.