

Fall 1991

Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders

Patricia A. Dore

Florida State University College of Law

Follow this and additional works at: <http://ir.law.fsu.edu/lr>



Part of the [Administrative Law Commons](#), and the [Legislation Commons](#)

Recommended Citation

Patricia A. Dore, *Florida Limits Policy Development Through Administrative Adjudication and Requires Indexing and Availability of Agency Orders*, 19 Fla. St. U. L. Rev. 437 (2017) .
<http://ir.law.fsu.edu/lr/vol19/iss2/6>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.

FLORIDA LIMITS POLICY DEVELOPMENT THROUGH ADMINISTRATIVE ADJUDICATION AND REQUIRES INDEXING AND AVAILABILITY OF AGENCY ORDERS

PATRICIA A. DORE*

I. INTRODUCTION

WHEN the Legislature revised chapter 120 in 1974, it put in place a complex rulemaking process for state agencies. It did not, however, expressly require the agencies to use the rulemaking process to formalize policy positions into rules before applying the policies in individual cases. The initial judicial reaction was to force rulemaking by permitting a person against whom unadopted policy was being applied to challenge the validity of the policy in a section 120.56¹ rule validity challenge proceeding. If the policy was found to be a rule within the meaning of the definition of that term in 120.52(16), and if it had not been adopted as a rule following 120.54 rulemaking procedures, then the policy was invalidated and could not be used as a basis for agency action until it was properly adopted.²

Not long afterward, an exception was created in *McDonald v. Department of Banking and Finance*.³ There, the court allowed agencies to apply incipient, emerging, nonrule policy that had not been adopted by rulemaking. The idea was to allow agencies to develop policies on a case-by-case basis until they had enough knowledge and experience to formalize the policy into rules.⁴ Before long, however, the limited *McDonald* exception swallowed the rule. Instead of inquiring into the extent of an agency's knowledge and experience with its nonrule policy to determine whether the nonrule policy was truly incipient and emerging, the courts allowed the agencies themselves to decide whether and when they were ready to proceed to rulemaking.⁵

* Associate Professor of Law, Florida State University; B.A., 1966, Carlow College; J.D., 1969, Duquesne University; LL.M., 1970, Yale University.

1. Because the provisions of chapter 120 are commonly referred to by number only, the word "section" will not appear in many subsequent references to chapter 120.

2. *Department of Admin. v. Stevens*, 344 So. 2d 290 (Fla. 1st DCA 1977).

3. 346 So. 2d 569 (Fla. 1st DCA 1977).

4. *Id.* at 581.

5. See *City of Tallahassee v. Florida Pub. Serv. Comm'n*, 433 So. 2d 505 (Fla. 1983); *Florida Cities Water Co. v. Florida Pub. Serv. Comm'n*, 384 So. 2d 1280 (Fla. 1980); *Florida Pub. Serv. Comm'n v. Indiantown Tel. Sys., Inc.*, 435 So. 2d 892 (Fla. 1st DCA 1983); *Anheuser-Busch, Inc. v. Department of Bus. Reg.*, 393 So. 2d 1177 (Fla. 1st DCA 1981).

Because the courts were not inclined to police the exercise of agency discretion in this area and the agencies were not interested in losing their discretion, legislative action was necessary to restore some balance between adjudication and rulemaking in the process of policy development.

At all times since the 1974 revision of chapter 120, agencies have been required to "make available for public inspection and copying . . . [a]ll agency orders [and a] current subject-matter index, identifying for the public any rule or order issued or adopted after January 1, 1975."⁶ As an interim project between the 1988 and 1989 legislative sessions, the staff of the Senate Governmental Operations Committee was directed to study agency compliance with the chapter's requirements relating to the availability of agency orders and current subject matter indexes for public inspection. The staff report confirmed what people working with administrative law in this State already knew—subject matter indexes were not being maintained in a useful manner by most agencies, and the availability of individual agency orders was a hit or miss proposition.⁷

The unchecked use of adjudication to develop policies and the lack of meaningful access to agency orders are interrelated problems. Agencies may use case-by-case adjudications to announce and to refine new policy over time. But because agencies generally have failed to compile and to maintain useful subject matter indexes of those orders resulting from adjudications, the people who need to know an agency's position on a given issue cannot find it. If rulemaking were required, the agency's position could be found in the Florida Administrative Code. Similarly, if keeping a useful subject matter index and requiring accessibility to final orders were mandated, the agency's position could be found in its final orders.

For the past several years, academics, the state administrative law bar, and the Florida Legislature have struggled to find solutions to both problems. How can we limit the discretion courts have given agencies to decide whether and when they will adopt policy statements as rules? How can we make final orders accessible and available to those who need them?

The academics have written articles.⁸ The Bar has convened confer-

6. Ch. 74-310, § 1, 1974 Fla. Laws 952, 955 (current version at FLA. STAT. § 120.53(2)(b)-(c) (1989)).

7. STAFF OF FLA. S. COMM. ON GOVTL. OPS., A REVIEW OF INDEXING OF AGENCY ORDERS ISSUED PURSUANT TO CHAPTER 120, F.S., THE ADMINISTRATIVE PROCEDURE ACT 5-7 (Apr. 1989) (on file with comm.).

8. See Bonfield, *Mandating State Agency Lawmaking by Rule*, 2 B.Y.U. J. PUB. L. 161

ences.⁹ The Legislature has debated the various suggestions offered by the scholars and the Bar—as well as some of their own—all to no avail.¹⁰ Finally, during the 1991 Regular Session, all the pieces fell into place. The Legislature passed one bill that addressed both questions.¹¹

II. LEGISLATIVE HISTORY

The House in 1991—as it did in 1990—took the lead on the question of limiting agency discretion in deciding whether to adopt rules, and the Senate spearheaded the effort to make agency final orders accessible and available.¹² But unlike in 1990, in 1991 both houses came together on both questions in the end.

The House bill began as an interim project by the House Governmental Operations Committee. What was to become Proposed Committee Bill 91-01, the House's Administrative Procedure Act Bill, was developed through a series of workshops conducted by the Subcommittee on Governmental Effectiveness. The subcommittee considered preliminary drafts of the proposed committee bill in workshops on January 8, January 23, and February 6, 1991.¹³

(1988); Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121 (1990); Burris, *The Failure of the Florida Judicial Review Process to Provide Effective Incentives for Agency Rulemaking*, 18 FLA. ST. U.L. REV. 662 (1991); Dore, *Seventh Administrative Law Conference Agenda and Report*, 18 FLA. ST. U.L. REV. 703 (1991); Levinson, *The Florida Administrative Procedure Act After 15 Years*, 18 FLA. ST. U.L. REV. 749 (1991).

9. Both the Sixth and the Seventh Administrative Law Conferences sponsored by the Administrative Law Section of the Florida Bar were devoted to discussion of these questions. See generally *The Seventh Administrative Law Conference*, 18 FLA. ST. U. L. REV. 607 (1991) (symposium issue).

10. The Senate passed Committee Substitute for Senate Bill 1334 (1989), dealing with subject matter indexing and the availability of agency orders, in 1989. See FLA. S. JOUR. 503 (Reg. Sess. 1989). The House did not take up the bill, and it died upon adjournment sine die. FLA. LEGIS., HISTORY OF LEGISLATION, 1989 REGULAR SESSION, HISTORY OF SENATE BILLS at 209, CS for SB 1334. In 1990, the Senate Committee on Governmental Operations favorably reported Committee Substitute for Senate Bill 2550, that session's version of the subject matter indexing bill. But the bill was pulled into the Senate Committee on Appropriations, where it died upon adjournment sine die of the 1990 Regular Session. See FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF SENATE BILLS at 204, CS for SB 2550. The House passed Committee Substitute for House Bill 2539, dealing with a requirement that agencies adopt policy statements as rules as soon as feasible and practicable, in 1990. See FLA. H.R. JOUR. 785, 786 (Reg. Sess. 1990). The bill was referred to the Senate Committee on Governmental Operations, where it died upon adjournment sine die of the 1990 Regular Session. See FLA. LEGIS., HISTORY OF LEGISLATION, 1990 REGULAR SESSION, HISTORY OF HOUSE BILLS at 419, CS for HB 2539.

11. Fla. CS for HB 1879 (1991).

12. See Dore, *supra* note 8, at 707.

13. See Fla. H.R. Comm. on Govtl. Ops., Subcomm. on Governmental Effectiveness, unpaged transcript of proceedings (Jan. 8, 1991) (on file with comm.); Fla. H.R. Comm. on Govtl. Ops., Subcomm. on Govtl. Effectiveness, unpaged transcript of proceedings (Feb. 6, 1991) (on file with committee).

The preliminary draft the subcommittee had before it at the February 6 workshop contained a controversial provision repealing the so-called "shield" that protects rules adopted to implement the growth management law from validity challenges under chapter 120.¹⁴ Representative C. Fred Jones¹⁵ was behind the idea of placing the "shield" repealer provision in Proposed Committee Bill 91-01, but he had the support of Speaker T.K. Wetherell.¹⁶ The "shield" itself is perceived by some, principally developers and home builders, as a denial of the rights to be heard and to contest important public policy decisions having statewide significance—rights otherwise available to people who will be substantially affected by agency policy decisions. The issue became especially controversial in 1989 when the Department of Community Affairs rejected Charlotte County's comprehensive plan because the plan failed to conform with the department's unadopted urban sprawl policies.¹⁷ Urban sprawl became the most highly visible and politically charged example of an agency's refusal to promulgate rules on a sensitive subject while at the same time applying its policy against urban sprawl to individual cities and counties while reviewing their comprehensive plans. More would have been done to prohibit future examples of the urban sprawl policy by passing a bill similar to the February 6 draft before the subcommittee without a "shield" repealer than could be done by repealing the "shield."¹⁸ But the "shield" had become a symbol in the battle concerning urban sprawl, and in politics symbolism sometimes masquerades as realism. In any event, so long as the "shield" repealer was in the bill, it would be seen as a growth management bill and not as a bill limiting agency discretion to develop policy through adjudication rather than through rule-making.

The subcommittee and the committee held back-to-back meetings on February 20, 1991. They met the same morning the *St. Petersburg Times* ran a scathing editorial calling the "shield" repealer a "back-

14. The provision was a single sentence that read: "Effective October 1, 1992, paragraph (k) of subsection (10) of section 163.3177, Florida Statutes, is hereby repealed." Fla. H.R. Comm. on Govtl. Ops., PCB 91-01, § 3 (draft of Feb. 6, 1991).

15. Dem., Auburndale.

16. Dem., Daytona Beach.

17. See Hyde, *Legislative Shields to Rulemaking*, 12 ADMIN. L. SEC. NEWSL. 1, 3-4 (May 1991).

18. All versions of the House bill contained language requiring agencies to adopt their policies as rules as soon as feasible and practicable. See *infra* notes 58-85 and accompanying text. The "shield" only protects the growth management rules as they existed before October 1, 1986. See FLA. STAT. § 163.3177(10)(k) (1989). So without doing anything to the "shield," the Legislature could be sure that any future policy developments would be subject to the rulemaking requirements in the House bill, if the bill became law.

door attack” on the growth management law and questioning the motives of both Wetherell and Jones.¹⁹ At its meeting, the subcommittee adopted an amendment offered by Representative Press²⁰ that struck everything after the enacting clause and substituted language that had been developed since the February 6, 1991 workshop.²¹ The “shield” repealer language was still in the bill.

By the time the full committee took up Proposed Committee Bill 91-01 later that same day, lobbyists representing both development and environmental interests had agreed to a compromise on the “shield” repealer language.²² The committee accepted the compromise and reported the bill favorably as amended.²³ The bill was filed as House Bill 1879 and referred to the House Appropriations Committee.²⁴ The Appropriations Committee reported the bill favorably with two amendments.²⁵ House Bill 1879 was then placed on the Special Order Calendar, read the second time, and the two amendments recommended by the Appropriations Committee were adopted.²⁶ A third amendment that removed all reference to the “shield” was also adopted.²⁷ House Bill 1879 was read the third time and passed as amended by the House on March 19, 1991.²⁸

In the Senate, Senator Curt Kiser²⁹ filed Senate Bill 900, which addressed indexing and availability of agency final orders. The bill was

19. *The Big Wink*, St. Petersburg Times, Feb. 20, 1991, at 12A, col.1.

20. Dem., Delray Beach.

21. Fla. H.R. Comm. on Govtl. Ops., Subcomm. on Governmental Effectiveness, unpaginated draft transcript of proceedings (Feb. 20, 1991) (on file with comm.).

22. Robert Rhodes, representing the Florida Home Builders Association, and Casey Gluckman, representing the Audubon Society, were the principal architects of the compromise. See Fla. H.R. Comm. on Govtl. Ops., draft transcript of proceedings at 11, 17 (Feb. 20, 1991) (on file with comm.).

23. *Id.* at 22.

24. FLA. H.R. JOUR. 71 (Reg. Sess. Mar. 6, 1991).

25. *Id.* at 130 (Reg. Sess. Mar. 12, 1991).

26. *Id.* at 153 (Reg. Sess. Mar. 13, 1991).

27. *Id.* The amendment striking the controversial “shield” language was offered by Representatives Mary Figg, Democrat, Lutz; C. Fred Jones; and Michael Friedman, Democrat, Surfside. Jones received a commitment from William Sadowski, Secretary of the Department of Community Affairs, that the growth management rules would be thoroughly analyzed “to determine, among other things, whether a revision or additional rules are necessary in order to continue review of local government comprehensive plan amendments and to conduct future reviews of evaluation and appraisal reports submitted to the Department by local governments.” Letter from William E. Sadowski, Sec’y Dep’t of Comm’y Affairs, to Rep. C. Fred Jones (Mar. 13, 1991) (on file with Fla. H.R. Comm. on Comm’y Affairs). As part of the thorough review, several workshops were scheduled around the state during May and June to receive citizen comments on the current growth management rules. Letter from William E. Sadowski, Sec’y Dep’t of Comm’y Affairs, to Hon. C. Fred Jones (Apr. 30, 1991) (on file with Fla. H.R. Comm. on Comm’y Affairs).

28. FLA. H.R. JOUR. 209, 210 (Reg. Sess. Mar. 19, 1991).

29. Repub., Palm Harbor.

referred to three Senate committees—Governmental Operations, Community Affairs, and Appropriations.³⁰ The Senate Committee on Governmental Operations reported it favorably on March 14, 1991.³¹ Senate Bill 900 was withdrawn from Community Affairs on March 19, 1991³² and later withdrawn from Appropriations.³³ The Senate passed the bill on April 9, 1991.³⁴ Upon receiving it, the House referred the bill to its own Committee on Governmental Operations.³⁵ Senate Bill 900 was not taken up in the House and died in committee on adjournment sine die.³⁶ The Senate then adopted the complete bill again, this time as an amendment to House Bill 1879.³⁷

Out of concern that the growth management rules “shield” repealer provision would doom passage of House Bill 1879, Senators Kenneth Jenne³⁸ and Curt Kiser on March 8, 1991, filed Senate Bill 1836, which replicated the House bill in all respects except for the “shield” repealer.³⁹ Senate Bill 1836 was referred to the Senate Committees on Governmental Operations, Judiciary-Civil, and Appropriations.⁴⁰ The bill was amended by the Senate Governmental Operations Committee and reported favorably as Committee Substitute for Senate Bill 1836 on April 2, 1991.⁴¹ It was withdrawn from Judiciary-Civil and Appropriations on the same day⁴² and placed on the Special Order Calendar.⁴³

After the House passed House Bill 1879, it too was referred to the Senate Committees on Governmental Operations, Judiciary-Civil, and Appropriations.⁴⁴ It was later withdrawn from all three committees, substituted for Committee Substitute for Senate Bill 1836, amended on the floor, and passed by the Senate.⁴⁵ The House concurred with the Senate amendments, and the bill was engrossed and enrolled.⁴⁶

30. FLA. S. JOUR. 48 (Reg. Sess. Mar. 5, 1991).

31. *Id.* at 109 (Reg. Sess. Mar. 14, 1991).

32. *Id.* at 170 (Reg. Sess. Mar. 19, 1991).

33. *Id.* at 195 (Reg. Sess. Mar. 27, 1991).

34. *Id.* at 307 (Reg. Sess. Apr. 9, 1991).

35. FLA. H.R. JOUR. 497 (Reg. Sess. Apr. 11, 1991).

36. FLA. LEGIS., HISTORY OF LEGISLATION, 1991 REGULAR SESSION, HISTORY OF SENATE BILLS at 94, SB 900.

37. FLA. S. JOUR. 345, 349 (Reg. Sess. Apr. 9, 1991).

38. Dem., Fort Lauderdale.

39. FLA. LEGIS., HISTORY OF LEGISLATION, 1991 REGULAR SESSION, HISTORY OF SENATE BILLS at 158, SB 1836.

40. FLA. S. JOUR. 122 (Reg. Sess. Mar. 14, 1991).

41. *Id.* at 218 (Reg. Sess. Apr. 12, 1991).

42. *Id.* at 232 (Reg. Sess. Apr. 12, 1991).

43. *Id.* at 309 (Reg. Sess. Apr. 9, 1991).

44. *Id.* at 196 (Reg. Sess. Mar. 27, 1991).

45. *Id.* at 308 (Reg. Sess. Apr. 9, 1991).

46. FLA. H.R. JOUR. 576 (Reg. Sess. Apr. 16, 1991).

The bill then became law without the Governor's signature on April 27, 1991.⁴⁷

Indeed, a gubernatorial veto had been a real possibility. To head that off, the Governor's Office and the legislative leadership agreed⁴⁸ to pass another bill delaying the effective date of House Bill 1879 from January 1, 1992, to March 1, 1992. The rules were waived to allow the late introduction and passage of Senate Bill 2504 on April 29, 1991.⁴⁹ The process was just as expeditious in the House, where Senate Bill 2504 was received, placed on the Special Order Calendar, read the second and third times, and passed on May 1, 1991.⁵⁰ The bill became law with the Governor's signature.⁵¹ By delaying the effective date of chapter 91-30⁵² for sixty days, the executive branch hoped to give the Legislature "the opportunity to reform the rule adoption procedures before the more stringent requirement for rules would take effect."⁵³ No specific reforms were suggested. At the time, both sides were referring only to the general need for "streamlining the rule making procedures of Chapter 120."⁵⁴ The Speaker has since asked Representative Figg and the House Governmental Operations Committee to undertake a review of rulemaking requirements before the 1992 legislative session. The Speaker has promised that executive branch "concerns regarding the burdensome nature of rulemaking will be a priority of this review. Proposals to eliminate burdens associated with rule adoption will receive prominent consideration and legislation to implement appropriate reforms introduced."⁵⁵

III. ANALYSIS OF THE 1991 LEGISLATION

Chapter 91-30 dramatically alters two important aspects of administrative practice. First, it legislatively reverses the judicially created doctrine that permits agencies to decide whether and when they will

47. Ch. 91-30, 1991 Fla. Laws 191, 200.

48. They reached this agreement in a meeting between Lieutenant Governor Buddy MacKay, Senators Jenne and Kiser, Representative Figg, and key legislative and executive staff. Telephone interview with David Nam, Legis. Analyst, H.R. Comm. on Govtl. Ops. (Oct. 15, 1991) (notes on file, Fla. Dep't of State, Div. of Archives, Tallahassee, Fla.).

49. FLA. S. JOUR. 1126, 1149 (Reg. Sess. Apr. 29, 1991).

50. FLA. H.R. JOUR. 1896 (Reg. Sess. May 1, 1991).

51. Ch. 91-191, 1991 Fla. Laws 1285.

52. 1991 Fla. Laws 191.

53. Letter from Buddy MacKay, Lt. Gov., to Gwen Margolis, S. Pres., and T.K. Wetherell, H.R. Speaker (June 24, 1991) (on file with Fla. S. Comm. on Govtl. Ops.).

54. *Id.*

55. Letter from T.K. Wetherell, H.R. Speaker, to Buddy MacKay, Lt. Gov. (July 11, 1991) (on file with House Speaker's Office).

formalize policy choices through rulemaking.⁵⁶ Second, it establishes clearer guidelines concerning which agency orders must be indexed and which must be made available for public inspection.⁵⁷

A. *Rule Adoption Is Not a Matter of Agency Discretion*

Chapter 91-30 creates a new section 120.535 entitled "Rulemaking required."⁵⁸ The first sentence in the new section states that "[r]ulemaking is not a matter of agency discretion."⁵⁹ That sentence is intended to proclaim in clear and unambiguous terms that the Legislature disagrees with and intends to change the court developed notion that rulemaking is a matter of agency discretion.⁶⁰ The discretion belongs to the Legislature, and in section 120.535 the Legislature establishes that agency statements that fit the definition of a rule provided in section 120.52(16) "shall be adopted by the rulemaking procedure provided . . . as soon as feasible and practicable."⁶¹ Furthermore, the Legislature created a presumption that rulemaking is feasible and practicable. The presumption of feasibility is rebutted if an agency proves the existence of one of three conditions:

1. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or
2. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or
3. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.⁶²

56. See Dore, *supra* note 8, at 708-11 for a detailed discussion of this problem.

57. See *id.* at 715-18 for a detailed discussion of this problem.

58. Ch. 91-30, § 3, 1991 Fla. Laws 191, 194.

59. *Id.* (to be codified at FLA. STAT. § 120.535(1)).

60. The preliminary drafts of Proposed Committee Bill 91-1 had both a different tag line and first sentence. In the preliminary drafts the tag line was "Required Rulemaking" and the first sentence was "Each agency statement defined as a rule under s. 120.52(16) shall be adopted by the rulemaking procedure provided by s. 120.54 as soon as feasible and to the extent practicable." Fla. H.R. Comm. on Govtl. Ops., Subcomm. on Govtl. Effectiveness, PCB 91-1 (draft of Jan. 7, 1991) (proposed FLA. STAT. 120.535); Fla. H.R. Comm. on Govtl. Ops., Subcomm. on Governmental Effectiveness, PCB 91-1 (draft of Feb. 6, 1991) (proposed FLA. STAT. 120.535(1)). The tag line was changed to "Rulemaking required" and "Rulemaking is not a matter of agency discretion" became the new first sentence by an amendment offered by Representative Steve Press to PCB 91-1 at the February 20, 1991, meeting of the Subcommittee on Governmental Effectiveness. The author suggested both changes to David Nam, the staff person responsible for drafting PCB 91-1.

61. Ch. 91-30, § 3, 1991 Fla. Laws 191, 194 (to be codified at FLA. STAT. § 120.535(1)).

62. *Id.* (to be codified at FLA. STAT. § 120.535(1)(a)1-3). The preliminary drafts of Pro-

An agency can demonstrate that rulemaking is not practicable if it proves that:

1. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or
2. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.⁶³

These five criteria are intended to be exclusive. When an agency's statement is challenged, its failure to rulemake can therefore be excused only if it proves that at least one of these criteria is satisfied.⁶⁴ Although the concept of requiring rule adoption when feasible and practicable was borrowed from the 1981 Model State Administrative Procedure Act,⁶⁵ the specific feasibility and practicability criteria adopted in Florida are this State's own.⁶⁶

Chapter 91-30 creates a procedure, modeled after the 120.54(4) proposed rule validity challenge procedure and the 120.56 rule validity challenge procedure, to contest an agency statement believed to violate the required rulemaking standards of section 120.535(1). "Any person substantially affected by an agency statement may seek an administrative determination that the statement violates subsection (1)."⁶⁷ The challenger initiates the process by filing a written petition with the Division of Administrative Hearings (DOAH). The petition

posed Committee Bill 91-1 did not contain a presumption that rulemaking is feasible and practicable unless the agency proved that one of five conditions existed. Rather, the preliminary drafts presented a list of factors to be considered by hearing officers and courts when deciding whether rulemaking was feasible and practicable. Fla. H.R. Comm. on Govtl. Ops., Subcomm. on Governmental Effectiveness, PCB 91-1 (draft of Jan. 7, 1991) (proposed FLA. STAT. § 120.535(1)(a)-(c), (2)(a)-(b)); Fla. H.R. Comm. on Govtl. Ops., Subcomm. on Govtl. Effectiveness, PCB 91-1 (draft of Feb. 6, 1991) (proposed FLA. STAT. § 120.535(1)(a)1-7, (b)1-4). Representative Press was troubled by this approach and persistently questioned staff and other participants about it during the subcommittee workshop on February 6, 1991. See Fla. H.R. Comm. on Govtl. Ops., Subcomm. on Govtl. Effectiveness, unpaginated transcript of proceedings (Feb. 6, 1991)(on file with comm.). The approach reflected in chapter 91-30 was the result of an amendment to PCB 91-1 offered by Representative Press at the Subcommittee on Governmental Effectiveness meeting on February 20, 1991.

63. Ch. 91-30, § 3, 1991 Fla. Laws 191, 194 (to be codified at FLA. STAT. § 120.535(1)(b)1,2).

64. Staff of Fla. H.R. Comm. on Govtl. Ops., HB 1879 (1991) Staff Analysis 4 (final May 22, 1991) (on file with comm.).

65. MODEL STATE ADMIN. PROCEDURE ACT § 2-104 (1981), 15 U.L.A. 28 (1990).

66. See Dore, *supra* note 8, at 712 n.45.

67. Ch. 91-30, § 3, 1991 Fla. Laws 191, 194 (to be codified at FLA. STAT. § 120.535(2)(a)).

must allege facts showing that the petitioner is substantially affected by the agency statement, that the statement is a rule within the meaning of the section 120.52(16) definition of rule, and that the agency has not followed the section 120.54 rulemaking procedures. In addition, the petition must include either the text of the agency statement or a description of it.⁶⁸

Immediately after receiving the petition, DOAH must send copies of it to the agency whose statement is in question, to the Department of State, and to the Legislature's Joint Administrative Procedures Committee (JAPC). The Department of State must publish notice of the petition, including the text or description of the challenged agency statement, in the first available issue of the *Florida Administrative Weekly*. If the petition is facially adequate, the DOAH director must assign a hearing officer within ten days of receiving the petition. The Division of Administrative Hearings then is to hold a hearing within thirty days, unless the petition is withdrawn or the hearing date is extended for good cause. If the petitioner succeeds in proving the allegations at the hearing, the burden falls on the agency to prove that rulemaking is not feasible or practicable under the criteria specified in section 120.535(1).⁶⁹

The hearing officer must render a written decision within thirty days of the hearing. This decision is a final order subject only to judicial review.⁷⁰ The Division of Administrative Hearings must send copies of the final order to the JAPC and to the Department of State, which must publish notice of it in the first available issue of the *Florida Administrative Weekly*.⁷¹

68. *Id.* (to be codified at FLA. STAT. § 120.535(2)(a)1-3).

69. *Id.* (to be codified at FLA. STAT. § 120.535(2)(b)).

70. Chapter 91-30 amends section 120.68 to provide that filing notice of appeal from a hearing officer's final order after a section 120.535 proceeding does not automatically stay the hearing officer's final order. A stay may be sought by an agency and may be granted by a court if it is "necessary to avoid a probable danger to the public health, safety, or welfare." Ch. 91-30, § 6, 1991 Fla. Laws 191, 199 (to be codified at FLA. STAT. § 120.68(3)(b)). The Legislature's concerns about an automatic stay when an agency files notice of appeal were spelled out this way:

If an agency received an automatic stay of a s. 120.535 order upon filing a petition for review, the Legislature's policy in favor of rulemaking would be frustrated while the case is on appeal. Agencies could simply appeal an adverse determination and avoid rulemaking. An automatic stay could create an incentive for appellate litigation. Agencies might misallocate finite resources in favor of appellate litigation and not provide appropriate levels of resources for rulemaking.

Staff of Fla. H.R. Comm. on Govtl. Ops., HB 1879 (1991) Staff Analysis 9 (final May 22, 1991) (on file with comm.). Nevertheless, the provision may be an unconstitutional encroachment by the Legislature on the Florida Supreme Court's exclusive authority to adopt rules of procedure for the courts. See FLA. CONST. art. V, § 2(a); *City of Jacksonville Beach v. Public Empls. Rels. Comm'n*, 359 So. 2d 578, 579 (Fla. 1st DCA 1978), cert. denied, 374 So. 2d 98 (Fla. 1979).

71. Ch. 91-30, § 3, 1991 Fla. Laws 191, 195 (to be codified at FLA. STAT. § 120.535(3)).

If the hearing officer determines that the agency statement is a rule that has not been adopted following 120.54 rulemaking procedures and also finds that it is feasible and practicable for the agency to adopt the statement as a rule, the agency cannot rely either on its statement or on anything substantially similar to support any agency decision.⁷² However, an agency may continue to rely on its statement as a basis for agency decision if it publishes notice of intent to adopt a rule that addresses the substance of the statement and if it "proceeds expeditiously and in good faith"⁷³ to adopt the rule.⁷⁴ If the agency does not adopt the rule within 180 days of the date it publishes notice of intent to adopt, the agency is presumed to be not acting expeditiously and in good faith. The 180 day period is tolled until a final order is rendered if the proposed rule is challenged in a 120.54(4) proceeding.⁷⁵

Chapter 91-30 also provides for the payment of costs and attorneys' fees incurred by substantially affected persons who successfully challenge agency statements previously invalidated in 120.535 proceedings. The challenger must prove that the agency was not entitled to rely on the invalidated statement, yet continued to do so.⁷⁶ Presumably the case would be made if the person proved that the statement had been invalidated and further proved that the agency had not published notice of intent to adopt a rule to replace the statement. One seeking attorneys' fees might also succeed by proving that more than 180 days had passed since notice to adopt was published and that the rule had not been adopted and was not the subject of a 120.54(4) challenge.

A person may recover costs and fees by filing a petition under 120.57(1) or 120.535.⁷⁷ Practitioners will probably prefer using

72. *Id.* (to be codified at FLA. STAT. § 120.535(4)).

73. *Id.* (to be codified at FLA. STAT. § 120.535(5)).

74. *Id.* This provision was amended by the Senate Committee on Governmental Operations. The original provision permitted an agency to rely on a "statement as a basis for agency action if the statement [met] the requirements of s. 120.57(1)(b)15." Fla. SB 1836, § 1 (1991) (proposed FLA. STAT. § 120.535(5)). The explicit cross reference to the requirements of new subsection 120.57(1)(b)15 was deleted, but the deletion is not expected to undercut the section 120.57(1)(b)15 requirements for the use of policy not adopted as a rule. See Staff of Fla. H.R. Comm. on Govtl. Ops., HB 1879 (1991) Staff Analysis 14 (final May 22, 1991) (on file with comm.). See also *infra* text accompanying notes 86-91 for a discussion of section 120.57(1)(b)15.

75. Ch. 91-30, § 3, 1991 Fla. Laws 191, 195 (to be codified at FLA. STAT. § 120.535(5)).

76. *Id.* (to be codified at FLA. STAT. § 120.535(6)). This provision was amended by the Senate Committee on Governmental Operations by deleting the word "all" before "reasonable costs and attorney's fees." Fla. SB 1836, § 1 (1991) (proposed FLA. STAT. § 120.535(6)). As amended, the provision now allows for full or partial recovery of costs and fees. See Staff of Fla. H.R. Comm. on Govtl. Ops., HB 1879 (1991) Staff Analysis 14 (final May 22, 1991) (on file with comm.).

77. *Id.*

120.535 because it offers two advantages. First, the petition is filed directly with DOAH and the hearing is conducted by a DOAH hearing officer.⁷⁸ Petitions filed under 120.57(1), on the other hand, are filed with the agency and the agency head decides whether to forward the petition to DOAH for hearing or to conduct the hearing himself or herself.⁷⁹ Second, the DOAH hearing officer's decision in a 120.535 proceeding is a final order,⁸⁰ and not—as under 120.57(1)—a recommended order that may be modified or changed by the agency's final order.⁸¹ To underscore the importance the Legislature attaches to agency rulemaking, any amount awarded for costs and attorneys' fees must be paid directly from the budget of the agency's highest administrator. Notwithstanding the provisions of any other law, the agency may not be reimbursed for the payment of these costs and fees.⁸²

An amendment adopted by the Senate Committee on Governmental Operations makes prisoners ineligible to challenge an agency statement believed to violate the required rulemaking standards of section 120.535(1).⁸³ Consequently, prisoners will not be able to challenge statements by the Department of Corrections. Courts are unlikely, however, to construe this provision to prohibit prisoner challenges to statements of other agencies affecting their substantial interests.⁸⁴

Section 120.535 should go a long way toward reversing undue agency reliance on case-by-case adjudication to announce policy. What started out as a justifiable exception to rulemaking for "incipient" policy in *McDonald*⁸⁵ has become, over the years, a license for agencies to avoid rulemaking by exercising their unbridled discretion to do so. Section 120.535 is important because it tells the agencies and the courts quite directly that whether and when agencies use the rulemaking process is not a matter of agency discretion. As reflected in section 120.535, it is a legislative judgment that rulemaking is required in all instances when it is feasible and practicable. The criteria for determining feasibility and practicability are sufficiently narrow to confine the use of unadopted policy to those circumstances when policy is truly incipient in the original *McDonald* sense of the word and to those circumstances when rulemaking simply is not practicable.

78. *Id.* (to be codified at FLA. STAT. § 120.535(2)(b)).

79. FLA. STAT. § 120.57(1)(b)3, (1)(a)1 (1989).

80. Ch. 91-30, § 3, 1991 Fla. Laws 191, 195 (to be codified at FLA. STAT. § 120.535(3),(7)).

81. FLA. STAT. § 120.57(1)(b)10 (1989).

82. Ch. 91-30, § 3, 1991 Fla. Laws 191, 195 (to be codified as FLA. STAT. § 120.535(6)).

83. *Id.* (to be codified at FLA. STAT. § 120.535(9)). See Staff of H.R. Comm. on Govtl. Ops., HB 1879 (1991) Staff Analysis 14 (final May 22, 1991) (on file with comm.).

84. See *Department of Prof. Reg. v. Yolman*, 508 So. 2d 468 (Fla. 1st DCA 1987).

85. 346 So. 2d 569, 580 (Fla. 1st DCA 1977).

B. *De Novo Review of Unadopted Policy Statements*

Chapter 91-30 adds new subsection 120.57(1)(b)15.⁸⁶ This provision articulates the requirements that must be satisfied when an agency statement within the definition of a rule, but not adopted as a rule, is sought to be used in a 120.57(1) proceeding that will determine the substantial interests of a party. The statement is subject to de novo review by the hearing officer, and the review must disclose that the statement does not “enlarge, modify, or contravene the specific provision of law implemented or otherwise exceed delegated legislative authority.”⁸⁷ The agency must demonstrate by a preponderance of the evidence that the statement is “within the scope of delegated legislative authority.”⁸⁸ Recommended and final orders involving an unadopted policy statement must explain both the statement and the evidentiary support for the statement, and they must provide “a general discussion of the justification for the statement applied.”⁸⁹ Section 120.57(1)(b)10 was amended to make it clear that an agency may not reject or modify the findings of fact made by a hearing officer concerning the use of an unadopted policy statement.⁹⁰

Section 120.57(1)(b)15 was amended by the Senate Committee on Governmental Operations. The original bill contained the following language:

Each agency statement not adopted by the rulemaking procedure provided by s. 120.54 that is relied upon by an agency to determine the substantial interests of a party shall be subject to de novo review by a hearing officer. *An agency statement shall not be presumed correct when reviewed by a hearing officer.* A statement shall not enlarge, modify, or contravene the specific provision of law implemented or otherwise exceed delegated legislative authority. The statement applied as a result of a proceeding pursuant to this subsection shall be demonstrated to be within the scope of delegated legislative authority *and that which best complies with and promotes legislative intent.* *The determination of the statement to be applied as a result of a proceeding pursuant to this subsection shall be based exclusively on evidence of record and matters officially recognized.* Recommended and final orders pursuant to this subsection shall provide an explanation of the statement that includes the evidentiary

86. Ch. 91-30, § 4, 1991 Fla. Laws 191, 198 (to be codified at FLA. STAT. § 120.57(1)(b)15).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 197 (to be codified at FLA. STAT. § 120.57(1)(b)10).

basis which supports the statement applied and a general discussion of the justification for the statement applied.⁹¹

The italicized language, however, was removed by committee amendment. The Senate sponsors agreed to this amendment to thwart opposition by the Department of Banking and Finance and the Department of Insurance. Although the fifth sentence was redundant in as much as 120.57(1)(b)8 already requires that "[f]indings of fact shall be based exclusively on the evidence of record and on matters officially recognized," the other deletions greatly weakened the provision.

While not as strong as the original proposal, the current version still provides more protection from arbitrary and excessive agency action than existed before. The mere fact that the Legislature set specific guidelines against which to measure the legitimacy of unadopted policy should discourage agency overreaching.

C. *Subject Matter Indexing and Availability of Agency Orders*⁹²

Chapter 91-30 amends the Public Records Act⁹³ to make clear that agency orders required to be indexed or listed by another section of the law have "continuing legal significance" and must be permanently maintained in accordance with rules promulgated by the Department of State.⁹⁴

For the first time, chapter 120 now specifies the agency orders that must be indexed:

- a. Each final agency order resulting from a proceeding under s. 120.57(1) or (2);
- b. Each final agency order rendered pursuant to s. 120.57(3) which contains a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value;
- c. Each declaratory statement issued by an agency; and
- d. Each final order resulting from a proceeding under s. 120.54(4) or s. 120.56.⁹⁵

91. Fla. SB 1836, § 2 (1991) (proposed FLA. STAT. § 120.57(1)(b)15) (emphasis added).

92. Much of the discussion in this section is taken from the author's earlier Article on the topic because, with the exception of two provisions criticized in that Article, the language in chapter 91-30 dealing with subject matter indexing and availability of agency orders is the same as it was in Committee Substitute for Senate Bill 2550 in 1990. See Dore, *supra* note 8, at 718-21. The discussion is repeated here for the convenience of the reader.

93. Ch. 119, FLA. STAT.

94. Ch. 91-30, § 1, 1991 Fla. Laws 191, 192 (to be codified at FLA. STAT. § 119.041(2)).

95. Ch. 91-30, § 2, 1991 Fla. Laws 191, 192-93 (to be codified at FLA. STAT. § 120.53(2)(a)3a-d).

Missing from that list, however, are final orders resulting from a proceeding under the newly created section 120.535. That omission resulted when the subject-matter indexing provisions of chapter 91-30 were taken from Senate Bill 900, which traveled through the legislative process independently until the very end.⁹⁶ Before the Legislature passed House Bill 1879, a 120.535 proceeding did not exist. Now that these proceedings do exist, it will be necessary to amend section 120.53 next session to add 120.535 final orders to the list of final orders that must be indexed.

The agency must keep a list containing the names of the parties and the number assigned to the final order rendered pursuant to 120.57(3) if those final orders are excluded from the indexing and public inspection requirements because they do not contain policy statements or have other precedential value. The Department of State must approve any exclusions,⁹⁷ and while it may consider an agency's arguments, the only orders it can approve for exclusion are those "of limited or no precedential value, [those] that are of limited or no legal significance, or [those] that are ministerial in nature."⁹⁸ The agency must make the list available for public inspection and copying and must maintain a subject-matter index of all listed orders⁹⁹ within 120 days after the order is rendered in accordance with procedures approved by the Department of State.¹⁰⁰ Also, unless the quantity of material makes this impractical, copies of any material incorporated by reference are to accompany indexed or listed agency orders. If this attachment is impractical, the final order must contain the location of the material and the manner in which it may be inspected or copied.¹⁰¹

All agencies must acquire written approval from the Department of State: (1) of the specific types of orders that may be excluded from indexing and public inspection; (2) of the method to be used to maintain indexes, lists, and orders that must be indexed or listed and made available to the public; (3) of the method by which indexes, lists, and orders may be inspected or copied; (4) of the numbering system used to identify orders that must be indexed or listed; and (5) of the proposed rules the agency intends to adopt relating to these requirements for indexing and making orders available to the public.¹⁰² In addition, each agency must adopt rules that specify: (1) the specific types of

96. See *supra* text accompanying notes 29-37.

97. Ch. 91-30, § 2, 1991 Fla. Laws 191, 193 (to be codified at FLA. STAT. § 120.53(2)(a)4).

98. *Id.* (to be codified at FLA. STAT. § 120.53(2)(d)).

99. *Id.* (to be codified at FLA. STAT. § 120.53(2)(a)4).

100. *Id.* (to be codified at FLA. STAT. § 120.53(2)(b)).

101. Ch. 91-30, § 5, 1991 Fla. Laws 191, 198 (to be codified at FLA. STAT. § 120.59(1)(b)).

102. Ch. 91-30, § 2, 1991 Fla. Laws 191, 193 (to be codified at FLA. STAT. § 120.53(2)(c)1-5).

orders that it excludes (with the permission of the Department of State) from indexing and public inspection; (2) the location where indexes, lists, and orders may be inspected or copied, as well as the procedure to be followed when inspection or copying is requested; (3) all systems, including any automated system, in use by the agency to search and find orders, and how assistance and information regarding orders may be received; and (4) the numbering system used to identify orders.¹⁰³ Orders required to be indexed or listed must be sequentially numbered in the order they are rendered.¹⁰⁴

Chapter 91-30 also addresses the problems encountered by the public when agencies designate an official reporter to index and publish orders.¹⁰⁵ Although agencies are permitted to designate an official reporter to satisfy the indexing and public inspection requirements, those requirements are satisfied only if the official reporter publishes an index of all agency orders that must be indexed and made available for public inspection.¹⁰⁶ The listing of all 120.57(3) orders that need not be indexed because they have no precedential value and do not contain policy statements may be done by a designated reporter, but the agency is required to retain each listed order and to make it available for public inspection.¹⁰⁷ Those 120.57(3) final orders that must be indexed because they do contain policy statements or do have precedential value need not be published in full by a designated reporter. They need only be kept by the agency and be available for public inspection; the official reporter has to index them and publish a synopsis of each one. The synopsis must contain the names of the parties; identify any relevant rule, statute, or constitutional provision involved; provide a factual summary if one is included in the order; and summarize the final disposition.¹⁰⁸

Agencies are allowed to publish their own official reporters or to contract with a publisher. In the alternative, the Department of State may publish or contract for the publishing of agency official reporters. If an agency contracts with a publisher, the agency remains responsible for the "quality, timeliness, and usefulness of the reporter."¹⁰⁹ If the Department of State contracts with a publishing

103. *Id.* (to be codified at FLA. STAT. § 120.53(2)(e)-(h)). The law also requires agencies to make all of their search capabilities available to the public subject to reasonable terms and conditions, including a reasonable charge. *Id.* (to be codified at FLA. STAT. § 120.53(2)(g)). However, agencies are not required to adopt a rule disclosing this obligation to the public.

104. Ch. 91-30, § 5, 1991 Fla. Laws 191, 198 (to be codified at FLA. STAT. § 120.59(1)(c)).

105. *See Dore, supra* note 8, at 715-18.

106. Ch. 91-30, § 2, 1991 Fla. Laws 191, 194 (to be codified at FLA. STAT. § 120.53(4)(a)).

107. *Id.*

108. *Id.* (to be codified at FLA. STAT. § 120.53(4)(d)).

109. *Id.* (to be codified at FLA. STAT. § 120.53(4)(b)).

firm, the Department is responsible for quality, timeliness, and usefulness.¹¹⁰

Because the Department of State has responsibility for preserving and protecting official state records and other materials denominated public records by law, the Legislature vested it with supervisory authority over all other agencies' compliance with the new directives relating to subject matter indexing and availability of agency orders. As a result, the Department of State has broad new authority to control and to monitor all agencies' implementation of the new legislative requirements. As of July 1, 1992, the Department of State will have the following responsibilities: (1) to "[a]dminister the coordination of the indexing, management, preservation, and availability of agency orders that must be indexed or listed";¹¹¹ (2) to adopt rules that provide criteria for indexing agency orders; (3) to adopt rules that establish storage and retrieval systems through which agencies will make agency orders available to the public by subject matter; (4) to determine which final orders must be indexed by each agency; (5) to require each agency to report to it those types of agency orders that establish precedent for that agency; (6) to require each agency to adopt rules that establish indexing procedures for all final orders required to be indexed, that establish a sequential numbering system for agency orders, and that establish procedures for the permanent preservation of all agency orders required to be indexed and procedures for making those orders available to the public; (7) to develop, monitor, and ensure agency compliance with all procedures established for indexing, managing, preserving, and making final orders available to the public; (8) to develop and offer a training program to assist agencies in meeting their indexing, managing, and preserving responsibilities; and (9) to provide technical assistance at the request of agencies.¹¹²

In addition to everything the Department of State will be doing to improve the accessibility and availability of agency final orders, the Legislature also authorized DOAH to undertake a study and pilot project that will lead to a full text retrieval system. This pilot project will focus on full text retrieval of recommended orders, as well as on final orders and declaratory statements.¹¹³ If the DOAH pilot project proves workable and financially reasonable, it will make subject matter indexing a thing of the past. Until that time, the combined efforts of DOAH and the Department of State at least give reason to hope

110. *Id.*

111. Ch. 91-30, § 9, 1991 Fla. Laws 191, 199.

112. *Id.* at 199-200.

113. Ch. 91-30, § 7, 1991 Fla. Laws 191, 199.

that in the not too distant future, the wealth of information buried in inaccessible and unavailable agency final orders will finally surface.

IV. CONCLUSION

With the enactment of chapter 91-30, the Legislature addressed the two most significant problems facing people involved with Florida administrative practice today. First, it established more specific guidelines concerning which agency final orders must be indexed by subject matter and be made available for public inspection and use. Agency adherence to these guidelines under the watchful supervision of the Department of State should vastly improve accessibility to final agency orders. Second, the Legislature determined that all agency policy statements that satisfy the definition of rule in the statute must be adopted as rules following the regular rulemaking procedures as soon as feasible and practicable. This legislation provides standards for judging feasibility and practicability that should give agencies the flexibility they legitimately need. At the same time, people who are most interested in and affected by policy developments should once again be able to participate in policy formulation through the various rulemaking proceedings available under chapter 120.

The Legislature will surely have to face the issue of public participation in rulemaking when it convenes in Regular Session in January 1992. The Governor's Office will recommend that some changes be made to the rulemaking process to make it less burdensome on executive branch agencies.¹¹⁴ Although the Legislature will certainly entertain any suggestions made by the Governor, it seems likely that, with the 1991 legislative reforms in place, the Governor will have to carry the burden of persuading the Legislature that any specific reforms of

114. The early indications are that the Governor's Office may be interested in pursuing the following changes to the rulemaking process: (1) repealing the 120.54(4) proposed rule validity challenge proceeding; (2) repealing the requirement that economic impact statements be prepared for all rules; (3) enacting specific statutory recognition that any procedural errors in the rulemaking process be judged by a harmless error standard; (4) limiting the right to challenge the adequacy of documents supporting a rule—for example, the small and minority business impact statement—to those persons who are substantially affected by the adequacy of the document they want to challenge; (5) precluding prisoners from challenging the validity of proposed or adopted rules; (6) prohibiting the Joint Administrative Procedures Committee from filing an objection if the objection is raised more than six months after the rule becomes effective; (7) clarifying the definition of rule to make clear that it does not apply to internally developed guidelines to be used by agency personnel when they interpret or implement an agency's rules or statutes; and (8) providing that when a rule refers to a specific federal or state statute, the reference be deemed to refer to the most current version of the referenced law. Letter from Buddy MacKay, Lt. Gov., to Rep. Mary Figg (Aug. 14, 1991) (on file with H.R. Comm. on Govtl. Ops.).

the rulemaking process designed to enhance administrative efficiency do not unacceptably abridge citizen participation. In the final analysis, it is the Legislature that holds the veto pen as the 1992 Regular Session approaches.

