Florida Law Review

Volume 35 | Issue 1 Article 7

January 1983

Judicial Review of Substituted Agency Fact-Finding: Florida Courts' Innovative Solution to the Competent Substancial Evidence "Conundrum"

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COMMENTARY

JUDICIAL REVIEW OF SUBSTITUTED AGENCY FACT-FINDING: FLORIDA COURTS' INNOVATIVE SOLUTION TO THE COMPETENT SUBSTANTIAL EVIDENCE "CONUNDRUM"

INTRODUCTION

By enacting the Administrative Procedure Act (APA)[1] in 1974, the Florida Legislature intended to create a uniform system of administrative rulemaking and adjudicative procedure.[2] Consonant with that goal, the APA established detailed criteria for judicial review of action by administrative agencies.[3] Despite this meritorious attempt to provide legislative guidance, confusion arose over the judiciary's proper role in reviewing substituted agency findings of fact.

The APA provides that all proceedings involving a "disputed issue of material fact" in which an agency determines the "substantial interests"[4] of a party shall be conducted as formal proceedings.[5] An assigned hearing officer[6]

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1. FLA. STAT. ch. 120 (1981).

2. *Id.* § 120.72(1)(a). *See also* Reporter's Comments on Proposed Administrative Procedure Act for The State of Florida 5 (March 9, 1974) (unpublished report available in the Legal Information Center of the Holland Law Center, University of Florida) (delineates due process minima and basic notions of fairness, which were neither uniformly nor universally applied prior to the APA) [hereinafter cited as Reporter's Comments].

3. The APA primarily defines agency action as "the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order." FLA. STAT. § 120.52(2) (1981). The Florida Rules of Appellate Procedure define administrative action as "an order of any public official, including the Governor in the exercise of all executive powers other than those derived from the Constitution, or of any agency, department, board or commission of the State or any political subdivision, including municipalities." FLA. APP. R. 9.020(a).

4. For examples of interests sufficiently substantial to entitle a party to request a hearing, see Burgess v. Department of Commerce, 400 So. 2d 1258, 1260 (Fla. 1st D.C.A. 1981) (per curiam) (agency decision to redesignate job classification affected employee's interest in retaining her present position); Couch Constr. Co. v. Department of Transp., 361 So. 2d 184, 186 (Fla. 1st D.C.A. 1978) (permitting losing bidder for a contracting job to receive hearing from the agency).

5. FLA. STAT. § 120.57 (1981). Where the proceeding does not involve a disputed issue of material fact, it may be conducted as an informal proceeding under § 120.57(2). Such proceedings, which may or may not involve hearing officers, facilitate the expeditious resolution of conflicts, yet remain subject to judicial review under § 120.68. *See* United States Serv. Indus. — Florida v. State, 383 So. 2d 728, 728-29 (Fla. 1st D.C.A. 1980).

6. The APA provides agencies the option to request a hearing officer from the Division of Administrative Hearings (DOAH). FLA. STAT. § 120.57(1)(b)(3) (1981). All hearings, however, must be conducted before a hearing officer, except in eight statutorily-excepted instances, such as hearings before agency heads. *Id.* § 120.57(1)(a)(1)-(8). The agency therefore must either conduct the hearing before a DOAH hearing officer or follow one of the eight specified procedures. As used in this commentary, hearing officer connotes not only DOAH hearing officers, but also any fact-finders, such as appeals referees, presiding over the initial administrative hearing.

presides at the evidentiary hearing[7] and submits to the agency a recommended order with findings of fact and conclusions of law.[8] Based upon its review of this recommendation, the agency promulgates a final order[9] which is judicially reviewable upon request of any party adversely affected by the agency action.[10]

While this adjudicative framework seems straightforward, a reviewing court's task compounds when the agency's final order substitutes its own fact-findings for those of the hearing officer. The APA precludes an agency from rejecting or modifying the hearing officer's findings of fact unless it first determines, after reviewing the complete record,[11] that those findings were not based upon competent substantial evidence.[12] The APA also limits judicial

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7. The APA delineates the evidentiary scope of hearings as follows: "All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to any order or hearing officer's recommended order, and to be represented by counsel." *Id.* § 120.57(1)(b)(4).

8. *Id.* § 120.57(1)(b)(8).

9. *Id.* § 120.57(8). Determining what constitutes a final order or final agency action can be difficult. *See, e.g.*, Torres v. Department of Health & Rehab. Servs., 384 So. 2d 978, 987 n.1 (Fla. 1st D.C.A. 1980) (decision upholding rejection of application for aid not subject to further administrative review was final agency action); Department of Health & Rehab. Servs. v. Barr, 359 So. 2d 503, 505 (Fla. 1st D.C.A. 1978) (pursuant to FLA. STAT. § 120.565 (1981) agency declaratory statement is final agency action); Harris v. Florida Real Estate Comm'n, 358 So. 2d 1123, 1124 (1st D.C.A.) (agency's failure to register petitioner's trade name was final action), *cert. denied*, 365 So. 2d 711 (Fla. 1978). The finality principle is important, however, for courts have interpreted it as "the principle jurisdictional requisite to judicial review" under FLA. STAT. § 120.68(1) (1981). 4245 Corp., Mother's Lounge v. Division of Beverage, 348 So. 2d 934, 936 (1st D.C.A. 1977) (denying motion to dismiss), *argued*, 371 So. 2d 1032 (Fla. 1978).

10. FLA. STAT. § 120.68(1) (1981). "Adversely affected" is the APA's statutory standing requirement for challenging agency action. Significantly, the standing requirement for appearing before an agency is much less stringent than requisite standing to appeal. In Daniels v. Florida Parole & Probation Comm'n, 401 So. 2d 1351 (Fla. 1st D.C.A. 1981), the court observed:

> The APA's definition of a party recognizes the need for a much broader zone of party representation at the administrative level than at the appellate level. For example, in rulemaking, a large number of persons may be invited or permitted by the agency to participate as parties in the proceeding, so as to provide information to the agency concerning a broad spectrum of policy considerations affecting proposed rules.

Id. at 1354. *See also* Gadsden State Bank v. Lewis, 348 So. 2d 343, 346 (Fla. 1st D.C.A. 1977) (standing to participate in APA hearing does not require that the contesting party's *own* substantial rights be in question, but only that the substantial rights of *a* party be in question).

11. The APA defines "record" quite broadly to include all evidence received, any decision or report by the hearing officer, and an official transcript of the hearing. *Id.* § 120.57(1)(b)(5)(a)-(i). In Florida, confusion exists as to the type of subject matter an agency may administratively notice to supplement the record in promulgating its order. *See* Peoples Bank of Indian River County v. State, 395 So. 2d 521, 524-25 (Fla. 1981) (expressly leaving the question open). The APA is explicit about official recognition in rulemaking proceedings. There, an agency may recognize any material that may be judicially noticed, so long as all parties are advised of these materials, are given access to them and have an opportunity to comment or rebut. FLA. STAT. § 120.54(6) (1981).

12. FLA. STAT. § 120.57(1)(b)(9) (1981).

discretion in reviewing agency action. A court may not substitute its own judgment on the weight of evidence supporting the agency's findings of fact;[13] it may only overturn agency orders based upon facts not supported by competent substantial evidence.[14] These successive competent substantial evidence standards[15] pose a "conundrum" for the reviewing court: the court must give proper deference to the agency's findings while ensuring the agency gave proper deference to the hearing officer's findings.[16]

In response to this problem, Florida courts have adopted a non-statutory differentiation between "policy" facts, those particularly susceptible to agency determination, and "credibility" facts, which are specifically within a hearing officer's determinative competence. Because private parties bear the burden and expense of judicial review of agency action,[17] this distinction has important ramifications in a society where administrative agencies exert increasing influence.[18] This commentary will therefore examine the credibility/policy distinction and its development by Florida courts. The theoretical underpinnings and effectiveness of the distinction will be analyzed in light of both the APA's goal of promoting uniform administrative procedure and the distinction's effect on judicial integrity. The commentary will conclude by offering guidance for using the distinction to determine the prospects of successfully appealing an agency's final order based upon substituted findings of fact.

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13. *Id.* § 120.68(10). *See, e.g.*, Gentsch, Larsen, Traad, M.D. v. Florida Dep't of Labor & Unemployment Sec., 390 So. 2d 802, 804 (Fla. 3d D.C.A. 1980); Zuckerman-Vernon Corp. v. State Dep't of Revenue, 339 So. 2d 685, 686 (1st D.C.A. 1976), *modified*, 354 So. 2d 353 (Fla. 1978) (modifying amount of assessed penalty).

14. FLA. STAT. § 120.68(10) (1981). For a general discussion of judicial review of agency fact-findings under Florida's APA, see 2 A. ENGLAND & L. LEVINSON, FLORIDA ADMINISTRATIVE PRACTICE MANUAL 75-79 (1979).

15. The statutory competent substantial evidence standard for appellate review of an administrative order essentially codifies the standard adopted in DeGroot v. Sheffield, 95 So. 2d 912 (Fla. 1957) (en banc). The *DeGroot* court described the traditional substantial evidence standard as "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Id.* at 916 (citing Becker v. Merrill, 155 Fla. 379, 20 So. 2d 912 (1944)). By adding the additional requirement of competence, the court sought to ensure that the evidence relied upon was "sufficiently relevant and material" in a procedural sense. *Id.* at 916. In interpreting the APA's competent substantial evidence standards, courts still look to *DeGroot* for guidance. *See, e.g.*, City of Bartow v. Public Employees Relation Comm'n, 382 So. 2d 311, 313 (Fla. 2d D.C.A. 1979).

16. McDonald v. Department of Banking & Fin., 346 So. 2d 569, 578 (Fla. 1st D.C.A. 1977).

17. Although a court in its discretion may award attorneys fees and costs for a successful appeal, private litigants ordinarily bear the cost of appeal. *See* FLA. STAT. § 120.57(1)(b)(9) (1981). *See also* Waas, *The Administrative Appeal*, 51 FLA. B.J. 276, 277 & 278 nn.2 & 3 (May 1977) (delineating statutory scheme of assessing appeal costs prior to repeal of the bad faith requirement for awarding fees). *Cf.* FLA. STAT. § 120.69(7) (1981) (in deciding a petition for enforcement, court may award prevailing party reasonable attorney fees whenever appropriate).

18. *See generally* Karl & Lehrman, *Our Work, Trends in Administrative Law*, 54 FLA. B.J. 24 (1980) (outlining the increasing Florida administrative law practice resulting from burgeoning agency influence in society).

CREDIBILITY VERSUS POLICY FACTS: THE *McDonald* APPROACH

The 1977 First District Court of Appeal[19] opinion in *McDonald v. Department of Banking & Finance*[20] embarked Florida courts on the course of distinguishing between credibility and policy facts when reviewing agency fact-finding. McDonald appealed the Department's final order rejecting his request for authority to organize a bank. In denying the application, the Department rejected many of the hearing officer's findings of fact as not based upon competent substantial evidence.[21] Reversing the agency's order and remanding[22] the case for further hearings, the court determined the agency improperly substituted its own fact-findings for those of the hearing officer.[23]

In reaching its decision, the *McDonald* court recognized the disparate nature of certain findings of fact. Some facts, such as witness credibility or facts susceptible of ordinary methods of proof, tend to fall within the hearing officer's adjudicative competence.[24] Other facts are inseparable from policy considerations over which the agency has special responsibility. Such facts are increasingly infused with opinion and, accordingly, reviewing courts allow agencies more latitude in substituting their own findings for those of the hearing officer.[25] The substantiality of the evidence supporting the Department's order therefore depended upon the categorization of the agency's findings along the credibility/policy continuum.[26]

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19. The APA's venue provisions provide for review in the district court where the agency maintains its headquarters or where a party resides. Because Tallahassee, the state capital and location of many state agency headquarters, lies in the First District, that district handles most administrative law cases. *See* Johnson v. Superintendent of Hernando County, 349 So. 2d 832, 833 (Fla. 1st D.C.A. 1977) (head of agency in teacher dismissal suit is local school board; but State Board of Education, a party by virtue of its administrative review, effectively resided in Tallahassee and therefore First District was an appropriate forum).

20. 346 So. 2d 569 (1st D.C.A. 1977), *on appeal after remand,* 361 So. 2d 199 (1978), *cert. denied,* 368 So. 2d 1370 (Fla. 1979).

21. 346 So. 2d at 577.

22. If the reviewing court determines agency action was based upon any fact-finding not supported by competent substantial evidence, the court shall remand or set aside the agency action. FLA. STAT. § 120.68(10) (1981). *See also* Harvey v. Nuzum, 345 So. 2d 1106 (Fla. 1st D.C.A. 1977) (describing the remand prerogative as "customary"). In cases involving erroneous substituted fact-finding, courts have made varied use of the remand option. *See, e.g.,* Wade Bradford Grove Serv., Inc. v. Bowen Bros., Inc., 382 So. 2d 719, 720 (Fla. 2d D.C.A. 1980) (remanding for hearing officer to take additional testimony); Tampa Wholesale Liquors, Inc. v. Division of Alcoholic Beverages & Tobacco, 376 So. 2d 1195, 1196 (2d D.C.A. 1979) (remanding for entry of order consistent with heading officer's fact-findings), *cert. denied,* 388 So. 2d 1112 (Fla. 1980).

23. 346 So. 2d at 585-86.

24. *Id.* at 579. The *McDonald* court observed an appellate court naturally grants "greater probative force to the hearing officer's contrary findings when the question is simply the weight or credibility of testimony by witnesses, or when the factual issues are otherwise susceptible of ordinary methods of proof, or when concerning those facts the agency may not rightfully claim special insight." *Id.*

25. *Id.*

26. The distinction has its origins in Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951), cited by the *McDonald* court. 346 So. 2d at 578. The Court observed the importance of its determination:

Examining the *McDonald* findings illuminates the distinction the court adopted. The Department interpreted statutory prerequisites for approving the bank organization application.[27] Those criteria included requirements that, in the Department's opinion, the bank should have reasonable promise of success, competent management, and adequate proposed banking quarters.[28] The first two criteria required substantial determinations of opinion particularly suitable to agency interpretation. The last criterion involved ordinary factual issues susceptible of the hearing officer's fact-finding competence.[29]

McDonald's significance, however, extends beyond categorizing facts to determine whether competent substantial evidence supports agency action. It attempts to respect the relative positions of hearing officers, agencies, and courts in the administrative decision-making process. From a narrow perspective, hearing officers resolve facts, agencies respond to those facts by determining individual claims, and courts review the evidence supporting those determinations.[30] From a broader perspective, the decision-making process involves incipient agency policymaking. Although agencies must ordinarily follow formal procedures for adopting general policy as rules,[31] they may also adopt new

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> The "substantial evidence" standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. . . . The significance of his report, of course, depends largely on the importance of credibility in the particular case.

Id. at 496. Federal courts continue to follow *Universal Camera*'s deference to hearing officers on credibility findings. *See, e.g.*, MPC Restaurant Corp. v. NLRB, 481 F.2d 75, 77 (2d Cir. 1973); Duncan v. Harris, 518 F. Supp. 751, 757 (E.D. Ark. 1980).

This problem arises only when the agency substitutes its findings for those of the hearing officer. In instances where the agency adopts the hearing officer's findings, courts find no need to classify the findings in question as policy or credibility. *See* ABC Liquors, Inc. v. Department of Bus. Reg., 397 So. 2d 696, 697 (Fla. 1st D.C.A. 1981). Courts must only then determine whether APA procedures have been followed, whether competent substantial evidence appropriate to the issue supports the finding and whether the agency action is clearly erroneous or unauthorized. *Id.* The appropriateness of the evidence turns upon the "nature of the issues involved." *See* Balino v. Department of Health & Rehab. Servs., 362 So. 2d 21, 24 (1st D.C.A. 1978), *cert. denied,* 370 So. 2d 458 (Fla. 1979). The substantiality requirement implicitly differs between different types of cases. For example, evidence sufficiently substantial to support ordinary regulatory action might not support a license suspension or revocation. *See* Bowling v. Department of Ins., 394 So. 2d 165, 171-72 (Fla. 1st D.C.A. 1981).

27. *See* FLA. STAT. § 659.03(2)(a)-(f) (1981).

28. 346 So. 2d at 584-86.

29. *Id.*

30. *See id.* at 582-83.

31. FLA. STAT. § 120.54 (1981) provides adoption procedures for agency rulemaking. The APA defines a rule as "each agency statement of general applicability that implements, interprets, or prescribes law or policy. . . ." *Id.* § 120.52(14). *See also* Department of Revenue v. United States Sugar Corp., 388 So. 2d 596, 598 (Fla. 1st D.C.A. 1980) (tax provision made no distinction between contract and common carriers; Department established a rule by adopting policy distinguishing between the two); State Dep't Commerce v. Matthews Corp., 358 So. 2d 256, 259 (Fla. 1st D.C.A. 1978) (determinations of wage rates were not rules, where applicable only to specific construction contracts).

policies through the individual adjudicative process.[32] If an agency chooses to utilize adjudicative policymaking, a second tier of duties emerges: hearing officers must respond in a manner that promotes responsible agency policymaking;[33] agencies must support non-rule policy through corroborative evidence and argument;[34] and courts must preserve agency policymaking discretion while ensuring the agency has substantiated its non-rule policy.[35] *McDonald* attempts to crystallize the roles in the administrative process to further the APA's goal of uniform agency action. To determine whether the *McDonald* approach of distinguishing credibility and policy facts[36] actually promotes this goal, subsequent development of the distinction must be examined.

Development of the Policy/Credibility Distinction

The distinction between credibility and policy facts is elucidated by closely examining specific factual findings. In *Anheuser-Busch, Inc. v. Department of Business Regulation*,[37] an agency order found that Anheuser-Busch violated

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The *McDonald* court noted formal rulemaking's contribution to fairness by providing notice to affected persons. 346 So. 2d at 580. The court was concerned that allowing policymaking during adjudication might cause APA rule adoption procedures to atrophy. *Id.* The court could not find, however, that the APA prohibits all policy making other than through formal rulemaking. *Id.*

32. 346 So. 2d at 582-83.

33. The *McDonald* court described the hearing officer's function as follows:

> The hearing officer's function creates agency incentives for rulemaking, which as far as it goes displaces proof and debate of policy in 120.57 proceedings; encourages an agency to fully and skillfully expound its non-rule policies by conventional proof methods; and, in appropriate cases, subjects agency policymakers to the sobering realization their policies lack convincing wisdom, and requires them to cope with the hearing officer's adverse commentary.

Id. at 583 (footnotes omitted).

34. *Id.* The court observed that as facts "blur" into opinions, the agency's ability to substitute its findings correspondingly increases. At the same time, however, the agency's duty to expose its reasoning also increases. *Id. See also* Smart v. Board of Real Estate, 421 So. 2d 22, 23 (Fla. 1st D.C.A. 1982) ("where ultimate facts include opinions infused with policy insight, the agency is required to explain its action"); FLA. STAT. § 120.57(1)(b)(9) (1981) (agency must state with particularity the reasoning behind the fact substitution).

35. 346 So. 2d at 583. *See also* FLA. STAT. § 120.68(12) (1981) (court shall not substitute its judgment for that of the agency on a matter of discretion).

36. The terms "credibility" and "policy" facts are used because they best approximate the language used by Florida courts in the area. Federal courts have coined different terms that may better convey the concepts represented. For example, the court in Saginaw Broadcasting Co. v. FCC, 96 F.2d 554, 559-60 (D.C. Cir.), *cert. denied*, 305 U.S. 613 (1938), spoke of "basic" facts and "ultimate" facts. The court in American Tobacco Co. v. The Katingo Hadjipatera, 194 F.2d 449, 451 (2d Cir. 1951), *cert. denied*, 343 U.S. 978 (1952), alternatively spoke of "testimonial inferences" and "derivative inferences." Regardless of the terminology chosen, these phrases indicate discrete steps in the fact-finding process, which can be described as follows: (1) taking evidence; (2) considering the evidence to determine basic facts; (3) inferring ultimate facts from the previously ascertained basic facts; and (4) applying statutory criteria based upon the ultimate findings. *See Saginaw Broadcasting*, 96 F.2d at 560. Under this framework, step two is credibility fact-finding and step three is policy fact-finding.

37. 393 So. 2d 1177 (Fla. 1st D.C.A. 1981).

Florida's "Tied House Evil" law,[38] which prohibits beverage manufacturers from giving a "gift" to retail vendors. Based on stipulated facts, the hearing officer determined Anheuser-Busch's bar-spending practice[39] did not constitute a gift. The agency purportedly adopted these findings, but concluded the activities involved substantial worth to vendors and were therefore statutorily prohibited gifts.[40]

The *Anheuser-Busch* court recognized that the agency was attempting to formulate a new policy prohibiting bar-spending as gifts.[41] Although an agency has discretion to make policy through either formal rule promulgation or individual case adjudication, if it chooses the latter prerogative, the hearing officer's findings check that discretion.[42] Because there was no evidence indicating vendors received substantial worth from bar-spending, the court found the agency's factual premise inadequate to support its new policy that bar-spending is a gift.[43] *Anheuser-Busch* demonstrates agency conclusions on policy facts must be predicated with adequate credibility facts.[44]

The agency order in *Jenkins v. State Board of Education*[45] had a similar defect. *Jenkins* involved a teacher's dismissal based upon intimations of improper sexual conduct with a student. The hearing officer, however, found no evidence supporting the request that the teacher be suspended for conduct seriously reducing the teacher's effectiveness.[46] Although the agency expressly adopted the officer's findings of fact and recommendation against suspension on the reduced effectiveness ground, it ordered suspension based upon the teacher's alleged failure to protect the student's health and safety.[47] The First

38. FLA. STAT. § 561.42(1) (1981). This provision provides: "No licensed manufacturer or distributor of any beverage . . . shall . . . assist any vendor by any gifts or loans of money or property. . . ." *Id.*

39. Bar-spending is the common practice by beverage manufacturers of sponsoring free beer parties in bars during college vacation season. As a promotional mechanism, the manufacturer provides free beer to the vendor's customers by reimbursing the vendor for the beer's ordinary retail price. 393 So. 2d at 1179.

40. *Id.* at 1180.

41. *Id.* at 1182. Neither the statute nor the rules in force at the time of the action clearly mandated the construction of bar-spending as a gift.

42. *Id.* at 1182-83. In addition, the agency must re-prove the facts supporting incipient agency policy in each individual case. *See* State Dep't of Health & Rehab. Servs. v. Barr, 359 So. 2d 503, 505 (Fla. 1st D.C.A. 1978); Hill v. School Bd. of Leon County, 351 So. 2d 732, 733 (1st D.C.A. 1977), *cert. denied*, 359 So. 2d 1215 (Fla. 1978).

43. 393 So. 2d at 1182.

44. The court elucidated the following standard for substantiating non-rule policy: "[T]he accuracy of every factual premise and the rationality of every policy choice which is identifiable and reasonably debatable must be shown by some kind of evidence undergirding the order which makes that policy choice on that factual premise." *Id.*

45. 399 So. 2d 103 (Fla. 1st D.C.A. 1981).

46. *See id.* at 104-05. Although the hearing officer's determination was undoubtedly correct, strong circumstantial evidence indicated improper conduct. The male teacher and his female student were found at night in a car parked in the country. The teacher had allegedly stopped the car because the student felt ill, and when the police arrived, both were in the back seat. Although the temperature was approximatley 40 degrees that night, the teacher was clad only in pants and socks. Despite these incriminating circumstances, all involved, including the student herself, testified there was no improper conduct involved. *Id.*

47. *Id.* at 105.

District reversed the order, observing the record was bereft of evidence supporting the order and that the agency failed to elucidate any non-rule policy it might be promoting.[48] As the court noted, the tenor of the proceeding below centered around the delicate nature of the alleged misconduct, sexual activity with a minor. The *Jenkins* decision thus ensures that agencies do not expressly adopt findings of fact, yet issue orders implicitly based upon facts rejected in those findings.[49]

Like the distinction between credibility and policy facts, differentiation between findings of fact and conclusions of law must also be clarified. In *School Board of Leon County v. Hargis*,[50] the First District addressed this problem when it rejected an order of the Florida Commission on Human Relations. The Commission adopted the hearing officer's fact-findings but reversed his conclusions of law, finding illegal employment discrimination based upon race. The court noted no special consideration arose from the agency's categorization of its conclusions as law.[51] Although the Commission may claim special insight into the "subleties of racial discrimination," its finding that the petitioner's activities were a pretext for discrimination was impermissibly based upon discernible motives of the parties involved.[52] Regardless of classifying the findings as fact or law, in substituting its interpretation of this credibility fact, the court determined the agency improperly invaded the hearing officer's fact-finding function.[53] *Hargis* and *Jenkins* together establish the appropriateness of applying the credibility/policy distinction when the agency ostensibly, yet not overtly, rejects the hearing officer's findings of fact.

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48. *Id.*

49. Significantly, the court found the case should have been reversed because the agency's health and safety rationale was not a statutory basis for suspension. *Id.* The court's extensive discussion of the substituted ground for dismissal issue therefore stands as a strong condemnation of agency action implicitly premised upon previously rejected fact-findings.

50. 400 So. 2d 103 (Fla. 1st D.C.A. 1981).

51. *Id.* at 107. In Hernicz v. Department of Prof. Reg., 390 So. 2d 194 (Fla. 1st D.C.A. 1980) (per curiam), the court took an approach similar to that in *Hargis*. The court determined that a conclusion of law erroneously inserted into the fact section of the agency's order did not change the conclusion of law into an improperly substituted fact. *Id.* at 195. *See also* Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n, Inc., 418 So. 2d 1046, 1049 (Fla. 1st D.C.A. 1982) (agency rejected as a conclusion of law hearing officer's finding that water quality would be lowered; the court, however, treated the substituted conclusion as a policy finding of fact); J. A. Jones Constr. Co. v. Department of Gen. Servs., 356 So. 2d 43, 43 (1st D.C.A.) (per curiam) (agency's interpretation of contract was finding of law, not fact), *cert. denied*, 362 So. 2d 1054 (Fla. 1978).

52. The case involved two school cafeteria workers, one caucasian and one black, competing to fill a job vacancy. The caucasian worker took the job after a seemingly endless process of faulty bureaucratic communication and coordination. Although the hearing officer found no evidence indicated racial discrimination, the agency determined the lack of communication constituted a pretext for avoiding promotion of the black applicant. 400 So. 2d at 106. The court therefore concluded the agency was incapable "of making unarticulated, speculative, and uncomplimentary assumptions about the purposes, motives, and abilities of persons unseen, unheard, and unknown." *Id.* at 107.

53. *Id. See also* Silver Sand Co. v. Department of Revenue, 365 So. 2d 1090, 1093 (Fla. 1st D.C.A. 1979) (agency may not characterize findings of fact as legal conclusions to avoid requirements of statute).

APPRAISAL OF THE CREDIBILITY/POLICY DISTINCTION

Concerns over uniform agency action focus upon fundamental notions of due process.[54] Because the delegation of administrative duties to agencies may lead to abuse,[55] judicial review of agency orders under the APA attempts to ensure affected parties' interests have been accounted for in the decision-making process and to correct deficiencies that might occur.[56] At the same time, however, courts must allow agencies freedom to exercise their expertise and special skills in implementing their delegated duties.[57] The APA's purpose is to protect these contrasting interests and to encourage "initiative and self-discipline within the executive branch."[58] The Florida Supreme Court has embraced the credibility/policy distinction for reviewing the substantiality of evidence supporting incipient agency policy;[59] therefore, it is important to discern

54. Various attempts have been made to outline the due process focus of administrative procedure acts. *See* State Rd. Dep't v. Cone Bros. Contracting Co., 207 So. 2d 489, 491 (Fla. 1st D.C.A. 1968) (to protect a person's rights, duties, privileges or immunities that the agency administers); Reporter's Comments, *supra* note 2, at 5 ("Three due process checks to prevent arbitrary agency action are the requirements that reasons be stated for all action taken or omitted, that reasons be supported by 'the record,' and that specific judicial review procedure allow the courts to remedy defects of substance."). *See also* Bath Club, Inc. v. Dade County, 394 So. 2d 110, 113-14 (Fla. 1981) (if one adequate means of judicial review of agency action is available, due process is met) (citing Johnson v. McNeill, 151 Fla. 606, 610, 10 So. 2d 143, 145 (1942)).

55. *See* Alley, *Agency Accountability: Judicial Remedies for Wrongful Agency Action Under the Florida APA,* 54 FLA. B.J. 445, 445 (1980) ("the powers that are committed to these [administrative] regulating agencies, and which they must have to do their work, *carry with them great and dangerous opportunities for oppression and wrong.*") (quoting Root, *Address of the President,* 41 A.B.A. REP. 369 (1916)) (emphasis added by Alley); Karl & Lehrman, *supra* note 18, at 26 (due to human nature, those involved with agencies often attempt to exercise the agency's delegated power to what is believed its fullest extent).

56. *See* Reporter's Comments, *supra* note 2, at 5-7. *See also* Bonfield, *An Introduction to the 1981 Model State Administrative Procedure Act, Part I,* 34 AD. L. REV. 1, 1 (1982) (one of the primary objectives of an administrative procedure act is to protect private rights against unlawful or unfounded agency action). The APA did not intend for the courts to freely overturn agency action. *McDonald,* 346 So. 2d at 584 n.13. *See also* Brodie & Linde, *State Court Review of Administrative Action: Prescribing the Scope of Review,* 1977 ARIZ. ST. L.J. 537, 563 (Florida's APA sets standards for judicial surveillance of agency action and prohibits "reversal by epithet.").

57. *See* Holden v. Florida Dep't of Corrections, 400 So. 2d 142, 144 (Fla. 1st D.C.A. 1981) (whether prisoner's intended marriage would endanger prison security clearly fell within the Department's delegated discretion); Couch Constr. Co. v. Department of Transp., 361 So. 2d 172, 183 (Fla. 1st D.C.A. 1978) (Boyer, C.J., dissenting) (APA does not divest agency's lawful discretion; discretion implies the right to elect); *McDonald,* 346 So. 2d at 584-86.

Agencies traditionally have been given great deference in interpreting the statutes they are delegated authority to administer. *See* Austin v. Austin, 350 So. 2d 102, 104 (1st D.C.A. 1977), *cert. denied,* 357 So. 2d 184 (Fla. 1978); Note, *Florida Administrative Procedure Act: Five Years of Judicial Review* (Winter 1980) (unpublished work available in University of Florida Law Review Office). In the fact-finding setting, agencies contribute technical expertise, specialization, and repeated contact with the regulatory statutes to the process. *See* Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis,* 58 HARV. L. REV. 70, 82 (1944).

58. Florida Dep't of Envtl. Reg. v. Falls Chase Special Taxing Dist., 424 So. 2d 787, 818 (Fla. 1st D.C.A. 1982) (Smith, J., dissenting). *See also* Bonfield, *supra* note 56, at 1.

59. Duval Util. Co. v. Florida Pub. Serv. Comm'n, 380 So. 2d 1028, 1031 n.3 (Fla. 1980)

whether the distinction implements the APA's goals and to determine its effect on both judicial integrity and administrative practice.

The Judiciary's Perspective: An Effective Distinction With Ramifications on Judicial Integrity

Case law indicates that the credibility/policy distinction has concretized the hearing officer's and agency's fact-finding roles. Courts reviewing agency orders based upon substituted credibility facts almost uniformly reject those orders as invading the hearing officer's pure fact-finding function,[60] thus solidifying the hearing officer's position in the decision-making process.[61] Furthermore, the *Jenkins* and *Hargis* courts' refusal to accept veiled agency encroachment on the hearing officer's fact-finding domain promotes procedurally sound adminsitrative decision-making.

Judicial reaction to substituted policy facts is not as clear. Courts have generally upheld agency orders when the primary issue is the substantial competence of substituted agency policy findings.[62] By granting greater weight

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(citing *McDonald* as providing the test for determining whether competent substantial evidence supports incipient agency policy determinations). In addition, two other Florida district courts of appeal have adopted the credibility/policy distinction. *See* Andrus v. Florida Dep't of Employment Sec., 379 So. 2d 468, 470 (Fla. 4th D.C.A. 1980) (dictum); Koltay v. Division of Gen. Reg., 374 So. 2d 1386, 1390-91 (Fla. 2d D.C.A. 1979).

60. *See* School Bd. of Leon County v. Hargis, 400 So. 2d 103, 107 (Fla. 1st D.C.A. 1981); Cenac v. Florida State Bd. of Acct'g, 399 So. 2d 1013, 1015-16 (Fla. 1st D.C.A. 1981); Sapp v. Florida State Bd. of Nursing, 384 So. 2d 254, 256 (Fla. 2d D.C.A. 1980); Tampa Wholesale Liquors, Inc. v. Division of Alcoholic Beverages & Tobacco, 376 So. 2d 1195, 1198 (2d D.C.A. 1979), *cert. denied,* 388 So. 2d 1112 (Fla. 1980); Koltay v. Division of Gen. Reg., 374 So. 2d 1386, 1391 (Fla. 2d D.C.A. 1979); Samson v. Bureau of Community Medical Facilities, 363 So. 2d 412, 416 (Fla. 1st D.C.A. 1978); *McDonald,* 346 So. 2d at 584-86.

For decisions implicitly classifying facts as credibility and rejecting substituted agency findings, see Jenkins v. State Bd. of Educ., 399 So. 2d 103, 105 (Fla. 1st D.C.A. 1981) (discussed *supra* notes 44-48 and accompanying text); Henderson Signs v. Florida Dep't of Transp., 397 So. 2d 769, 773 (Fla. 1st D.C.A. 1981) (agency effectively modified essential findings as to whether highway was open on date in question); Wade Bradford Grove Serv., Inc. v. Bowen Bros., Inc., 382 So. 2d 719, 720 (Fla. 2d D.C.A. 1980) (agency's order conflicted with unrebutted testimony taken at hearing); Gruman v. State Dep't of Revenue, 379 So. 2d 1313, 1316 (Fla. 2d D.C.A. 1980) (hearing officer's finding that party never agreed to pay mortgage was binding on Department); Shablowski v. State Dep't of Envtl. Reg., 370 So. 2d 50, 54 (Fla. 1st D.C.A. 1979) (order overturning findings on extent to which fill activity is contrary to public's interest); Silver Sand Co. v. Department of Revenue, 365 So. 2d 1090, 1092-93 (Fla. 1st D.C.A. 1979) (substituted finding concerning agent's apparent and actual authority to purchase gasoline for client); Catholic Social Serv. v. State Dep't of Commerce, 365 So. 2d 427, 429 (Fla. 1st D.C.A. 1978) (order disregarding hearing officer's finding based upon conflicting evidence of two witnesses); Boyette v. State Prof. Practices Council, 346 So. 2d 601, 602-03 (Fla. 1st D.C.A. 1977) (order rejecting hearing officer's finding that evidence failed to show elements constituting forcible rape).

61. The importance of hearing officers should not be underestimated. In administrative proceedings, the hearing officer, not the agency, is the trier of fact. As one commentator observed, implicit in *McDonald* is the notion that an outside hearing officer is essential to fairness and due process under the APA. Sheldon, *1977 Amendments to the Administrative Procedure Act,* 6 FLA. ST. U.L. REV. 443, 451 (1978).

62. *See* City of Clearwater Fire Dep't v. Lewis, 404 So. 2d 1156, 1162 (Fla. 2d D.C.A. 1981); Holden v. Florida Dep't of Corrections, 400 So. 2d 142, 144 (Fla. 1st D.C.A. 1981); Gulf State

to agency policy determinations, courts recognize the need to permit agency action that initiates or refines general policies through individual case adjudication.[63] The additional requirement that policy facts are supported by adequate credibility facts bridles potentially unrestrained adjudicative policymaking.[64] This restraint is not unreasonable. If the agency does not follow the formal APA rulemaking procedures,[65] it must justify the policy developed in individual cases with supporting facts.[66] Both procedures expose agency decision-making to careful scrutiny, while the latter procedure also preserves the hearing officer's function.[67]

Because the initial classification of a fact correlates to the court's ultimate ruling, the major criticism of the distinction is that its effectiveness depends upon predictable categorization of a specific fact as credibility or policy. The

Bank v. State Dep't of Banking & Fin., 367 So. 2d 671, 672-73 (Fla. 1st D.C.A. 1979); McDonald v. Department of Banking & Fin., 361 So. 2d 199, 201 (1st D.C.A. 1978), *cert. denied*, 368 So. 2d 1370 (Fla. 1979); Fraser v. Lewis, 360 So. 2d 1116, 1117-18 (Fla. 1st D.C.A. 1978). *But see* Boyette v. State Prof. Practices Council, 346 So. 2d 601, 604 (Fla. 1st D.C.A. 1977) (quashing agency order based upon substituted *policy* findings not supported by competent substantial evidence).

63. *See* Florida Cities Water Co. v. Florida Pub. Serv. Comm'n, 384 So. 2d 1280, 1281 (Fla. 1980) (citing *McDonald*).

64. The potential for runaway agency policymaking is not an abstract concern. From the agencies' perspective there are numerous advantages to incipient policymaking in contrast to rulemaking. These advantages include flexibility, retroactivity, particularity and avoidance of possible reprimand by the legislature's administrative procedures committee. *See* Anheuser-Busch, Inc. v. Department of Bus. Reg., 393 So. 2d 1177, 1182 (Fla. 1st D.C.A. 1981).

65. FLA. STAT. § 120.54 (1981). *See infra* note 78 and accompanying text.

66. *See supra* notes 41-44 and accompanying text.

67. A comparison of the Florida APA and the federal APA provides insight into differing philosophical perceptions of the agency's versus the hearing officer's proper roles in the administrative process. The federal APA, the traditional model, grants an agency "all the powers which it would have in making the initial decision," when reviewing a hearing officer's determinations. 5 U.S.C. § 5576 (1976). The Florida APA has no corresponding provision. In addition, although a federal court considers the hearing officer's findings in determining whether substantial evidence supports the agency's findings, the agency remains the primary fact finder. FCC v. Allentown Broadcasting Corp., 349 U.S. 358, 364 (1955). Thus, the role of the federal hearing officer differs greatly from that of a judicial officer whose decision is merely subject to review on appeal. The federal hearing officer is more of an advisor than an actual decision-maker. Traditionalists see this as desirable because enhancing the position of hearing officers would be inconsistent with the agency's responsibility to carry out the duties delegated to it by the legislature. *See* K. DAVIS, ADMINISTRATIVE LAW TEXT § 10.07 (1972).

Undoubtedly, the Florida APA presents a different model, as it contemplates the hearing officer as a much more independent decision-maker. This scheme reflects recent dissatisfaction with the traditional model of granting virtually unchecked discretion to agencies in executing their legislative mandate. *See* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1681-88 (1975) (outlining the problem of agency discretion); Note, *Regulatory Analyses and Judicial Review of Informal Rulemaking*, 91 YALE L.J. 739, 740-41 (1981) (delineating traditional justifications for granting agency discretion and recent doubts as to the continued efficacy of this model). Regardless of the validity of concerns over unchecked agency discretion, the competent substantial evidence standard placed on agencies in FLA. STAT. § 120.57(1)(b)(9) (1981) and the failure to adopt a counterpart to the federal § 557b are direct legislative indications of an intent to modify the traditional administrative model. The emphasis found in Florida case law on preserving the hearing officer's role in the administrative process therefore merely reflects the legislative policy choice of modifying the traditionalist model.

McDonald approach lends greater weight to the agency's or the hearing officer's fact-findings depending upon its credibility/policy categorization. If this identification is not readily ascertainable, courts might be accused of using the distinction to foreshadow a desired result.

Several factors, however, mitigate this criticism. Credibility facts are analogous to those within the trier of facts' competence for which an appellate court may not substitute its judgment on an ordinary appeal.[68] When reviewing substituted agency fact-finding, courts have this experience to draw upon in determining which facts are particularly within the hearing officer's competence.[69] Additionally, in most cases the distinction seems clear-cut, which reduces the opportunity for judicial manipulation. In this regard, there have been few disagreements within individual appellate panels over the categorization of specific facts as credibility or policy.[70] This suggests consistent application of the distinction.

Notwithstanding these indications of even-handed application, the potential for manipulating the distinction in ambiguous cases undermines judicial integrity. To further predictability and impartiality, the judiciary must maintain the distinction's effectiveness by creating an expectation of the judicial categorization of facts not immediately identifiable as policy or credibility. The judiciary could accomplish this by explicitly stating that findings other than clear-cut credibility facts will be categorized as policy facts.[71] Under the man-

68. *See* Tampa Wholesale Liquors v. Division of Alcoholic Beverages & Tobacco, 376 So. 2d 1195, 1197 (1st D.C.A. 1979), *cert. denied,* 388 So. 2d 1112 (Fla. 1980); Koltay v. Division of Gen. Reg., 374 So. 2d 1386, 1391 (Fla. 1st D.C.A. 1976). Both *Tampa Wholesale* and *Koltay* relied upon the reasoning of Venetian Shores Home & Property Owners v. Ruzakawski, 336 So. 2d 299 (Fla. 3d D.C.A. 1976). In this pre-*McDonald* decision, the *Venetian Shores* court articulated the posture courts would later take when examining credibility facts: "We do not think that the Administrative Procedure Act can be read to grant to the head of an agency greater powers over an examiner's findings than those of a trial judge over the findings of a master in chancery." *Id.* at 401. In Bowling v. Department of Ins., 394 So. 2d 165, 174 (Fla. 1st D.C.A. 1981), the court described these credibility facts as "plain, garden-variety fact[s]."

69. *See, e.g.,* Shaw v. Shaw, 334 So. 2d 13, 16-17 (Fla. 1976) (function of trial court is to weigh credibility; function of appellate court is not to re-weigh evidence); Westerman v. Shell's City, Inc., 265 So. 2d 43, 45-46 (Fla. 1972) (appellate court cannot re-evaluate evidence and improperly substitute its judgment for that of trial court on question of whether parties entered oral contract). Arguably, the standards expounded in *Shaw* and *Westerman* are subject to manipulation as well. The decisions, however, are helpful guidelines for ascertaining which facts fall within the credibility nomenclature.

70. For example, of the 21 courts applying the credibility/policy distinction, cited *supra* notes 60 & 62, only two dissents questioned the majority's categorization of the facts in question. *See* Shablowski v. State Dep't of Envtl. Reg., 370 So. 2d 50, 54 (Fla. 1st D.C.A. 1979) (Ervin, J., dissenting) (determination of whether biological effects of fill project would be contrary to public interest is not a factual determination as majority held, but policy); Silver Sand Co. v. Department of Revenue, 365 So. 2d 1090, 1097 (Fla. 1st D.C.A. 1979) (Ervin, J., dissenting) (findings concerning the extent of agency relationship are not facts as majority held, but legal conclusion).

71. Both *McDonald,* 346 So. 2d at 584, and Peoples Bank v. State Dep't of Banking & Fin., 395 So. 2d 521, 525 (Fla. 1981), foretell this conclusion. These decisions recognize the appropriateness of classifying findings simultaneously based upon "pure fact-finding" and policy considerations as policy findings. The classification of truly ambiguous findings as policy is a logical extension of this judicial attitude toward mixed fact-finding. *See also* Reporter's Comments, *supra* note 2, at 6-7 (APA's purpose of allowing total flexibility in ad-

date of *Anheuser-Busch*, even if these borderline facts are classified as policy, the underlying predicate of credibility facts would be required.[72] Moreover, this policy would not usurp the hearing officer's fact-finding competence nor diminish the distinction's usefulness.[73] The expectation that ambiguous facts will be construed as policy facts would entail a self-imposed restraint on the courts not to disappoint the expectations created, lest they tarnish their perceived neutrality in applying the distinction.

The Advocate's Perspective: The Distinction As a Tool to Gauge Reversibility

The credibility/policy distinction's practical usefulness for determining reversibility in a particular case aids the administrative practitioner. Because private parties usually bear the expense of appealing adverse agency action,[74] advocates must be able to advise their clients whether to appeal. The key to successfully utilizing the distinction to predict reversibility lies in properly classifying the substituted facts. To determine whether the facts in question are credibility an attorney should first draw on previous cases classifying analogous facts. If the facts are credibility facts, they will invoke judicial deference to the hearing officer's fact-finding competence and will likely result in reversal of the agency's substituted findings.[75]

If the facts cannot be classified as credibility, the agency action may only be sustained by navigating between judicial pincers operating in the policy arena. On one side, courts require agency policymaking to be fully explained[76] and to be substantiated with such credibility facts as can be proven by ordinary

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ministrative fact-finding in both rulemaking proceedings and policymaking individual cases is to abrogate the legislative/judicial distinction in agency decision-making).

72. *See supra* notes 41-44 and accompanying text. Observe that the "clear cut" and "borderline" terminology is not used to denote legal standards. Rather, it expresses this author's perception that most facts can be readily categorized if the *Saginaw Broadcasting* analytical framework of the fact-finding process is utilized. *See supra* note 36.

73. The Florida APA is definitely a step away from the traditional model of granting agencies near unchecked discretion in carrying out their delegated duties. *See supra* note 67. The *McDonald* distinction attempts to recognize this by heightening judicial scrutiny over certain forms of substituted agency fact-finding. Courts should be careful, however, to not hamstring agencies attempting to carry out their legislative mandate. *See* K. DAVIS, *supra* note 67, § 10.07. The suggested pronouncement of deference in ambiguous situations would change little in the actual operation of the distinction, but would serve as a constant reminder to the courts to respect agency authority in certain areas. It merely recognizes that courts would be most tempted to manipulate the distinction in favor of individual claimants and against administrative bureaucracy.

74. *See supra* note 17.

75. *See supra* notes 60-62 and accompanying text.

76. FLA. STAT. § 120.57(1)(b)(9) (1981), states that the agency "may not reject or modify the findings of fact unless the agency first determines from a complete review of the record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence. . . ." *See also* Lewis v. Department of Prof. Reg., 410 So. 2d 593, 595 (Fla. 2d D.C.A. 1982) (requiring strict compliance with section for modification or rejection of hearing officer's finding); Grove Isle, Ltd. v. Bayshore Homeowners' Ass'n, Inc., 418 So. 2d 1046, 1049 (Fla. 1st D.C.A. 1982) (agency must specifically note and explicate policy basis for rejection of finding).

methods of proof. On the other side, courts reject policy of widespread scope and general applicability actually approximating a rule,[77] and require promulgation pursuant to the APA's formal rulemaking procedures.[78] These constraints form a narrow corridor for affirming agency policymaking and provide an inroad to the judicial deference granted agencies on policy matters. By wisely assessing the strength of either argument, the probability of reversing adverse agency action based upon substituted policy facts can be reasonably assessed.[79]

CONCLUSION

Although the APA provides multiple competent substantial evidence standards for judicial review of substituted agency fact-finding, Florida courts have responded admirably to this complexity by formulating the credibility/policy fact distinction. This factual categorization preserves both the hearing officer's and the agency's position in the administrative decision-making process. Consistent judicial application of the distinction lends predictability to judicial review and encourages proper agency action formulation.

The distinction also provides litigants with valuable insight to the amorphous competent substantial evidence standards. This judicially created distinction stands as a guidepost for gauging the reversibility of adverse agency action. To prevent any appearance of judicial bias, however, courts should pronounce that ambiguous facts will be classified as policy facts. Despite this present defect, the distinction culls from complex statutory standards a means to further the APA's goal of channeling agency action into uniform procedure.

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77. FLA. STAT. § 120.52(14) (1980) in part defines a rule as "each agency statement of general applicability that implements, interprets, or prescribes law or policy. . . ." *Cf.* Reporter's Comments, *supra* note 2, at 13 (definition of rule purposefully avoids technical classifications such as "order" or "regulation," so that definition encompasses all agency action having the described effects).

78. *See* Anheuser-Busch, Inc. v. Department of Bus. Reg., 393 So. 2d 1177, 1181 (Fla. 1st D.C.A. 1981); Department of Revenue v. United States Sugar Corp., 388 So. 2d 596, 598 (Fla. 1st D.C.A. 1980). The choice between promoting policy through individual adjudication or rulemaking is largely left to the agency. Florida Cities Water Co. v. Public Serv. Comm'n, 384 So. 2d 1280, 1281 (Fla. 1980). The question of judicial intervention therefore rests upon deference to the agency as an extension of another branch of government. However, because of the advantages of individual case adjudication, such as retroactivity, see *supra* note 64, parties' substantial private interests may be affected. In such instances, agencies can expect courts to "ponder whether agency rulemaking was reasonably practicable as well as desirable. . . ." *Anheuser-Busch*, 393 So. 2d at 182.

79. It should be noted that a harmless error rule operates in this field of judicial review of administrative action. *E.g.*, Peoples Bank v. State Dep't of Banking & Fin., 395 So. 2d 521, 524 (Fla. 1981) (agency supplemented field examiner's data concerning a policy fact; court held it harmless error because of other substantial competent evidence).