Required Rulemaking Under Florida’s APA: An Analysis of “Feasible” and “Practicable”

Rulemaking is not a matter of agency discretion,” the Florida Legislature decreed in 1991 by enacting §120.535 into Florida’s Administrative Procedure Act.1 In so doing, the legislature modified a more than decade-old judicial exception to required rulemaking created by McDonald v. Department of Banking and Finance, 346 So. 2d 569 (Fla. 1st DCA 1977), and refined by its progeny. It allowed agencies the choice of either adopting their “incipient” or emerging policies as rules, or not adopting those policies as rules and explicating, supporting, and defending such policies with competent, substantial evidence in the record of a §120.57 proceeding.2

The McDonald exception was based on the recognition that agency rules develop along a continuum “from vague standards to definite standards to broad principles to rules.”3 Without the possibility of developing rules along this continuum, “public information concerning agency purpose would vanish.”4 Agency orders would become “arid unreasoning edicts” if rulemaking was strictly required of incipient policy because if the agency attempted to explain the basis for its decision in a final order, the basis would be attacked as an invalid rule which would nullify the agency’s action.5

The McDonald court noted that “[s]ection 120.68(12)(b) [now section 120.68(12)(c)] recognizes there may be ‘officially stated agency policy’ otherwise than in ‘an agency rule.’”6 The McDonald court then reasoned that “since all agency action tends under the APA to become either a rule or an order, such other ‘officially stated agency policy’ is necessarily recorded in agency orders.”7

Section 120.53(2) requires agencies to catalogue these orders by a subject-matter index and make them available for the public to inspect and copy. Thus, the McDonald court concluded that the public could inform itself of, and rely on, an agency’s incipient policy because these catalogued orders would form “an ever-expanding library of precedents to which the agency must adhere or explain its deviation.”8

To encourage agencies to adopt policy as rules, the McDonald court held that “[t]o the extent the agency may intend in its final order to rely on or refer to emerging policy not recorded in rules or discoverable precedents . . . that policy must be established and may be challenged by proof” in a §120.57 proceeding.9 By burdening agencies with repeatedly explaining and proving their emerging nonrule policies by conventional methods of proof, and by allowing substantially affected persons the continual opportunity to challenge nonrule policy in §120.57 proceedings, the McDonald court reasoned that agencies would adopt policies as rules to relieve themselves of this burden and insulate themselves from this continual challenge.10

Additionally, since nonrule policy would eventually appear in an agency’s final order subject to §120.68 judicial review, the McDonald court concluded that continual judicial review of the agency’s nonrule policy basis would induce agencies to adopt their policies as rules.11

However, a 1989 legislative staff study indicated that the McDonald premise of “an ever-expanding library of precedents” available to the public was being unmet because most agencies did not maintain useful subject matter indexes, and did not have all their agency orders readily available.12 Additionally, scholars and others in the area were arguing that the McDonald premise of continual judicial review as an inducement to agency rulemaking was also being unmet because courts were allowing agencies to decide whether to adopt their policies by rule instead of examining agency nonrule policy to see if it was truly incipient.13 To correct these unmet McDonald inducements to rulemaking, the legislature enacted §120.535.14

Impact of F.S. §120.535

Section 120.535(1) provides: “[e]ach agency statement defined as a rule under section 120.52(16) shall be adopted by the rulemaking procedure

F.S. §120.535 requires agencies to maintain a constant vigil over their nonrule policy statements

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provided by section 120.54 as soon as feasible and practicable.” Section 120.52(16) defines a rule as:

[An] statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by existing rule. This term also includes the amendment or repeal of a rule.

This definition was not changed with the enactment of §120.535. Thus, the determination of whether an agency statement is a rule because it is generally applicable or implements, interprets, or prescribes law or policy remains unchanged. Similarly, the process for determining when an agency’s statement is a rule because it “purports in and of itself to create certain rights and adversely affect others” or serves “by [its] own effect to create rights, or so require compliance, or otherwise to have the direct and consistent effect of law” remains unchanged. Agency statements which are not generally applicable due to temporal or geographic limitations do not meet the definition of a rule and, therefore, are not subject to the §120.535 analysis. Likewise, agency statements which are not generally applicable because they apply only to limited individuals or are not intended by their own effect to create rights or require compliance are not rules as defined in §120.52(16) and are not subject to §120.535.

What the enactment of §120.535 did change is the McDonald incipient policy exception to required rulemaking. Section 120.535 altered this exception by creating a duty to overcome a presumption that rulemaking is feasible and practicable when a nonrule policy is challenged in a §120.535 proceeding. An agency can overcome this presumption by proving one of five statutory criteria.

Feasible

To overcome the presumption that rulemaking is feasible, an agency must prove that:

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.

The first criterion for overcoming the presumption of feasibility seems designed to address those circumstances in which an agency is reacting to a new statute, legal precedent, or novel factual situation and does not yet have the knowledge or experience to address the matter by generally applicable means.

For example, the nonrule moratorium the Department of Health and Rehabilitative Services (HRS) imposed in Balsam v. Department of Health and Rehabilitative Services, 452 So.2d 976 (Fla. 1st DCA 1984), might have satisfied this criterion. In Balsam, HRS imposed the nonrule moratorium on certificate of need applications to allow it time to promulgate rules on statewide bed-need methodologies as was mandated by recent legislation, HRS then failed to promulgate these new rules, and the Balsam court struck down the moratorium as an invalid rule. However, if HRS had promulgated the new rules, the nonrule moratorium might have satisfied this first criterion for overcoming the presumption of feasibility because HRS might have been able to show that it did not have sufficient time to acquire the knowledge and experience reasonably necessary to develop general standards and promulgate rules for the new statewide bed-need methodologies. Therefore, HRS could have shown that it had to impose the nonrule moratorium until it could acquire the necessary knowledge and experience.

Similarly, the nonrule moratorium on authorizations for leases of sovereign submerged lands adjacent to coastal barrier islands imposed by the board of trustees of the Internal Improvement Trust Fund in Board of Trustees of the Internal Improvement Trust Fund v. Lost Tree Village Corporation, 600 So. 2d 1240 (Fla. 1st DCA 1992), might have satisfied this criterion. The trustees imposed the nonrule...
moratorium in response to an application for a sovereign submerged land lease for a private docking facility on the coastal island of Atsena Otie Key which might have adversely impacted natural resources. This application presented a novel factual problem for which the trustees had no clear policy to evaluate. The trustees needed time to develop a “coastal island policy” that would consist of “comprehensive guidelines to consider current levels of development, existing land authorizations, and impacts on submerged resources.”

The Lost Tree nonrule moratorium might satisfy the first criterion for overcoming the presumption of feasibility because the trustees lacked a clear policy to evaluate the novel Atsena Otie Key sovereign submerged land lease application problem. The trustees needed sufficient time to acquire the experience and knowledge reasonably necessary to address the problem by rulemaking. It would not have been feasible for the trustees to promulgate a rule on leases of sovereign submerged lands adjacent to coastal barrier islands because they had not gained enough knowledge or experience to address this problem by generally applicable standards.

The nonrule sanctions policy imposed by the Administration Commission in Florida League of Cities v. Administration Commission, 586 So. 2d 397 (Fla. 1st DCA 1991), might also have satisfied this first nonfeasibility criterion. In Florida League, the commission was presented with the novel problem of sanctioning municipalities for their late submittals of comprehensive plans required by the Growth Management Act. The resolution of this problem required interpretation of the Growth Management Act.

Initially, the commission could not agree on how to impose the sanctions and, therefore, directed its staff to formulate a policy for the imposition of sanctions. Once staff developed a policy, the commission implemented the policy and imposed it on the municipalities without adopting the policy by the rulemaking procedure.

The sanctions policy might have satisfied the first criterion for overcoming the feasibility presumption because the commission was facing the novel problem of imposing sanctions for untimely comprehensive plan submittals, and the commission had to interpret the relatively new Growth Management Act to resolve this problem. Thus, the commission may not have had sufficient time to acquire the knowledge and experience reasonably necessary to address the sanctions policy by rulemaking.

The second criterion for overcoming the presumption of feasibility, that “related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking,” seems designed to address situations in which something other than lack of agency knowledge or experience prevents the agency from adopting a statement as a rule. “Related matters” might consist of new technology or methodology, pending legislation, or pending litigation. For example, the Department of Natural Resources’ use of a nonrule “beach-dune system” definition to establish the coastal construction control line in Island Harbor v. Department of Natural Resources, 495 So. 2d 209 (Fla. 1st DCA 1986), might satisfy this second criterion.

In Island Harbor, DNR proposed certain rule revisions to reestablish the coastal construction control line in Charlotte County pursuant to statutory mandate. In reestablishing the coastal construction control line, DNR employed a newly developed erosion computer model and new scientific methodology to identify those portions of the coast that might be affected by a three-foot storm surge wave. In employing this computer model and new scientific methodology, DNR developed a nonrule definition of the statutory term “beach-dune system.”

Although DNR in Island Harbor had sufficient knowledge and experience in establishing coastal construction control lines to do so by rule, the employment of the new computer model and new scientific methodology were matters related to the use of the nonrule “beach-dune system” definition. The new computer model and scientific methodology may not have been sufficiently resolved to enable DNR to address the “beach-dune system” definition by rulemaking. Thus, DNR might have satisfied the second criterion for overcoming the feasibility presumption for the “beach-dune system” definition policy.

The third criterion for overcoming the presumption of feasibility, that “the agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement,” is self-explanatory. Under the 1992 amendments to Ch. 120, an agency could overcome the presumption of rule feasibility using this criterion by showing that it provided notice of rule development as allowed by §120.54(1)(c), and is proceeding in good faith toward the publication and adoption of the proposed rule. The notice of rule development allowed by §120.54(1)(c) expands what is considered the “rulemaking procedure” to a point earlier than publication of the proposed rule by providing an additional procedure of which the agency may avail itself. If an agency elects not to provide a notice of rule development, the agency may only be able to overcome the presumption of feasibility using this criterion if it has published notice of its intent to adopt the nonrule policy as a rule, and is proceeding toward adoption of the rule.

Practicable

To overcome the presumption that rulemaking is practicable, an agency must prove 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 impracticable outside an adjudication to determine the substantial
interests of a party based on individual circumstances. The criteria for overcoming the presumption of rulemaking practicability are similar to the statutory definition of a rule. If the matter addressed by an agency's statement cannot reasonably be defined by sufficient detail or precision to allow the agency to establish principles, criteria, or standards for its decisions, then the statement cannot be a rule because if a matter has no common principles, criteria, or standards, it cannot be applied generally. Likewise, if the questions the agency's statement addresses are of such a narrow scope that more specific resolution of the matter is impracticable outside an adjudication to determine the substantial interest of a party based on individual circumstances, then the statement is not a rule because a matter not practicably susceptible to resolution by general standards cannot be generally applied. Thus, if an agency can overcome the presumption that adoption of a statement as a rule is practicable using these two statutory criteria, then the statement probably does not meet the statutory definition of a rule.

The criteria for overcoming the presumption of practicability will be difficult to satisfy for a nonrule policy applied in licensee disciplinary proceedings. A nonrule policy, the violation of which will trigger licensee disciplinary proceedings, in most instances will be a policy for which the detail and precision needed to establish general standards is reasonable, or for which the particular questions addressed are of a general scope such that resolving the matter outside adjudication is practical, because licensee disciplinary proceedings involve an agency's decision to enforce its policy against an individual. In making that decision, the agency will necessarily have determined that it wishes to generally proscribe some objectionable conduct. Thus, in most instances, the agency will have established sufficient detail and precision to address its policy by rulemaking because, in determining the objectionable conduct to be proscribed, the agency will have had to consider and resolve the details needed to make that determination.

For example, in Anheuser-Busch v. Dept. of Business Regulation, 393 So. 2d 1177 (Fla. 1st DCA 1981), the Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, brought a license disciplinary proceeding against Anheuser-Busch to enforce a nonrule policy against bar spending which was an established industry-wide practice in which a representative of an alcoholic manufacturer or wholesaler purchased drinks for consumers on a retail licensee's premises. The department in Anheuser-Busch would have been unable to overcome the presumption of rulemaking practicability for this nonrule policy using the statutory criteria because the department, in banning a well-known industry practice, had determined clearly and unambiguously what it wished to generally proscribe. By that determination, the department had reasonable detail and precision to address the policy by rule, and resolution of the policy outside adjudication was practicable.

F.S. §120.535 requires agencies to maintain a constant vigil over their nonrule policy statements keeping in mind the criteria which must be met to overcome the presumptions of feasibility and practicability. To some extent, §120.535 may result in agency orders which are "arid unreasoning edicts," as the McDonald court warned, because agencies may avoid explaining the policy basis for their decisions out of fear of a §120.535 challenge. More probably, §120.535, combined with the 1992 rulemaking procedure streamlining amendments to Florida's APA, will result in increased rulemaking activity that will provide the public with a clearer understanding of agency policy and provide for greater legislative oversight of agency lawmaking.


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2 St. Frances Hosp. v. DHRS, 553 So. 2d 1351 (Fla. 1st D.C.A. 1989).
3 McDonald v. Department of Banking and Finance, 546 So. 2d 569, at 580 (Fla. 1st D.C.A. 1987); citing R. Davis, DISCRETIONARY JUSTICE, 55 (1964).
4 McDonald, 346 So. 2d at 580.
5 Id. at 581.
6 Id.
7 Id. at 582.
8 Id.
9 Id.
10 Id.
11 Id. at 583. While the McDonald court noted that Florida's APA did not explicitly require agencies to make their generally applicable policy statements, the court reasoned that rulemaking must be the "necessary effect" of the APA, otherwise its prescribed rulemaking procedures might be "atrophied by nonuse." Id. at 580.
12 Id. at 583. For a critique of this judicial review incentive to rulemaking, see Burris, The Failure of the Florida Judicial Review Process to Provide Effective Incentives for Agency Rulemaking, 18 Fla. St. L. Rev. 662 (1991).
14 Dore, supra note 1, at 437; Burris, supra note 12.
15 Dore, supra note 1, at 438, 439. The legislature also amended §120.53 to specify the types of agency orders which must be cataloged and indexed and to require agencies to adopt a rule explaining how their orders would be indexed and where their orders must be maintained for public inspection. 1991 Fla. Laws Ch. 91-30, §2, 191.
17 Dep't. of Admin. v. Stevens, 344 So. 2d 290, 296 (Fla. 1st D.C.A. 1977).
18 Dep't. of Admin. v. Harvey, 356 So. 2d 323, 325 (Fla. 1st D.C.A. 1978) (quoting McDonald v. Dep't of Banking and Fin., 346 So. 2d 569, 581 (Fla. 1st D.C.A. 1977)).
19 Dept. of Commerce v. Matthews, 358 So. 2d 256, 258 (Fla. 1st D.C.A. 1978).
21 Fla. Stat. §120.53 is only effective when a person substantially affected by an agency statement seeks an administrative determination that the statement violates the mandate of that section. Fla. Stat. §120.535(2) (1991). If the policy is not challenged pursuant to §120.535, the agency may still rely on the nonrule policy in a §120.57(1) proceeding if the policy does not "enlarge, modify, or contravene the specific provision of law implemented or otherwise exceed delegated legislative authority," and the evidentiary basis and justification for the policy are explained in the recommended and final orders. Fla. Stat. §120.57(1)(b)(15) (Supp. 1992).
23 Id. at 978.
24 Board of Trustees of the Internal Improvement Trust Fund v. Lost Tree Village Corporation, 600 So. 2d 1240 (Fla. 1st D.C.A. 1992). The Lost Tree court held that the moratorium was not a rule because the lease applicants had no guarantee under Florida law that they would be permitted to conduct activities on sovereign lands, and, thus, the moratorium was "not intended by its own effect to create rights or to require compliance." and did not adversely affect the rights of the applicants. Id. at 1246 (quoting Florida League of Cities v. Admin. Comm'n, 586 So. 2d 397 (Fla. 1st D.C.A. 1991)).
25 Florida League, 586 So. 2d at 404.
26 Id.
27 Id.
28 Id.
29 Id. at 400. The Florida League court held that since the policy applied only to municipalities who submitted their comprehensive plans late or not in compliance, the policy was not an agency statement of general applicability and, thus, was not an illicit rule. Id. at 406.
30 Island Harbor v. Department of Natural Resources, 495 So. 2d 209, at 221 (Fla. 1st D.C.A. 1986). The Island Harbor court held that the "beach-dune system" definition was not an illicit rule because the definition did not extend beyond the intent of the statute and DNR's delegated authority, and the court could find no statute or case law requiring an agency's definition of a statutory term to be adopted by rule. Id.
33 Anheuser-Busch v. Dept. of Business Regulation, 393 So. 2d 1177, at 1181 (Fla. 1st D.C.A. 1981). The Anheuser-Busch court struck down the bar-spacing policy because the department failed to explain and defend the basis for the policy in the §120.57 hearing below. Id. at 1183.

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