RULES

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While speaking with a younger administrative lawyer regarding a state agency matter, I abruptly interrupted his tirade against agencies and the manner in which this particular agency was not following its own statutes, with a very simple question – "What do the rules say?" His response was one of shock and confusion –"Rules? What rules? Agencies have rules? How come I never heard of these 'rules'? What the heck is a rule anyway??!!?" I thought to myself, "Oh boy!" For many practitioners, their first foray into administrative law is met with some surprise when they encounter "agency rules." This installment is a brief introduction to the mystery of agency rules.

A "rule" is generally defined as "an agency statement of statewide/general applicability." In other words, a rule applies to everyone in the state who appears before that agency (it is quite telling that the exceptions to rules are longer than the definition of "rule" itself).[1] So, why rules? First, and from my experience, agencies really do not like rules and secondly they have so many rules because they need them. In my twenty years as an administrative/agency lawyer, I moved from despising rules as an Assistant General Counsel, because they seemed restrictive, to embracing rules, as a General Counsel, because they were so restrictive.

Rules provide uniformity and predictability. They provide that persons who are similarly situated can reasonably be expected to be treated in the same or similar manner when engaged in the same activity before an agency. Think of a prospective licensee attempting to obtain a professional license. By looking at the appropriate agency's rules, one can reasonably predict how the agency may view the license application, despite whether the applicants are from different parts of the state or country or with diverse backgrounds, be they educational or otherwise. So long as the rule criteria are met, the applicants will be treated fairly equally (CAVEAT: I say "fairly," because no two applicants are ever the same and their responses may differ and one may require greater scrutiny than another). Either way, the agency is bound to apply its rules in a uniform manner.

In the years prior to "rulemaking" and "rules," agency business was handled in an almost haphazard manner with "rules" lacking uniformity and being little more than "legacy memoranda" passed down from employee to employee (more seasoned practitioners reading this blog may take issue with such characterization, but hindsight is "20/20" after all). As Florida's population increased, so did the confusion as it became apparent that similarly situated people were not being treated equally; and the state had apparently lost control of its agencies. Statutorily mandated rulemaking and uniformity in the process worked to corral agencies into promulgating uniformity and predictability in the form of rules. This led to the inevitability of agencies promulgating numerous rules, some of which mimicked statutes verbatim, while others simply fashioned rules out of the ether because it "seemed like a good thing to do at the time." Governor Lawton Chiles in his famous "cook shack"[2] reference mandated agencies in the mid-1990's to reduce their rules by fifty per-cent. Agencies either diligently eliminated rules altogether or simply consolidated rules to achieve the mandate.

With further refinement, the legislature finally settled on language that agencies must have "specific legislative authority" to promulgate a rule. This put an end to "good idea rules," and restricted agencies to promulgate rules only as granted by the legislature to implement and explain statutory language. Thus agencies could no longer engage in utilizing "incipient agency policy" (loosely defined as an agency pronouncement of what it has

always done in the past with no real statutory support) that existed before anyone currently employed could recall. Conversely there was an increase in challenges to rules on the basis that the rules constituted an "invalid exercise of delegated legislative authority."[3] Essentially, agencies are not authorized "to implement statutory provisions setting forth general legislative intent and policy," and thus have no implied authority for rulemaking purposes. Sec. 120.52(8), Florida Statutes.

Whew! While rules can be restrictive and the newer administrative law practitioner may not fully embrace the perceived constraints under which to operate, the more seasoned agency practitioner comes to appreciate the transparency and predictability afforded by agency rules which ultimately leads to greater defensibility associated with rule compliance.

Iconic cases of interest:

1. Askew v. Cross Key Waterways, 372 So. 2d 913 (Fla. 1979);
2. St. John's River Water Management District v. Consolidated-Tomoka Land Co., 717 So. 2d 72 (Fla. 1st DCA 1998);
3. Financial Services Commission v. Florida Insurance Council, Inc., 938 So. 2d 545 (Fla. 1st DCA 2006);
4. State Bd. Of Trustees of the Internal Improvement Trust Fund v. Day Cruise Ass'n, Inc., 794 So. 2d 696 (Fla. 1st DCA 2001);
5. G.B. v. Agency for Persons with Disabilities, 143 So. 3d 454 (Fla. 1st DCA 2014);
6. State, Dept. of Financial Services v. Peter R. Brown Construction, Inc., 108 So. 3d 723 (Fla. 1st DCA 2013);
7. Florida Bd. Of Medicine v. Florida Academy of Cosmetic Surgery, Inc., 808 So. 2d 243 (Fla. 1st DCA 2002).

For more information on this topic, please contact the author, Colin Roopnarine, on the firm's Government and Regulatory Team.

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[1] Section 120.52(16), Florida Statutes, states: "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the 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 an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:

(a)?Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.
(b)?Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.
(c)?The preparation or modification of:

1.?Agency budgets.

2.?Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief
Financial Officer or Comptroller.

3.?Contractual provisions reached as a result of collective bargaining.

4.?Memoranda issued by the Executive Office of the Governor relating to information resources management.

[2] Gov. Chiles lamented at the numerous agency rules he would have to meander to construct a simple cook-shack on hunting property. He had been trying for over a year to get a permit for the cook shack and due to code requirements the cost had risen from $15,000 to $65,000 for construction.

[3] Section 120.52(8), Florida Statutes, sates, in part that, “Invalid exercise of delegated legislative authority” means action that goes beyond the powers, functions, and duties delegated by the Legislature.

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