

Governor's Rules Freeze Draws Legal Challenge: Governor Asserts "Supreme Executive Power"

by Lawrence E. Sellers, Jr.

Shortly after his inauguration, Governor Rick Scott issued an executive order that freezes all rulemaking by agencies under the direction of the Governor. The executive order has drawn a legal challenge from Rosalie Whiley, a blind woman, who asks the Florida Supreme Court to order the Governor to demonstrate the authority to issue such an order and, if the Court finds there is no authority, she seeks to have the order revoked. In response, the Governor asserts that, as the chief administrative officer, he has the "supreme executive power" to direct those agency heads who serve at his pleasure.

Executive Order No. 11-01

On January 4th, Governor Scott issued Executive Order No. 11-01.¹ The executive order freezes all new rules and establishes the Office of Fiscal Accountability and Regulatory Reform (OFARR), which is to review all rules prior to promulgation. The order immediately suspends rulemaking for all agencies under the direction of the Governor and prohibits agencies from promulgating rules unless they obtain prior approval from OFARR. The order also prohibits the Secretary of State from publishing notices of rulemaking except at the direction of OFARR.

The Whiley Petition for Writ of Quo Warranto

On March 28th, Ms. Whiley filed a petition for writ of quo warranto in the Florida Supreme Court.² She asks the court to order the Governor to demonstrate the authority for Executive Order No. 11-01, and, if the Court finds there is no authority, she seeks to have the order revoked. She argues that Florida's Administrative Procedure Act (APA) assigns certain rulemaking authority directly to the "agency heads," and that just because the Legislature allows the Governor

to appoint agency heads does not mean that the Governor has the power to control their rulemaking by fiat. She argues that the Governor does not have the constitutional authority to replace legislative mandates with procedures that are inconsistent with the APA. She argues that the executive order violates the separation of powers because: (1) it violates the APA's express prohibition on delegation of the agency head's authority to propose rules or to file proposed rules for adoption; (2) it violates the APA's express time limits for adopting or withdrawing proposed rules; and (3) it violates the APA's express mandate for the Secretary of State to publish notices of rulemaking.

Executive Order 11-72.

On April 8th, and after the filing of Ms. Whiley's petition, the Governor issued Executive Order 11-72.³ It expressly supersedes Executive Order No 11-01 and chronicles the rulemaking reviews conducted by OFARR pursuant to that order in the intervening three months. It notes that OFARR has reviewed over 11,000 existing rules and helped agencies identify 1,035 unnecessary rules for repeal. The new order contains many of the same requirements as the initial order. It no longer prohibits the Secretary of State from publishing notices; however, it provides that no agency may submit a notice of rulemaking for publication without OFARR approval. Unlike the initial order, Executive Order 11-72 begins by reciting that the Florida Constitution vests the "supreme executive power" in the Governor.

The Governor's Response to the Whiley Petition

On May 12th, the Governor filed a lengthy response to the petition. He argues that the two Executive Orders are fully consistent with the Gover-

nor's constitutional powers and the APA. The Governor says the OFARR approval process does not violate the Florida Constitution because the Governor has the power to inform agency heads who serve at his pleasure of the considerations that will govern their retention and removal, and that as the chief administrative officer and the supreme executive, the Governor may direct those agency heads who serve at his pleasure. The Governor also argues that the orders do not violate the APA because they do not require agency heads to improperly delegate or transfer rule-making responsibilities and OFARR does not require agencies to contravene APA time limits. In addition, the Governor contends that the Court lacks jurisdiction to issue a writ of quo warranto, in part because the petition constitutes a standard APA challenge that should be brought at DOAH.

The Whiley Reply

In a reply filed on June 2nd, Ms. Whiley argues that neither the "supreme executive power" nor the Governor's role as the chief administrative officer allow the Governor to ignore or displace statutes that govern rulemaking. She also argues that both executive orders violate the rulemaking authority that the Legislature gives exclusively to agency heads and rulemaking time limits mandated by the APA. She summarizes the narrow question presented as: Whether the Governor's authority under the separation of powers authorizes him to contravene the legislative mandate in the APA by giving rulemaking power to OFARR that should, by law, lie with agency heads?

HB 993.

Meanwhile, the Florida Legislature

enacted HB 993 during the recently-concluded 2011 Regular Session.⁴ HB 993 specifically refers to Executive Order No. 11-01 (but not to No. 11-72). The bill establishes an enhanced biennial review and compliance economic review process for rules in effect on November 16, 2010.⁵ However, the measure provides that an agency is exempt from these reviews “if it has cooperated or cooperates with OFARR in a review of the agency’s rules in a manner consistent with Executive Order No. 11-01, or any alternative review directed by OFARR.”⁶ It is unclear whether this legislation was intended to provide any authorization for the executive orders.

Ms. Whiley’s case presents interesting questions for administrative

lawyers. She has asked for expedited argument, asserting that “this suspension of rulemaking raises issues of great importance to determining a critical separation of powers issue affecting the Administrative Procedure Act, a law that affects the lives of thousands of Floridians everyday.” On June 17, 2011, the Court granted the request and set oral argument for June 29th. Stay tuned.

Endnotes:

¹ Executive Order No. 11-01 (issued Jan. 4, 2011) is available at: http://www.flgov.com/wp-content/uploads/2011/01/scott.eo_one.pdf.

² *Whiley v. Scott*, Case No. SC11-592 (petition filed Mar. 28, 2011). The petition and other pleadings are available at: http://www.floridasupremecourt.org/pub_info/summaries/briefs/11/11-592/index.html.

³ Executive Order No. 11-72 (issued Apr. 8,

2011) is available at: <http://www.flgov.com/wp-content/uploads/orders/2011/11-72-fiscal.pdf>.

⁴ As of June 5, 2011, HB 993 had not yet been presented to the Governor and was therefore not yet effective.

⁵ For a summary of the new reviews required by HB 993, see Eric Miller, HB 7253 & HB 993: The Legislature’s Policy of Economic Review and the 2011 Amendments to the APA, *Administrative Law Section Newsletter*, Vol. XXXII, No. 4 (June 2011).

⁶ HB 993, s. 5, to be codified as s. 120.745(9)(a), F.S.

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