



# ADMINISTRATIVE LAW SECTION NEWSLETTER

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## Governor's Rules Freeze: Supreme Court Says Legislative Power Trumps "Supreme Executive Power"

by Lawrence E. Sellers, Jr.

On August 16, 2011, the Florida Supreme Court issued an opinion holding that Governor Rick Scott "impermissibly suspended agency rulemaking to the extent that Executive Orders 11-01 and 11-72 include a requirement that the Office of Fiscal Accountability and Regulatory Reform (OFARR) must first permit an agency to engage in the rulemak-

ing which has been delegated by the Florida Legislature." Two justices dissented, arguing that Governor Scott was completely within his authority as the chief administrative officer in issuing Executive Order 11-72.

### The Executive Orders and the Legal Challenge.

One of Governor Scott's first official

acts was to issue an executive order suspending (some called it "freezing") all rulemaking by agencies under his direction and prohibiting agencies from promulgating rules unless they obtained prior approval from the newly created OFARR. This executive order prompted a legal challenge from Rosalie Whiley, a blind woman, who asked the Florida Supreme

*See "Governor's Rules Freeze" page 14*

## Chair's Column

by Allen R. Grossman

As I assume leadership of the Administrative Law Section of The Florida Bar, I must take a moment to acknowledge and thank several individuals who have contributed significantly to the good and welfare of the Section and its more than 1200 members. First, I would like to recognize and thank Cathy Sellers who has dedicated significant effort to the betterment of the Section for many years. Her dedication and devotion to the Section were repeatedly displayed during the past year in her outstanding service as the Chair of the Administrative Law Section. At the same time that Cathy com-

pleted her term as Section Chair, two other individuals also completed extended terms on the Section's Executive Council. Both William "Bill" Williams and Andrew "Andy" Bertron decided, after long and distinguished years of service, during which each accepted the responsibility of serving as Section Chair and then returned to extended service as active and reliable members of the Section's Executive Council, to step aside and allow newer members to move up and take their places in the leadership of the Section. The leadership and expertise exhibited by these three individuals have been consistent and stellar for

so many years and I hope and expect that they will each continue to contribute to the continued growth and

*See "Chair's Column," next page*

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Court to order the Governor to demonstrate the authority to issue such an order and, if the Court found there was no authority, to revoke the order. Ms. Whiley argued that neither the "supreme executive power" nor the Governor's role as the chief administrative officer allows the Governor to ignore or displace statutes that govern rulemaking. She also argued that both executive orders violate the rulemaking authority that the Legislature has given exclusively to agency heads. She summarized 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? In response, the Governor asserted that, as the chief administrative officer, he has the "supreme executive power" to direct those agency heads who serve at his pleasure.<sup>1</sup>

**The Majority Opinion.**

A majority of the Court determined that rulemaking is a derivative of lawmaking and that the legislative branch is responsible for the rulemaking function. The majority specifically noted that the Legislature has delegated certain rulemaking responsibilities to agency heads, such as the authority to determine whether to go forward with proposing, amending, repealing or adopting rules. The majority concluded that the executive orders, to the extent each suspends and terminates rulemaking by precluding publication of notice and other compliance with the APA absent prior approval from OFARR--contrary to the APA--infringe upon the rulemaking process and encroach upon the Legislature's delegation of rulemaking power as set forth in the APA.

The majority also rejected the Governor's argument that the Florida Constitution's grant of the supreme executive power to the Governor authorizes the Governor to suspend, terminate and control agency rulemaking, contrary to the APA. The

majority concluded that the Legislature retains the sole right to delegate rulemaking authority to agencies, and held that all provisions in both Executive Orders 11-01 and 11-72 that operate to suspend rulemaking contrary to the APA constitute an encroachment upon a legislative function. The Court therefore granted Ms. Whiley's petition, but withheld issuance of the writ of quo warranto, trusting that any provision in Executive Order 11-72 suspending agency compliance with the APA will not be enforced against an agency until such time as the Legislature may amend the APA or otherwise delegate such rulemaking authority to the Executive Office of the Governor.<sup>2</sup>

**The Dissenting Opinions.**

Chief Justice Canady and Justice Polston filed dissenting opinions. The Chief Justice noted that Ms. Whiley had failed to show any specific action required by law that was prevented by the implementation of the executive orders, and that the majority had not come to terms with the absence from Florida law of any restrictions on the authority of the Governor to supervise and control policy choices made by subordinate executive branch officials with respect to rulemaking. He opined that the Governor's right to exercise supervision and control flows from the Florida Constitution, which vests in the Governor the "supreme executive power" and the power to appoint executive department heads who serve at the Governor's pleasure. He also was of the view that the majority unjustifiably concluded that the Legislature had implicitly divested the Governor of his supervisory power with respect to executive officials who serve at his pleasure.

Likewise, Justice Polston found that the Governor, as the chief administrative officer charged with faithfully executing the law and with managing and ensuring that the agencies under his control also faithfully execute the law (including the APA), was completely within his constitutional authority in issuing Executive Order 11-72. Following a detailed review of the rulemaking process established in the APA, Justice Polston argued that agency heads may comply with

both the APA and the executive order, and that the record discloses not a single instance where the executive order has caused any actual violation of the rulemaking requirements in the APA. In addition, he argued that any actual violation of the APA should be challenged using the remedies provided by the APA, and not in an extraordinary writ proceeding before the Supreme Court. He therefore would have denied the petition for writ of quo warranto.

**Some Interesting Questions.**

The majority opinion raises a number of interesting questions. Here are a few:

*Who knew one could file a challenge to agency action directly in the Florida Supreme Court?*

Ms. Whiley's attorneys knew, but don't try this at home, or otherwise plan to add the petition for writ of quo warranto to the APA's "impressive arsenal of varied and abundant remedies for administrative error."<sup>3</sup> Here, the majority found that this case raised a serious constitutional question relating to the authority of the Governor and the Legislature, respectively, in rulemaking proceedings, and believed that a decision on this issue would provide important guiding principles to other state courts. This won't be the case with most challenges to agency action.

*What is the effect of the opinion on the Executive Order?*

Technically, the Court granted relief only "to the extent that the Executive Orders 11-01 and 11-72 include a requirement that OFARR must first permit an agency to engage in the rulemaking which has been delegated by the Florida Legislature."<sup>4</sup> As such, it appears that the other provisions of Executive Order 11-72--which the majority recognized were not at issue in this proceeding--remain valid and in force. Among other things, these unaffected provisions require review of proposed and existing rules to determine if they unnecessarily restrict entry into an occupation, adversely affect the availability of services, unreasonably affect job creation or retention, impose unreasonable restrictions on those seeking

employment, or impose unjustified costs on businesses and consumers. A memorandum from the Governor's office indicates that OFARR will adjust its policies and procedures to comply with the Court's order and that these changes will be memorialized in a forthcoming executive order.<sup>5</sup> The memorandum also states that OFARR will continue to advise the Governor on rulemaking, that OFARR will continue to require agencies to provide information on rulemaking activities and that OFARR will continue to provide advice and commentary on proposed rulemaking actions. Agencies should continue to provide the requested information to OFARR prior to publication of rulemaking actions; however, no formal authorization to publish is required from OFARR.

*What is the practical effect of the opinion on Ms. Whiley?*

The particular proposed amendment to the online application for food stamps that was of concern to Ms. Whiley was reportedly approved by OFARR the day after it was submitted to the office by the Department of Children and Families.<sup>6</sup> Similarly, it appears OFARR has approved the proposed rules identified by Amici Florida Audubon Society and Disability Rights Florida. Of course, this doesn't mean that the agencies have adopted rules that are to the liking of the challenger and amici; it simply means that these rulemaking proceedings are no longer being delayed pending OFARR review.

*What is the practical effect of the opinion on agency heads?*

The Governor argued that 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. While the majority rejected this argument, it seems likely that these agency heads who serve at the Governor's pleasure will continue to "voluntarily" consult with OFARR,

particularly with respect to significant rulemaking initiatives.<sup>7</sup>

*What is the practical effect of the opinion on the rule reviews required by HB 993?*

The Florida Legislature enacted HB 993 during the 2011 Regular Session.<sup>8</sup> 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.<sup>9</sup> 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."<sup>10</sup> The majority found that this legislation could not provide any authorization for the challenged parts of the executive orders that purport to suspend or terminate rulemaking, since HB 993 applies to rules already in effect on November 16, 2010. Presumably, this also means that agencies need not comply with the challenged (and now invalidated) provisions of the executive orders to qualify for the exemption provided in HB 993.

*Will the Legislature amend the APA to authorize the Governor to suspend or terminate rulemaking?*

The majority expressly recognized that the Legislature may amend the APA or otherwise delegate such rulemaking authority to the Executive Office of the Governor.<sup>11</sup> Will the Legislature do so?<sup>12</sup> Alas, it seems we have run out of space. But stay tuned, as the next Regular Session will begin in just a few months, on January 10, 2012.

#### Endnotes

<sup>1</sup> For a summary of the executive orders and the parties' arguments as presented to the Court, see Lawrence Sellers, *Governor's Rules Freeze Draws Legal Challenge: Governor Asserts "Supreme Executive Power,"* Administrative Law Section Newsletter, Vol. XXXII, No. 4 (June 2011).

<sup>2</sup> Executive Order 11-72 expressly supersedes Executive Order 11-01, so presumably the latter is no longer in effect.

<sup>3</sup> State ex rel. Dep't of General Services v. Willis, 344 So. 2d 580, 589 (Fla. 1st DCA 1977).

<sup>4</sup> Slip Op. at 1-2.

<sup>5</sup> Memorandum from Stephen R. MacNamara to agency heads re interim guidance regarding Office of Fiscal Accountability and Regulatory Reform (Aug. 19, 2011).

<sup>6</sup> Slip Op. at 48 (Polston, J., dissenting). Counsel for Ms. Whiley reports that the agency has not yet revised the online application to address Ms. Whiley's substantive concerns.

<sup>7</sup> See Memorandum cited in n. 4, supra ("With respect to any requests for authorization that OFARR had previously denied, agencies may proceed with such rulemaking if they so choose, but agencies should note that OFARR's previously expressed guidance with respect to such proposed rulemaking represents the strongly held views of the Office of the Governor as to the efficacy and the propriety of the proposed action.")

<sup>8</sup> HB 993 was approved by the Governor on June 24, 2011. See Chapter 2011-225, Laws of Florida, available at [http://laws.flrules.org/files/Ch\\_2011-225.pdf](http://laws.flrules.org/files/Ch_2011-225.pdf).

<sup>9</sup> 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).

<sup>10</sup> HB 993, s. 5, to be codified as s. 120.745(9)(a), Fla. Stat.

<sup>11</sup> Slip Op. at 27. The majority also recognized that the Legislature had in specific terms and circumstances delegated to the Executive Office of the Governor certain responsibility for the oversight of agency rulemaking. Id. at 25.

<sup>12</sup> At one point during the Legislative Session, HB 993 included a section providing for the summary repeal of rules by the Governor and other statewide elected executive officers within the first six months of their elective terms. See CS/CS/HB 993, s. 3. This provision was removed from the bill and was not enacted.

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