

Who Makes the Rules?

Florida's New Paradigm of Constitutional Rulemaking

To avoid wasting valuable time and resources, a party wanting to challenge an administrative agency's rule or rule-based decision is well advised to seek advice from an administrative attorney to determine first from where the agency derived its rulemaking authority.

The answer to this first necessary step may change the entire recommended course of action for a particular case.

Florida administrative agencies can and do derive their rulemaking power both from statutory and constitutional grants of authority. When the grant of rulemaking authority is statutory, that means that it is the Florida Legislature's delegating authority. When the grant of rulemaking authority is constitutional, however, that means it is the Florida Constitution which is delegating authority.

Given the passage of numerous amendments to Florida's Constitution in the last general election, including several that resulted in agency rulemaking directed by the constitutional amendments, it is now more important than ever for this threshold inquiry to be done at the outset of any case in which an agency has taken adverse action based on its rules and regulations.

The source of the authority for an objectionable rule may affect which tribunal has jurisdiction to hear a challenge to that rule. Picking the wrong tribunal in which to file your challenge to the agency's rule or rule-based decision can result in inefficiencies, delay, waste of resources, and could even foreclose the ability to challenge altogether.

Generally speaking, the Florida Administrative Procedure Act (APA) codifies the procedures to challenge a state agency rule and grants to the Division of Administrative Hearings (DOAH) the jurisdiction to hear and resolve agency rule challenges. DOAH, however, does not generally have jurisdiction to address constitutional claims. When the authority for the rule is derived from statute—which is the case for the vast majority of rules—there are no jurisdictional concerns. But when a rule is promulgated pursuant to constitutional authority, questions arise as to the scope of DOAH's authority to address a challenge of that rule, and in what forum such a challenge must be heard.

In fact, appellate courts have held that DOAH does not have subject matter jurisdiction over at least some forms of agency rulemaking when that agency's rulemaking authority is derived from the Florida Constitution. For example, a Florida appeals court held in *NAACP, Inc. v. Fla. Bd. of Regents*, 876 So. 2d 636 (Fla. 1st DCA 2004), that administrative rules promulgated by the Florida state university system's Board of Governors could not be challenged in a DOAH proceeding because "the Board of Governors' constitutional authority to promulgate the challenged rules [was] not dependent on any delegation from the Florida Legislature."

Holdings on the books like this suggest Florida’s recent constitutionally-delegating rulemaking may fall outside of the normal DOAH purview to hear and resolve agency rule disputes. At the same time, given the focus on this being a matter of “subject matter jurisdiction” may mean that typical precautionary approaches of bringing the case in DOAH anyway have a downside in this subject area as well.

Often, cases will be brought in DOAH in an abundance of caution, notwithstanding concerns about whether it is the proper venue, especially where there is a fear of being kicked out of circuit court for failure to exhaust administrative remedies. But there may be pitfalls to this route—subject matter jurisdiction is an issue that can be raised at any time, by any party, which means that the administrative law judge or even the district court of appeal after an entire case has been litigated in DOAH could end up being dismissed for lack of jurisdiction, leaving the challenger back at square one, potentially time barred from choosing another route at that point.

For all of these reasons, it is important at the outset of every rule challenge to have qualified counsel conduct a careful analysis of the source of the grant of authority under which the objectionable rule was promulgated. This is the only way to be sure that a rule challenge is being brought before a tribunal with the necessary subject matter jurisdiction to hear and adjudicate the claims.

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