

STORAGE NAME: h0107a.go

DATE: January 21, 1999

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
ANALYSIS**

BILL #: HB 107

RELATING TO: Administrative Procedure Act

SPONSOR(S): Representative Pruitt and others

COMPANION BILL(S): SB 206 (Identical)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) WATER AND RESOURCE MANAGEMENT YEAS 5 NAYS 3
 - (2) GOVERNMENTAL OPERATIONS YEAS 6 NAYS 0
 - (3) GOVERNMENTAL RULES AND REGULATIONS
 - (4)
 - (5)
-

I. SUMMARY:

House Bill 107 addresses cases interpreting several recent amendments to the Administrative Procedure Act. It provides that:

- ◆ Agency rulemaking can only implement, interpret, or make more specific the detailed powers and duties granted by the enabling statute.
- ◆ An agency may not adopt a rule simply because it is reasonably related to the purpose of the enabling legislation or is within the agency's class of powers and duties and is not arbitrary and capricious.
- ◆ An agency has the burden of going forward and the burden to prove by a preponderance of the evidence that a proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised.
- ◆ An agency in its final order may modify or reject the clearly erroneous conclusions of law over which it has substantive jurisdiction.

The bill also makes a technical correction to the definition of agency, and amends the definition of agency action to provide that agency confirmation or affirmation of the applicability of a statutory exemption shall not be considered agency action for the purposes of challenge under the APA.

The bill has an indeterminate fiscal impact and takes effect upon becoming law.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The Administrative Procedure Act

Validity of Rulemaking

In 1996, the Legislature significantly revised the Administrative Procedure Act (APA) in Chapter 120, Florida Statutes, to clarify definitions and exceptions and to simplify its procedures. Notable among the 1996 amendments to the APA are amendments establishing a standard to determine the validity of a proposed rule. Identical language is found in ss. 120.52(8) and 120.536(1), F.S.:

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement, interpret, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than the particular powers and duties conferred by the same statute.

There are three appellate cases interpreting this language. First, in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co., et al*, 23 Fla. L. Weekly D1787 (Fla. 1st DCA July 29, 1998), the petitioner land owners challenged proposed rules of the District to regulate certain aspects of development in the Spruce Creek and Tomoka River Hydrologic Basins. An Administrative Law Judge (ALJ) in the Division of Administrative Hearings held that, although the proposed rules were supported by competent and substantial evidence, the rules were invalid as a matter of law because the rules exceeded the grants of rulemaking authority found in ss. 373.413(1) and 373.416(1), Florida Statutes. The District appealed on this issue.

The First District Court of Appeal reversed the ALJ's final order, holding that the proposed rules were valid. In doing so, the court applied a "functional test based on the nature of the power or duty at issue and not on the level of detail in the language of the applicable statute." *Tomoka* at 23 Fla. L. Weekly D1790. "The question is whether the rule falls within the range of powers the Legislature has granted to the agency for the purpose of enforcing or implementing the statutes within its jurisdiction. A rule is a valid exercise of delegated legislative authority if it regulates a matter directly within the class of powers and duties identified in the statute to be implemented." *Id.*

Second, in *Department of Business and Professional Regulation v. Calder Race Course, Inc., et al.*, 23 Fla. L. Weekly D1795 (Fla. 1st DCA July 29, 1998), the respondent Department challenged the ALJ final order invalidating rules that would authorize the Department to conduct warrantless searches of persons and places within a permitted pari-mutuel wagering facility. The First District Court of Appeal affirmed the ALJ, noting

first that where “government is to be given the right to conduct a warrantless search of a closely regulated business, the Fourth Amendment demands that the language of the statute delegating such power do so in clear and unambiguous terms,” and second, that “. . . highly regulatory laws are subject to strict construction and may not be extended by interpretation.” *Calder* at 23 Fla. L. Weekly D1797. The court, in applying the *Tomoka* reasoning, found that the Department did not have the statutory basis to adopt these rules because the enabling statute did not provide the specific law under which such a rule could be adopted.

Third, in *St. Petersburg Kennel Club v. Department of Business and Professional Regulation*, 23 Fla. L. Weekly D2046 (Fla. 2d DCA Sept. 2, 1998), the petitioner kennel club appealed an ALJ final order validating Department rules defining the game of poker, and a Department final order denying application of three card games. The court reversed both the ALJ final order that validated rules of the Department defining the game of poker and reversed a final order of the Department denying approval of three particular card games. The court, in applying s. 120.536(1), F.S., noted that the enabling statutes did not provide specifically that the Department is authorized to adopt rules to define the game of poker. The Department could not administratively determine what would constitute the game of poker and therefore could not deny approval of card games because the denial was based upon application of an invalid rule. *St. Petersburg Kennel Club* at 23 Fla. L. Weekly D2046.

Order and Burden of Proof in Rule Challenge Cases

The 1996 amendments to the APA also changed the burden of proof when a challenge is made as to the validity of a proposed rule. In amending s. 120.56(2), F.S., the Legislature removed the presumption of validity that cloaked a proposed rule; the APA now states that a proposed rule is not to be presumed valid or invalid. Further, when a petitioner challenges a proposed rule as an invalid exercise of delegated legislative authority, it is the agency that must proceed with the burden to prove the validity of the rule. See section 120.56(2)(a).

However, in *Tomoka*, the ALJ interpreted this procedure to mean that although the agency has the ultimate burden of establishing the validity of the proposed rule, the petitioner has the burden of going forward with the evidence supporting the objections. The court approved this interpretation, noting that “if the agency had the burden of going forward with the evidence, it would be forced to rebut every objection made in the petition, if for no other reason than to avoid the possibility of an award of attorney fees for its failure to justify the proposed rule.” *Tomoka* at 23 Fla. L. Weekly D1788.

Additionally, in *Board of Clinical Laboratory Personnel v. Florida Ass’n of Blood Banks*, 23 Fla. L. Weekly D1851 (Fla. 1st DCA August 3, 1998), the court reversed the ALJ’s final order on the issue of what evidentiary standard should be employed to prove the validity of a challenged rule. The ALJ held that the agency had to establish proof by a preponderance of the evidence. In reversing on this issue, the court noted that the APA did not require this level of proof when challenging a proposed rule but did not state what should be the standard. *Board of Clinical Laboratory Personnel* at 23 Fla. L. Weekly D1852.

Agency Confirmation of the Applicability of Statutory Exemptions

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For example, s. 373.406(2), F.S. (1997) provides an exemption to Part IV, Ch. 373 F.S., Management and Storage of Surface Waters, for persons engaged in “agriculture, purposes consistent with the practice of such occupation.” It is argued that such an exemption is self-executing; no agency action need occur for a person to qualify under inquiry of the Department of Environmental Protection, asking that it confirm or affirm that the activity in question does qualify for the exemption. However, case law suggests may be considered final agency action for purposes of challenge under the APA. See _____, 580 So.2d 267 (Fla. 1st DCA 1991)

This chapter regulates the affairs of water control districts. These districts are limited-purpose local governmental units administratively separate from state and other local when general-purpose local governments (cities and counties) are unwilling or unable to provide the needed capital or services. The chapter was significantly revised in 1997 to, from ad valorem assessments. Additionally, the revisions repealed the water control districts’ authority to adopt rules, substituting that with the authority to adopt policies and

B. EFFECT OF PROPOSED CHANGES:

water control districts from the definition of an agency subject to the APA, and amends the definition of agency action.

proposed changes.

C.

1. Less Government:

Does the bill create, increase or reduce, either directly or indirectly:

(1)

Although HB 107 does not create any new authority for agencies to adopt rules, provisions found in the bill _____ the authority of agencies to adopt rules pursuant to the more restrictive standard for rulemaking enacted

Placing on the agency the burden of going forward and the burden of proof by a preponderance of the evidence will not affect the authority of an agency to make rules, but will affect its ability to validate the rule in a rule challenge proceeding. Also, restricting an agency's ability to reject or modify an ALJ's recommended final order to "clearly erroneous" conclusions of law will reduce the ability of an agency to adjudicate disputes.

- (2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

- (3) any entitlement to a government service or benefit?

N/A

- b. If an agency or program is eliminated or reduced:

- (1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

- (2) what is the cost of such responsibility at the new level/agency?

N/A

- (3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

- a. Does the bill increase anyone's taxes?

N/A

- b. Does the bill require or authorize an increase in any fees?

N/A

- c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

ss. 120.52(1)(b), (2) and (8), 120.536(1), 120.56(2)(a), and 120.57(1)(1), F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Removes citation to Ch. 298, F.S., from the definition of agency found at s. 120.52(1)(b), F.S. Inserts language that removes agency confirmation or affirmation of a statutory exemption from the definition of agency action found at s. 120.52(2), F.S. Amends the flush left paragraph of s. 120.52(8), F.S., relating to the standard to determine the validity of a proposed rule, to clarify the meaning of the 1996 amendment to this subsection. Strikes the adjective "particular" and replaces it with "detailed." Inserts language which rejects a judicial interpretation of the 1996 amendments which created a functional test for the validity of agency rules.

Section 2: Amends s. 120.536(1), F.S., to clarify the meaning of the 1996 amendments to this subsection (identical changes from section 1 above to identical paragraph in other subsection). Strikes the adjective “particular” and replaces it with “detailed.” Inserts language which rejects a judicial interpretation of the 1996 amendments which created a functional test for the validity of agency rules.

Section 3: Amends s. 120.56(2)(a), F.S., relating to special provisions for challenging proposed rules. Provides that the agency has the burden of going forward and the burden of proof in demonstrating that a proposed rule is not an invalid exercise of delegated legislative authority. Also provides that the agency must prove that the proposed rule is not an invalid exercise of delegated legislative authority by a preponderance of the evidence.

Section 4: Amends s. 120.57(1)(1), F.S., relating to additional procedures applicable to hearings involving disputed issues of material fact. Makes clear that an agency may, in a final order, reject or modify clearly erroneous conclusions of law only when it has substantive jurisdiction over the law.

Section 5: Provides that the act takes effect upon becoming law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

N/A

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

HB 107 does not require the counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

HB 107 does not reduce the authority that municipalities or counties have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

HB 107 does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

Primarily, the bill would clarify the meaning of the 1996 APA law, about which some recent court opinions expressed uncertainty, rather than change the meaning of the rulemaking standards. The 1996 changes contemplated a comprehensive dialog between agencies and the legislature regarding the sufficiency of the delegated power in an enabling statute for then-existing rules, see s. 120.536(2), F.S.. That process has proved very workable in determining an appropriate level of specificity in an enabling statute regarding the particular powers and duties of an agency. As a result of the 1996 changes, both the legislature and agencies are on notice to avoid enabling statutes without sufficient detail, even while recognizing that the level of specificity will vary according to the particular powers and duties authorized. In practice, the dialog between the legislature and agencies will assist in the oversight function of the legislature as intended by the legislature when it enacted the 1996 amendments.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On January 7, 1999, the Committee on Water and Resource Management adopted by a vote of 7-3 one amendment to HB 107. The amendment specifies that judges hearing appeals of agency rules shall not defer, or otherwise give any special weight, to an agency's interpretation of a law or a rule. The amendment was not incorporated into the bill, but will travel separately. The Committee on Governmental Operations adopted without objection a substitute amendment to this traveling amendment (amendment 10) which merely moved the language to another subsection of s. 120.68, F.S.

On January 21, 1999, the Committee on Governmental Operations adopted without objection all eleven amendments offered. In numerical order:

Amendment 1. The amendment removes from the definition of agency action certain language which excludes agency confirmation of a statutory exemption; amends s. 120.52, F.S. (1998 Supp.). This keeps current law in place.

Amendment 2. This amendment clarifies the 1996 standards when agencies adopt rules pursuant to statutory authority, and does not change the standard; amends s. 120.52, F.S. (1998 Supp.). The words "particular" and "detailed" are replaced by "specific", which may better reflect the intent of the 1996 APA law.

Amendment 3. This amendment repeats the clarifying language from amendment 2 above in another section of the same subsection of s. 120.52, F.S. (1998 Supp.).

Amendment 4. This amendment repeats the same language change from amendment 2 above in an identical paragraph in another subsection of s. 120.536, F.S.

Amendment 5. This amendment repeats the same language change from amendment 3 above to an identical paragraph in another subsection of s. 120.536, F.S.

Amendment 6. This amendment establishes that the petitioner has the burden of going forward with particular objections when challenging the validity of a proposed rule under s. 120.56, F.S., rather than requiring the agency to go forward and disprove everything in the petition. This amendment also makes clear that the burden of proof will be by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority.

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Amendment 7. This amendment provides for a two-year rule authorization process, similar from challenge until the agency determines if it has sufficient statutory authority to adopt the rule, and if not, to ask the legislature to enact authorizing legislation; amends s. 120.56, F.S.

120.52, F.S. (1998 Supp.) to another in the same sentence in order to not disrupt the flow of an existing legal test of validity.

above in an identical paragraph in another subsection of s. 120.536, F.S.

Amendment 10. (Discussed above amending the traveling amendment adopted by the

Amendment 11. This amendment prohibits the retroactive application of rules; amends s. 120.54, F.S. (1998 Supp.)

SIGNATURES:

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