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HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
GOVERNMENTAL RULES AND REGULATIONS
ANALYSIS

BILL #: CS/HB 107

RELATING TO: Administrative Procedure Act

SPONSOR(S): The Committee on Governmental Rules and Regulations, Representative Pruitt and others

COMPANION BILL(S): SB 206 (Compare)

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 YEAS 6 NAYS 1
(4)
(5)

I. SUMMARY:

Committee Substitute for House Bill 107 incorporates the amendments adopted by all the committees of reference. The committee substitute revises and clarifies amendments to the APA enacted in 1996, ones that have been subsequently interpreted by the courts.

CS/HB 107 provides that:

- Agency rulemaking can only implement or interpret the specific powers and duties granted by the enabling statute.
- An agency may not adopt a rule because it is within the agency's class of powers and duties found in the enabling statute.
- A petitioner has the burden of going forward with presenting the objections to the proposed rule. The agency then has 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.
- When reviewing a challenged final order, the court shall not defer to an agency's construction of a statute or rule or otherwise afford any special weight to the agency's interpretation of a statute or rule.

The bill also rewrites the definition of agency for clarity and makes a technical correction to that definition.

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

II. SUBSTANTIVE ANALYSIS:
PRESENT SITUATION:

Chapter 120, F.S., The Administrative Procedure Act

Standard for Agency Rulemaking

In 1996, the Legislature significantly revised the Administrative Procedure Act (APA), 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.

Rule authorization activities under section 120.536. The Legislature also provided an opportunity to agencies to review existing rules to determine whether these rules were in compliance with this new rulemaking standard. Section 120.536(2) directed agencies to identify and report those rules that exceeded the new rulemaking standard. Rules identified by the agencies were reported to the Joint Administrative Procedures Committee (JAPC), which then compiled a report presented to the Senate President and Speaker of the House on October 31, 1997. The JAPC reported that 114 state agencies identified 2,236 rules that exceeded rulemaking authority, and 19 school boards identified 3,614 rules that exceeded rulemaking authority.

The rules identified are shielded from challenge as to validity until July 1, 1999. In the 1998 Regular Session the Legislature had the opportunity to address legislation authorizing those rules. In the 1998 session, 48 bills submitted for the purpose of authorizing rules identified under this section were enacted; several other bills also addressing rules identified under this section were enacted. Agencies were to have initiated repeals of those rules not ratified by the Legislature beginning January 1, 1999. Finally, the shield is entirely removed on July 1, 1999, and the JAPC or any substantially affected party may petition for the repeal of any remaining rule identified as exceeding rulemaking authority and for which authorizing legislation has not been enacted.

Analysis of the standard. The first sentence of the rulemaking standard found in s. 120.536(1) is clear; a rule must have as its basis a specific enabling statute, and a grant of rulemaking authority is necessary but not sufficient for the adoption of a rule.

The third sentence overrules a judicially created test to determine the validity of a rule. No longer would a rule be valid if it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious, nor would an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. As it was described in the Final Bill Analysis of Senate Bill 2290 and 2288 (1996):

> These two provisions would overrule the decisions that followed the rule established prior to the enactment of the section 120.52(8), Florida Statutes, that "rules and regulations would be upheld so long as they are reasonably related to the purpose of the enabling legislation and are not arbitrary or capricious." *General Telephone Co. of Florida v. Florida Public Service Commission*, 446 So.2d 1063 (Fla. 1984); *Department of Labor and Employment Security, Division of Workers' Compensation v. Bradley*, 636 So.2d 802 (Fla. 1st DCA 1994); *Florida Waterworks Ass'n v. Florida Public Service Com'n*, 473 So.2d 237 (Fla. 1st DCA 1985); *Department of Professional Regulation, Board of Medical Examiners v. Durrani*, 455 So.2d 515 (Fla. 1st DCA 1984) *Agrico Chemical Co. v. State, Department of Environmental Protection*, 365 So.2d 759 (Fla. 1st DCA 1978); *Florida Beverage Corp. v. Wynne*, 306 So.2d 200 (Fla. 1st DCA 1975).

However, it is the standard for rulemaking found in the second sentence and reiterated in the fourth sentence, that have generated discussion since enactment. Several appellate cases have sought to interpret this standard. First, in *St. Johns River Water Management District v. Consolidated-Tomoka Land Co., et al,* 717 So.2d 72 (Fla. 1st DCA July 29, 1998), the petitioner land owners challenged proposed rules of the District that would create a regulatory subdistrict in the Spruce Creek and Tomoka River Hydrologic Basins, and would create new standards for managing and storing surface waters in developments within this basin. *Tomoka* at 717 So.2d 75. An Administrative Law Judge (ALJ) in the Division of Administrative Hearings held that although the proposed rules were not arbitrary or capricious, were supported by competent and substantial evidence, and substantially accomplish the statutory objectives, the rules were invalid as a matter of law because the rules lacked the underlying statutory detail required by the new rulemaking standard in ss. 120.52(8) and 120.536(1), F.S. *Id.* at 76. The District appealed on this issue.

The First District Court of Appeal reversed the ALJ's final order, holding that the proposed rules are 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 717 So.2d 80.

> 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. In applying this test, the court found that delegated legislative authority was to identify geographic areas that require greater environmental protection and to impose more restrictive permitting requirements in those areas. *Id.* at 81. The challenged rules fell within the class of powers delegated by the statute and therefore were a valid exercise of delegated legislative authority. *Id.*

Second, in *Department of Business and Professional Regulation v. Calder Race Course, Inc., et al.*, 1998 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-mutual wagering facility. *Id.* at 23 Fla. L. Weekly D1795. 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." *Id.* 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. *Id.*

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. *Id.* 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. *Id.* 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. *Id.* 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. *Id.*

<u>Order of Presentation of Evidence and Burdens of Proof in Rule Challenge Cases</u>

The 1996 amendments to the APA also changed the burden of proof when challenge is made 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. *Tomoka* at 717 So.2d 76-7.

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 respondent Board challenged the ALJ's invalidation of proposed rule changes to the licensure requirements of blood bank

personnel made in response to changes in the federal licensure requirements. *Id. at* 23 Fla. L. Weekly D1852. The court reversed the ALJ's final order, noting that although s. 120.56(2) did require the agency to prove by a preponderance of the evidence that the proposed rules satisfied s. 120.52(8), that section did not require the agency to prove by a preponderance of the evidence that its proposed changes were not an invalid exercise of delegated legislative authority. *Id.* The court noted that the APA did not require this level of proof when challenging a proposed rule but the court did not state what should be the level of proof. *Id. See Agency for Health Care Administration v. Fla. Coalition of Professional Laboratory Organizations* 718 So.2d 869 (Fla. 1st DCA 1998).

Finally, in *Dept. Of Children and Families v. Patricia Morman d/b/a Patti Cake Nursery*, 23 Fla. L. Weekly 1900 (Fla. 1st DCA August 7, 1998), the concurring opinion reads s. 120.57(1)(l), F.S., relating to the adoption of the final recommended order of the ALJ by the agency, to mean that an agency may reject or modify only the interpretations of administrative rules over which it has substantive jurisdiction, but that it may reject or modify any conclusion of law found in a recommended final order. *Id.* In this case, the court reversed the ALJ's *sua sponte* dismissal of the complaint against the respondent because the petitioner agency did not provide enough specificity in the complaint against which the respondent could defend. *Id.* The court found that the respondent failed to object to the lack of specificity in the complaint in the trial court below and that the transcript showed that the respondent was clear as to the rules violated and those in her employ who violated the rules. *Id.*

Retroactive Application of Rules

In general, the administrative rules of a state agency are prospective in application. *Gulfstream Park v. Dept. of Business Regulation* 407 So.2d 263 (Fla. 3d DCA 1981). However, in a recent opinion, a district court of appeal applied an exception, drawn from federal administrative law cases, that a rule that "merely clarifies another existing rule and does not establish new requirements" may be applied retroactively. *See Environmental Trust v. Dept. Of Environmental Protection,* 714 So.2d 493 (Fla. 1st DCA 1998). Although the circumstances of that case are unusual, it is argued that the exception could place a citizen in the untenable position of defending conduct that at the time was not prohibited by that rule, but by the retroactive application of an amendment to that rule, becomes violative of the rule.

Chapter 298, Florida Statutes

This chapter regulates the affairs of water control districts. These districts are limited-purpose local governmental units administratively separate from state and other local governments. These units are created to provide financing or maintain infrastructure 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, among other things, create a circuit court process for adjudicating disputes resulting 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 resolutions.

A. EFFECT OF PROPOSED CHANGES:

HB 107 addresses several cases interpreting 1996 amendments to the APA, rewrites the definition of agency for clarity and deletes citation to Ch. 298, F.S. from the definition.

It clarifies the rulemaking standard found in ss. 120.52(8) and 120.536(1), F.S., and rejects a judicial interpretation of this standard which created a functional test to determine whether a challenged agency rule is directly within the class of powers and duties identified in the statute to be implemented. *St. Johns River Water Management District v. Consolidated-Tomoka Land Co., et al,* 717 So.2d 72 (Fla. 1st DCA July 29, 1998).

See below section III.E., Section-by-Section Analysis, for discussion of the effect of the proposed changes.

B. APPLICATION OF PRINCIPLES:

1. Less Government:

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

(1) any authority to make rules or adjudicate disputes?

Although HB 107 does not create any new authority for agencies to adopt rules, provisions found in the bill will clarify the authority of agencies to adopt rules pursuant to the more restrictive standard for rulemaking enacted in the 1996 amendments to the APA. These provisions also prohibit an agency from adopting a rule where the statutory basis for the rule is “class of powers and duties” found within the enabling statute.

(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

C. STATUTE(S) AFFECTED:

ss. 120.52(1)(b) and (8), 120.536, 120.54(1)(f), 120.56(2)(a), 120.57(1)(1), and 120.68(7)(d), F.S.

D. 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., and rewrites this definition for clarity.

Amends the flush left paragraph of s. 120.52(8), F.S., to read that an agency may only implement or interpret the specific powers and duties found in an enabling statute and that statutory language granting rulemaking authority shall be construed to extend no further than implementing or interpreting the same. Prohibits an agency from adopting a rule because it is within the agency's class of powers and duties.

Section 2 Amends s. 120.536(1), F.S., to read that an agency may only implement or interpret the specific powers and duties found in an enabling statute and that statutory language granting rulemaking authority shall be construed to extend no further than implementing or interpreting the same. Prohibits an agency from adopting a rule because it is within the agency's class of powers and duties (identical to changes made to s. 120.52(8), found in section 1, above).

Creates a two-year rule authorization process, similar to the process provided by the 1996 APA amendments. The process protects identified rules from challenge until the Legislature has had an opportunity to ratify these rules. Provides for a shield from challenge as to the validity of the legal basis for the rule for a period of time and a deadline for repeal of those rules not ratified by the Legislature.

Section 3 Amends s. 120.54(1)(f), F.S., relating to the general provisions applicable to all rules other than emergency rules. Prohibits the adoption of retroactive rules, including retroactive rules intended to clarify existing law, unless that power is expressly authorized by statute

Section 4 Amends s. 120.56(2)(a), F.S., relating to special provisions for challenging proposed rules. Provides that the petitioner has the burden of going forward with presenting the particular objections to the challenged rule. Provides that the agency has to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority.

Section 5 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 over which it has substantive jurisdiction as well as administrative rules over which it has substantive jurisdiction.

Section 6 Amends s. 120.68(7)(d), F.S., relating to judicial review. Provides that the court shall not defer to an agency's construction of a statute or rule or otherwise afford any special weight to the agency's interpretation of a statute or rule.

Section 7 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:

The bill 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:

The bill 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:

The bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

N/A

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

This committee substitute substantially incorporates the amendments to House Bill 107 adopted in the Committees on Water and Resource Management, Governmental Operations, and Governmental Rules and Regulations. It also rewrites the definition of agency for clarity. Please see this bill analysis document for details.

VII. SIGNATURES:

COMMITTEE ON WATER AND RESOURCE MANAGEMENT:

Prepared by:	Staff Director:
Joyce Pugh	Joyce Pugh

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:	Staff Director:
Douglas Pile	Jimmy O. Helms

AS FURTHER REVISED BY THE COMMITTEE ON GOVERNMENTAL RULES AND REGULATIONS:

Prepared by:	Staff Director:
David M. Greenbaum	David M. Greenbaum