SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 2546

SPONSOR: Senator Scott

SUBJECT: Rulemaking Authority of the Department of Management Services

DATE: April 5, 2000 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Favorable
2.			FP	
3.				
4.				
5.				

I. Summary:

The Department of Management Services (DMS) reported 8 rules to the Joint Administrative Procedures Committee (JAPC), pursuant to s. 120.536(2)(b), F.S., as exceeding the department's statutory rulemaking authority. The Division of Retirement within the DMS reported 19 rules as exceeding the department's rulemaking authority.

Section 120.536(2)(b), F.S., requires the Legislature to determine whether specific legislation should be enacted to authorize the rules, or portions thereof, identified by the agency. This bill provides specific statutory authority to authorize the rules reported by the DMS and its Division of Retirement.

This bill substantially amends the following sections of the Florida Statutes: 112.362, 121.021, 121.051, 121.0515, 121.081, 121.085, 121.091, 121.121, and 287.16.

II. Present Situation:

Administrative Procedures Act

The Administrative Procedure Act (APA), contained in ch. 120, F.S., sets forth the general standards and procedures that all agencies must follow when adopting administrative rules. Agencies do not have inherent rulemaking authority.[1] Shaping public policy through lawmaking is the exclusive power of the Legislature.[2] The Legislature, however, may delegate to agencies the

[1] *Grove Isle, Ltd. v. State Dept. of Envtl. Reg.*, 454 So.2d 571, 573 (Fla. 1st DCA 1984).

[2] *Jones v. Department of Rev.*, 523 So.2d 1211, 1214 (Fla. 1st DCA 1988).

authority to adopt rules[3] that implement, enforce, and interpret a statute.[4] An enabling statute that delegates rulemaking authority to an agency cannot provide unbridled authority to an agency to decide what the law is,[5] but must be complete,[6] must declare the legislative policy or standard,[7] and must operate to limit the delegated power.[8]

Agencies are not authorized to determine whether or not they want to adopt rules.[9] They are required by law to adopt as a rule each agency statement that meets the definition of a rule as soon as feasible and practicable. Rulemaking is presumed to be feasible and practicable unless the agency proves certain statutory standards. Whenever an act of the Legislature requires implementation by rule, an agency has 180 days after the effective date of the act to do so, unless the act provides otherwise.[10]

While agencies are required to adopt as a rule each agency statement that implements, interprets, or prescribes law or policy, there are limitations on the content and scope of these rules. When the Legislature adopted changes to the APA in 1996, it overturned case law that had permitted broader bases for rulemaking, and significantly narrowed the standard for rulemaking.[11] In 1996, ss. 120.52(8) and 120.536(1), F.S., provided in relevant part that, "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. [*emphasis added*]."

When this new provision was challenged, the courts had difficulty construing the "particular powers and duties" language. In an administrative proceeding, a judge ruled that the phrase meant

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[3] A rule is defined by s. 120.52(15), F.S., to mean, ". . . each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. . . ."

[4] *State v. Atlantic C.L.R. Co.*, 47 So. 969 (1909).

[5] *State ex rel. Davis v. Fowler*, 114 So. 435, 437 (Fla. 1927).

[6] *Spencer v. Hunt*, 147 So. 282, 286 (Fla. 1933); accord *Florida Beverage Corp. V. Wynne*, 306 So.2d 200, 202 (Fla. 1st DCA 1975).

[7] *Chiles v. Children A, B, C, D, E, & F*, 589 So.2d 260, 268 (Fla. 1991).

[8] *Palm Beach Jockey Club, Inc. v. Florida State Racing Comm'n.*, 28 So.2d 330 (Fla. 1946).

[9] Section 120.54(1)(a), F.S.

[10] Section 120.54(1)(b), F.S.

[11] Before the 1996 revision to the APA, the courts had held that a rule is a valid exercise of delegated legislative authority if it is "reasonably related" to the enabling statute and not arbitrary and capricious. See, *General Tel. Co. of Fla. v. Florida Pub. Serv. Comm'n*, 446 So.2d 1063 (Fla. 1984); *Department of Labor and Employment Sec., Div. of Workers' Compensation v. Bradley*, 636 So.2d 802 (Fla. 1st DCA 1994); *Florida Waterworks Ass'n v. Florida Pub. Serv. Comm'n*, 473 So.2d 237 (Fla. 1st DCA 1985); *Department of Prof'l Regulation, Bd. of Med. Exam'rs v. Durrani*, 455 So.2d 515 (Fla. 1st DCA 1984); *Agrico Chem. Co. v. State, Dept. of Envtl. Regulation*, 365 So.2d 759 (Fla. 1st DCA 1978); *Florida Beverage Corp., Inc. v. Wynne*, 306 So.2d 200 (Fla. 1st DCA 1975).

an enabling statute must detail the powers and duties that would be the subject of the rule.[12] On appeal, however, the First District Court of Appeals held that a broader interpretation was proper, and stated that the test to determine whether a rule is a valid exercise of delegated authority 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. This approach meets the legislative goal of restricting the agencies' authority to promulgate rules, and, at the same time, ensures that the agencies will have the authority to perform the essential functions assigned to them by the Legislature [*emphasis added*].[13]

In 1999, the Legislature rejected the First District's broad "class of powers and duties" test when it enacted 99-379, L.O.F. The APA now provides:

> 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 or interpret the *specific 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 or is within the agency's class of powers and duties, 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 implementing or interpreting the specific powers and duties conferred by the same statute (*emphasis added)*.[14]

The Legislature recognized that as a result of this amendment some existing rules might no longer be authorized, and consequently, also provided that agencies could temporarily shield unauthorized rules from rule challenges based on the amendment until July 1, 2001.[15] In order to have shielded a rule, agencies were required to have submitted to the Joint Administrative Procedures Committee (JAPC) by October 1, 1999, a list of rules, or portions thereof, adopted prior to June 18, 1999, which exceeded the newly amended rulemaking authority standard.

The statutory directive further provided that the Legislature is required to consider at the 2000 Regular Session whether specific legislation authorizing the shielded rules, or portions thereof, should be enacted. Thereafter, agencies must begin repeal proceedings by January 1, 2001, for shielded rules for which authorizing legislation does not exist. On or after July 1, 2001, the JAPC

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[12] *St. Johns River Water Management District v. Consolidated-Tomoka Land Co., et al*, 717 So.2d 72 (Fla. 1st DCA 1998).

[13] *Id.*

[14] Sections 120.52(8) and 120.536(1), F.S.

[15] Section 120.536(2)(b), F.S.

or any substantially affected person may petition an agency to repeal any rule because it exceeds the rulemaking authority permitted by the new standard.

Department of Management Services

The DMS shielded eight rules, but repealed two of these rules. The following summarizes the six rules which are addressed by the bill:

- Rules 60B-3.001 -- 3.006, F.A.C., address how the state may dispose of state-owned, surplus motor vehicles, watercraft, and aircraft. The rules provide that these surplus units must be reported to the DMS within 45 days of becoming excess, and the DMS will determine whether to transfer the unit or sell it at public auction.

  Section 287.16, F.S., provides that the DMS shall be responsible for the acquisition, disposal, operation, maintenance, repair, storage, supervision, control, and regulation of state aircraft and motor vehicles. Additionally, the section provides that DMS shall adopt rules for the safe use, operation, maintenance, repair, and replacement of state aircraft and motor vehicles. The section, unlike the rule, however, does not refer to state watercraft, and does not provide DMS with the authority to adopt rules regarding the disposal of state aircraft, watercraft, and motor vehicles.

The Division of Retirement within the DMS shielded the following 19 rules as exceeding its rulemaking authority:

- Rule 60S-4.002(7), F.A.C., provides that a member or beneficiary may refuse application of the minimum benefit adjustment to his or her retirement benefit. This provision exists due to the fact that application of the minimum benefit might increase the retirement benefit such that the member becomes ineligible for other non-Florida Retirement System (FRS) benefits.

  Section 112.362, F.S., addresses the minimum benefit adjustment and details when a member or beneficiary is entitled to the adjustment; however, the section does not provide that a member or beneficiary may refuse application of the adjustment.

- Rule 60S-2.002(4)(b)4., F.A.C., defines the term “work year” as July 1 through June 30 for the purpose of determining service credit for employees other than employees of the Department of Education.

  Section 121.021, F.S., provides definitions for the chapter addressing the FRS. The section defines “work year” as, “the period of time an employee is required to work to receive a full year of retirement credit, as provided by rule.”

- Rules 60S-6.001(10), (13), (14), (36), (44), and (53), and 60S-4.002(11), F.A.C., provide definitions for the following terms: (a) benefit; (b) calendar month; (c) leave of absence; (d) payee; (e) retiree; and (f) signature.

  Section 121.021, F.S., which sets forth the definitions for the chapter addressing the FRS, does not contain these definitions.

- Rule 60S-1.007(4)(c), F.A.C., provides that a local official must be designated to execute agreements with the Director of the Division of Retirement in cities and special districts which apply to be admitted to the FRS.

  Section 60S-121.051(2), F.S., prescribes the requirements for cities and special districts to apply to participate in the FRS, but does not specifically provide the department with authority to adopt rules concerning the submission of documents for participation by cities and special districts in the FRS.

- Rule 60S-1.0075(4)(a)-(c), F.A.C., addresses what occurs when the transfer, merger, or consolidation of state or local government results in the member's employer ceasing to be a FRS participant. Specifically, the rule provides that the member remains in the FRS, unless he or she elects to participate in a local retirement system.

  Section 121.051(2)(f), F.S, provides that an employer participating in the FRS must give 60 days notice to the department prior to transfer, merger, or consolidation of governmental functions. The provision does not specify what occurs when such action results in withdrawing from FRS participation.

- Rule 60S-1.002(3), F.A.C., provides that an employee must furnish the department with certain information when enrolling in the FRS.

  Section 121.051(4), F.S., provides that an employer must provide the administrator with any requested information for the enrollment of officers and employees in the FRS. The subsection does not provide that the department may require employees to furnish requested information.

- Rule 60S-1.053(2)(c), F.A.C., provides definitions for the positions of "Superintendent" and "Assistant Superintendent" in a correction or detention facility, and provides that these employees may seek special risk membership.

  Section 121.0515(2)(c), F.S., provides that Superintendents and Assistant Superintendents in correctional facilities shall participate in the special risk class, but does not provide definitions of these positions.

- Rule 60S-2.003(g), F.A.C., provides that a special risk member may purchase past service credit as special risk service under specified circumstances, including when the member has past service with a participating agency to which the member's governmental unit was transferred, merged, or consolidated.

  Section 121.0515(5)(a), F.S., addresses when a member may purchase retirement credit in the special risk class, but does not specify the circumstance contained in the rule concerning transfer, merger, or consolidation.

- Rule 60S-2.0041(2)(d)1., F.A.C., provides that retroactive coverage in the special risk administrative support class shall be granted when any member filling an administrative

support position between October 1, 1978, and June 30, 1982, was: (a) removed from special risk membership effective October 1, 1978, due to a change in special risk criteria as a result of the enactment of ch. 78-308, L.O.F.; or (b) reassigned or employed for training and/or career development or to fill a critical agency need.

Section 121.0515(7), F.S., addresses when retroactive coverage applies, but does not contain the reasons contained in Rule 60S-2.0041(2)(d)1., F.A.C.

- Rule 60S-2.004(2)(c), F.A.C., provides that if a member claiming credit for prior service does not claim all of his or her credit, the credit claimed must be for the most recent period of service.

  Section 121.081(2), F.S., addresses when prior service may be claimed as creditable service under the FRS, but does not specify what period of prior service the member must claim when only claiming partial credit for the prior service.

- Rule 60S-2.004(4), F.A.C., identifies the various types of prior service which may be claimed and credited, and specifies the membership class for the credit.

  Section 121.081(2)(a)-(d), F.S., like the rule, addresses the various types of prior service which may be claimed and credited, but does not specify the membership class for the credit.

- Rules 60S-2.002(1) and (4)(g), 60S-2.003(1)(g)1., 60S-2.004(6), 60S-2.005(1)(b), 60S-2.005(2)(e), 60S-2.007(2)(d)1.-3., 60S-2.007(3)(e), 60S-2.013(2)(a), 2.017(4)(a), and 2.017(4)(a), F.A.C., specify procedures for the submission of evidence or information necessary to establish a member's claim of creditable service, and that once a retirement benefit has been cashed or deposited no additional service which remained unclaimed at retirement may be claimed or purchased.

  No section of the Florida Statutes addresses the content of the aforementioned rules.

- Rule 60S-1.004(6), F.A.C., provides that a member whose employment is terminated before retirement retains membership rights to all previously earned employer-contributory service credit, and to member-contributory service credit if the contributions are left on deposit in his or her retirement account. Furthermore, the rule provides that if member contributions are refunded, the member may reinstate any previously earned member-contributory service credit upon completion of 1 year reemployment and repayment of the refunded employee contributions.

  Section 121.091, F.S., specifies when benefits may be paid under the FRS, but does specify how membership rights may be retained upon termination in the manner provided in the rule.

- Rule 60S-4.021(3) and (4), F.A.C., provides that retirement benefits will not be paid to an active or retired member who has had an information filed against him or her, or has been indicted for a crime that may result in the forfeiture of benefits, until the charges have been resolved and determination concerning the forfeiture of benefits has been made by the administrator.

Section 121.091(5)(j), F.S., states that retirement benefits will not be paid pending resolution of the charges against the beneficiary. The section does not specify, as does the rule, that the charges must be of the type specified in s. 121.091(5)(f)-(i), F.S., which may result in the forfeiture of benefits.

- Rule 60S-4.002(7), F.A.C., provides that a retired person may not reduce his monthly benefit for the purpose of preserving eligibility for other pensions or benefits, except that the member may refuse application of the minimum benefit adjustment.

  Section 121.091(14), F.S., which addresses the payment of retirement benefits, does not contain the content of Rule 60S-4.002(7), F.A.C.

- Rule 60S-4.002(9), F.A.C., provides that the department shall annually audit the benefit payroll to determine that recipients of benefits are still living, and that the department shall suspend the benefits payable to any recipient not determined to be living.

  Section 121.091(14), F.S., which addresses the payment of retirement benefits, does not contain the content of Rule 60S-4.002(9), F.A.C.

- Rule 60S-2.006(1), F.A.C., addresses when a member may purchase up to 2 years of FRS credit for leave of absences, and specifies that one form of qualifying leave is that which is covered by the Family Medical Leave Act.

  Section 121.121(1), F.S., provides that a member may purchase creditable service for up to two years of authorized leaves of absence, but does not specify that leave covered by the Family Medical Leave Act qualifies.

III. Effect of Proposed Changes:

Section 1. This section authorizes Rule 60S-4.002(7), F.A.C., by creating s. 112.362(7), F.S., to provide that a member or beneficiary may refuse application of the minimum benefit adjustment.

Section 2. This section authorizes Rule 60S-2.002(4)(b)4., F.A.C., by clarifying s. 121.021(54), F.S., to provide that "work year" means, "the period of time that an employee is required to work during the plan year to receive a full year of retirement credit, as provided by rule." Furthermore, the section authorizes the definitions contained in Rules 60S-6.001(10), (13), (14), (36), (44), and (53), and 60S-4.002(11), F.A.C., by amending s. 121.021, F.S., to also contain these definitions.

Section 3. This section authorizes Rules 60S-1.007(4)(c), 60S-1.0075(4)(a)-(c), 60S-1.002(3), F.A.C., by amending s. 121.051, F.S., to provide that: (a) the department shall adopt rules establishing provisions for the submission of documents for participation by cities and special districts in the FRS; (b) a FRS member may elect to remain in the FRS or to participate in a local retirement system when the transfer, merger, or consolidation of his employer results in the employer ceasing to be a FRS participant; and (c) the department may require employees to furnish information requested by the administrator when enrolling in the FRS.

Section 4. This section authorizes Rule 60S-1.053(2)(c), F.A.C., by providing that the definitions of correctional "Superintendents" and "Assistant Superintendents" for the purpose of special risk membership shall be defined by rule. The section also authorizes Rule 60S-2.003(g), F.A.C., by providing that a special risk member may purchase past service credit as special risk service when the member has past service with a participating agency to which the member's governmental unit was transferred, merged, or consolidated. Finally, the section authorizes Rule 60S-2.0041(2)(d)1., F.A.C., by amending s. 121.0515(7), F.S., to provide the reasons contained in the rule for which a special risk member could be eligible for retroactive special risk coverage.

Section 5. This section authorizes Rule 60S-2.004(2)(c), F.A.C., by amending s. 121.081(2), F.S., to provide that if a member claiming credit for prior service does not claim all of his or her credit, that the credit claimed must be for the most recent period of service. Furthermore, the section authorizes Rule 60S-2.004(4), F.A.C., by amending s. 121.081(2)(a)-(d), F.S., to specify the membership class to which various types of prior service may be credited.

Section 6. This section authorizes Rules 60S-2.002(1) and (4)(g), 60S-2.003(1)(g)1., 60S-2.004(6), 60S-2.005(1)(b), 60S-2.005(2)(e), 60S-2.007(2)(d)1.-3., 60S-2.007(3)(e), 60S-2.013(2)(a), 2.017(4)(a), and 2.017(4)(a), F.A.C., by creating s. 121.085, F.S., to provide that: (a) the department shall adopt rules which specify procedures for the submission of evidence or information necessary to establish a member's claim of creditable service; and (b) once a retirement benefit has been cashed or deposited no additional service which remained unclaimed at retirement may be claimed or purchased.

Section 7. This section authorizes Rule 60S-1.004(6), F.A.C., by amending s. 121.091, F.S., to specify how membership rights may be retained upon termination in the manner provided in the rule. Rule 60S-4.021(3) and (4), F.A.C., is authorized by clarifying s. 121.091(5)(j), F.S., to provide that retirement benefits will not be paid to a member who is charged with a crime which could result in the forfeiture of benefits. The section also authorizes Rule 60S-4.002(7), F.A.C., by creating s. 121.091(14)(e), F.S., to provide that a retired person may not reduce his monthly benefit for the purpose of preserving eligibility for a federal program. Finally, the section authorizes Rule 60S-4.002(9), F.A.C., by creating s. 121.091(14)(f), F.S., to provide that the department shall adopt rules to establish procedures to determine that persons to whom benefits are being paid are still living, and that the department shall suspend benefits when it is unable to confirm the payee is still living.

Section 8. This section authorizes Rule 60S-2.006(1), F.A.C., by amending s. 121.121(1), F.S., to provide that leave covered by the Family Medical Leave Act may be purchased as leave of absence credit in the FRS.

Section 9. This section authorizes Rules 60B-3.001 -- 3.006, F.A.C., by amending s. 287.16, F.S., to provide that the DMS is responsible for state watercraft, in addition to state aircraft and motor vehicles, and to provide that the DMS shall adopt rules concerning the disposal of state aircraft, watercraft, and motor vehicles.

Section 10. This section states that it is the Legislature's intent that all amendments to the various sections of law contained in the bill are supplemental to other amendments to those sections which are enacted during the 2000 Regular Session of the Legislature.

Section 11. This section provides that the bill takes effect July 1, 2000.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

There should be no direct impact, as the changes will only authorize rules that are currently in effect.

C. Government Sector Impact:

There should be no direct impact, as the changes will only authorize rules that are currently in effect.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.