STORAGE NAME: h1135.sa.doc
DATE: April 5, 2001

HOUSE OF REPRESENTATIVES
COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS

BILL #: HB 1135 [(i) SB 910 by King]

RELATING TO: Administrative Procedure

SPONSOR(S): Representative(s) Ross

TIED BILL(S): None

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

(1) STATE ADMINISTRATION
(2) JUDICIAL OVERSIGHT
(3) COUNCIL FOR SMARTER GOVERNMENT
(4)
(5)

I. SUMMARY:

Current law provides, in certain situations for the award of attorney's fees and costs against the state. However, no award of attorney's fees and costs against the state for an action initiated by a state agency can exceed $15,000. This bill increases that amount from $15,000 to $50,000. Additionally, "small business party" is defined to mean an "entity" with 25 or less full-time employees (FTEs) with a net worth of $2 million, or less. This bill increases FTE cap from 25 to 50 and the net worth cap from $2 million to $10 million.

The Administrative Procedure Act allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions through an administrative hearing process. The Administrative Procedure Act also provides that certain hearings must be conducted in an expedited manner.

This bill establishes a new set of procedures with respect to "any proceeding brought by a third party" to challenge a permit application that deals with management and storage of surface waters. Under this new procedure, once challenged, a respondent may file a motion to show cause why the permit should be granted.

"Summary hearing" is renamed "expedited hearing". This bill allows a non-agency party to request an expedited hearing, which must occur within 30 days after the date the response period to the motion expires. It is unclear whether a "non-agency party" includes an intervenor. This provision appears to make it more difficult for third parties to participate in these type of hearings. This bill changes the administrative law judge's decision in a summary or expedited hearing from a "final order" to a "recommended order" to which the parties may file exceptions. The agency must issue the final order within 30 days after the issuance of the administrative law judge's recommended order.

This bill adds that in those cases involving judicial review of an agency decision resulting in the issuance of a license or permit, the court **must** order any nonprevailing third party appellant to pay costs, damages, and attorney's fees. There is no requirement of bad faith or delay, nor are permit applicants and agencies subject to the same requirement. There is also no definition of "nonprevailing third party" in law.

This bill eliminates standing for a citizen to intervene as a party on the filing of a verified pleading asserting that the activity, has or will have the effect injuring the air, water, or other natural resources of the state, unless his or her substantial interests have been determined under agency action.

This bill does not appear to have a fiscal impact on local governments; however, there may be a fiscal impact to the state. See "Fiscal Comments" section of the bill analysis. This bill is controversial. See the "Section-by-Section" for certain concerns, and "Other Comments" for a limited list of opponents and proponents.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1.	Less Government	Yes []	No []	N/A [X]
2.	Lower Taxes	Yes []	No []	N/A [X]
3.	Individual Freedom	Yes []	No []	N/A [X]
4.	Personal Responsibility	Yes []	No []	N/A [X]
5.	Family Empowerment	Yes []	No []	N/A [X]

For any principle that received a "no" above, please explain:

B. PRESENT SITUATION:

Section 57.111, F.S., the "Florida Equal Access to Justice Act"

The Legislature acknowledges that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and of administrative proceedings. To diminish that result, the Legislature sets forth, in s. 57.111, F.S., certain situations wherein the court is authorized to award attorney's fees and costs against the state. However, no award of attorney's fees and costs for an action initiated by a state agency can exceed $15,000.

Additionally, several terms are defined in s. 57.111, F.S.; more particularly, the term "small business party." In order to be classified as a "small business party", an entity, among other things, must neither have more than 25 full-time employees nor have a net worth of more than $2 million.

Chapter 120, The Administrative Procedure Act

Chapter 120, F.S., allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions. When a state agency, acting in its regulatory capacity, has determined that a person failed to achieve a passing score on the real estate licensing examination, should not receive a permit to build a dock and boathouse in the waters of the state, or failed to maintain minimum standards for the operation of a nursing home facility, that person has the right to participate in that decision before it becomes final.[1] The way this is accomplished is through an administrative hearing.

In Florida, administrative hearings involving disputed issues of fact are generally referred to the Division of Administrative Hearings (DOAH), an independent group of administrative law judges who hear cases involving most state agencies.[2] DOAH's administrative law judges also determine whether

[1] *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, by Judge Linda M. Rigot, The Florida Bar Journal, Jan. 2001, at 14.

[2] Although DOAH is a division administratively assigned to the Department of Management Services (DMS), *see* s. 20.22, F.S., DMS does not have statutory authority over DOAH; it is responsible directly to the Governor and Cabinet. The director is appointed by a majority vote of the Administration Commission, that is the Governor and the Cabinet, and the appointment must be confirmed by the

proposed and existing agency rules are invalid exercises of delegated legislative authority based on certain statutory grounds, and based on constitutional grounds in the case of proposed rules. DOAH proceedings are conducted like nonjury trials and are governed by Ch. 120, F.S., and the rules adopted to implement those statutory provisions.[3]

In the mid-1990s, Ch. 120, F.S., underwent sweeping review, analysis, and amendment. The Legislature, after receiving a report from the Governor's Administrative Procedure Act Review Commission, enacted significant amendments to Ch. 120, F.S. The purpose of those amendments was to simplify the Administrative Procedure Act, to increase flexibility in the application of administrative rules and procedures, and to increase agency accountability to the Legislature and the public. "Among other things these amendments created a variance and waiver procedure to allow agencies more flexibility when the strict application of rules resulted in unfairness, the award of attorneys' fees to administrative litigants, increased opportunities for informal resolution of administrative disputes, and additional rulemaking requirements for agencies."[4] Furthermore, as a result of amendments in 1996 and 1999, the substantive standard for rulemaking and for determining the validity of rules was made more restrictive, although administrative law judges continue to be entrusted with final order authority in rule challenges.[5]

In adjudicatory cases, where a decision affects "substantial interests," the administrative law judge normally has the role of making findings of fact and drawing conclusions of law and providing a recommended order. The affected agency is responsible for entering a final order. Findings of fact by administrative law judges continue to be presumptively correct, and may not be lightly set aside by the agency. An agency may enter a final order rejecting or modifying findings of fact upon review of the entire record and after stating with particularity that the findings were not based upon competent substantial evidence or did not comply with essential requirements of law.[6] As a consequence of recent amendments, however, an administrative law judge's conclusions of law are even more insulated from change by the agency. "In view of these new responsibilities, it is plain that the division and administrative law judges continue to enjoy the confidence of the legislature."[7] An agency may enter a final order rejecting or modifying conclusions of law over which it has substantive jurisdiction. The agency must state its reasons with particularity, and must find that its substituted conclusion of law is at least as reasonable as the conclusion of law it rejected.[8]

The Administrative Procedure Act also provides that certain hearings must be conducted in an expedited manner. More particularly, a hearing on a bid protest must commence within 30 days of receipt by DOAH of a request for hearing, and a recommended order generally must be entered within 30 days after receipt of the transcript of the hearing.[9] Cases involving exceptional education students are also expedited, and a final order must be issued 45 days after the request for a hearing is filed. Rule challenges must be heard within 40 days of filing and a final decision rendered within 30 days following the hearing.[10] Summary hearing procedures have expedited provisions as well.

Senate. s. 120.65, F.S. DOAH is a separate budget entity. It is funded, however, entirely from trust funds rather than from general revenue. Thus, the funding is directly correlated to the work the division does for executive agencies. *The Florida Division of Administrative Hearings*, by Judge William C. Sherril, Jr., The Florida Bar Journal, Jan. 2001, at 23.

[3] *Id*.

[4] *Why Florida Needs the Administrative Procedure Act*, by William E. Williams and S. Curtis Kiser, The Florida Bar Journal, Jan. 2001, at 20.

[5] *The Florida Division of Administrative Hearings*, at 24.

[6] s. 120.57(1), F.S.

[7] *The Florida Division of Administrative Hearings*, at 24.

[8] s. 120.57(1), F.S.

[9] s. 120.57(3)(e), F.S.

[10] s. 120.56(1)(c), F.S.

Summary hearings are governed by s. 120.574, F.S. This procedure is analogous to the federal procedure which permits a U.S. magistrate judge to try a civil case and enter final judgment with the consent of the parties.[11] Within five business days following DOAH's receipt of a petition or request for hearing, DOAH must issue and serve on all original parties an initial order that assigns the case to a specific administrative law judge, and which provides general information regarding practice and procedure before DOAH. The initial order must also contain a statement advising the addressees that a summary hearing is available upon the agreement of all parties, and briefly describing the expedited time sequences, limited discovery, and final order provisions of the summary procedure.

Within 15 days after service of the initial order, any party may file with DOAH a motion for summary hearing. If all original parties agree, in writing, to the summary proceeding, the proceeding must be conducted within 30 days of the agreement.

Section 120.574, F.S., sets forth the types of motions that are allowed in this type of proceeding. For example, the parties are authorized to file a motion requesting discovery beyond the informal exchange of documents and witness lists, otherwise required. Upon a showing of necessity, additional discovery may be permitted in the discretion of the administrative law judge, but only if it can be completed no later than 5 days prior to the final hearing.

Finally, during or after any preliminary hearing or conference, any party or the administrative law judge may suggest that the case is no longer appropriate for summary disposition, and the judge may so order. To date, there have been only 22 consent summary hearing cases heard by administrative law judges.[12]

C. EFFECT OF PROPOSED CHANGES:

See "SECTION-BY-SECTION ANALYSIS"

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 57.111, F.S., regarding civil actions and administrative proceedings initiated by state agencies, to increase, from 25 to 50, the number of full-time employees allowed in order for an entity to be classified as a "small business party," and to increase, from $2 million to $10 million, the net worth maximum allowed in order for an entity to be classified as a "small business entity." Section 57.111, F.S., is also amended to increase, from $15,000 to $50,000, the amount of attorneys' fees that can be awarded against a state agency, in an action initiated by that state agency. The existing figures, including the attorney's fee cap, were established when this section was created in 1984.[13]

Section 2. Amends s. 120.52, F.S., which is the definitional section that applies to the Administrative Procedure Act. This section defines "agency" to include state officers and state departments, and any authority, including a regional water supply authority; any board; or any commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission.

This bill inserts the word "state" before the words "authority," "board", and "commission" to correct a previous legislative error in draftsmanship and to clarify the existing meaning of those words.[14]

Section 3. Amends s. 120.569, F.S., relating to agency decisions that affect a person's substantial interests, to new language with respect to "any proceeding brought by a third party to challenge a

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[11] *See* 28 U.S.C. s. 636. *The Florida Division of Administrative Hearings*, fn 26, at 27.
[12] *Id*.
[13] Chapter 84-78, Laws of Florida (CS/SB 438)
[14] *See* Attorney General Opinion 77-142; *see also*, s. 2, Chapter 99-379, Laws of Florida (CS/HB 107)

permit application under part IV of chapter 373." Part IV of Ch. 373, F.S., deals with management and storage of surface waters. Any person proposing to construct or alter a stormwater management system, dam, impoundment, reservoir, or appurtenant work must apply to the governing board [of a water management district] or the Department of Environmental Protection for a permit.[15]

Under this new language, once challenged, a respondent may file a motion to show cause why the permit should be granted. All issues must be framed with sufficient particularity and the scope of anticipated evidence to be presented at the final hearing must be presented. The administrative law judge must hold a hearing to determine if the issues are framed adequately and whether the scope of anticipated evidence is sufficient to put the petitioner on notice as to what specific elements of the permit application are at issue, or whether the petition should be dismissed.

The new language also requires that either the party or an attorney or qualified representative sign every pleading, motion, or paper filed, and that any person signing, filing, submitting, or advocating such a pleading, motion, or paper is certifying that the same is not filed for any improper purpose, is nonfrivolous, factual with evidentiary support, and any denials of factual contentions are warranted. The "presiding officer" may impose sanctions for failure to comply.[16]

Concerns:

Any party can request the administrative law judge to hold a hearing to determine if the "third party" complied with these procedures and whether "the scope of anticipated evidence to be presented at the final hearing" supports the pleading. This, of course, allows all parties access to anticipated evidence. Furthermore, this bill appears to misuse the term "third party." Proceedings are not brought by third parties; "petitioners" file "petitions." Currently, a third party in this context is a non-permit applicant; and, the respondent is usually the agency, but under these circumstances it is unclear whether the respondent is the applicant or the agency. Furthermore, the changes made as a result of this new language could make part IV, Ch. 373 petitions more specific than circuit court complaints and may increase hearing costs and pleading preparations. Equally unclear is why just part IV, Ch. 373 petitions are affected. Furthermore, this new procedure creates a more active role for the administrative law judge in such a proceeding.

Section 4. Amends s. 120.574, F.S., regarding summary hearings, to rename the hearing process "expedited" rather than "summary" hearings. This bill allows a non-agency party to request, by motion, an expedited hearing, which must occur within 30 days after the date the response period to the motion expires. It is unclear whether a "non-agency party" includes an intervenor.

If the affected agency files a motion for an expedited hearing and an original party files a response within 7 days after service of that motion objecting to the expedited hearing, the administrative law judge, must, nonetheless, enter an order granting the motion for expedited hearing unless he or she finds "that any of the original parties will be unduly prejudiced thereby."

This bill changes the administrative law judge's decision from a "final order" to a "recommended order" to which the parties may file exceptions. The agency must issue the final order within 30 days after the issuance of the administrative law judge's recommended order.

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[15] ss. 373.413 and 373.016(6), F.S.

[16] Not all cases that involve agency decisions which affect a party's substantial interest are referred to DOAH; cases involving disputed issues of fact are forwarded to DOAH, unless waived by all parties. If waived, then the hearing is conducted by the agency, or if the issue does not involve a disputed issue of fact. s. 120.569, F.S.

Concerns:

This provision appears to make it more difficult for third parties to participate in these type of hearings; this will force intervenors to be ready to proceed with their experts within a few days of intervention depending on when they discover the ongoing proceeding.

See also "Fiscal Comments" section.

Section 5. Amends s. 120.595, F.S., regarding attorney's fees, to amend the definition of "improper purpose" to include needlessly increasing the cost of litigation.

Section 6. Amends s. 120.60, F.S., regarding licensing, to require that a license must be issued if an examination is required as a prerequisite to licensure and the license applicant has satisfactorily completed the examination.

Section 7. Amends s. 120.68, F.S., regarding judicial review, adds that in those cases involving judicial review of an agency decision resulting in the issuance of a license or permit, the court **must** order any nonprevailing third party appellant to pay costs, damages, and attorney's fees.

Concerns:

There is no requirement of bad faith or delay, nor are permit applicants and agencies subject to the same requirement. There is also no definition of "nonprevailing third party" in law. "Nonprevailing adverse party" is defined in s. 120.595, F.S., for the purposes of that subsection. It excludes parties supporting the agency's position.

"This will probably stop most environmental groups from appealing administrative law judge decisions."[17]

Section 8. Amends s. 373.114, F.S., regarding the Land and Water Adjudicatory Commission. Currently, except as otherwise provided, the Governor and Cabinet, sitting as the Land and Water Adjudicatory Commission, have the exclusive authority to review any order or rule of a water management district, other than a rule relating to an internal procedure of the district.

Sections 9, 10, 13 –23. Make conforming changes.

Section 11. Amends s. 403.412, F.S., regarding the Environmental Protection Act. Currently, in any administrative, licensing, or other proceeding authorized by law for the protection of the air, water, or other natural resources of the state from pollution, impairment, or destruction, the Department of Legal Affairs, a political subdivision or municipality of the state, or a citizen of the state will have standing to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state.

This bill adds that a citizen of this state whose substantial interests have not been determined by agency action may not institute, initiate, petition, or request a proceeding under s. 120.569, F.S., or under s. 120.57, F.S. This provision does not limit the ability of a non-profit corporation or association organized for purposes of conservation, protection of the environment, or other biological values, or preservation of historical sites, from initiating any of the above proceedings upon asserting by petition that an activity, conduct, or product to be licensed or permitted has harmed or will harm the natural

[17] *Position Paper – Administrative Procedure Act Amendments (H 1135-Ross – S 910-King),* by David Gluckman, Esq., undated.

resources of the state. The verified petition must also assert that the corporation or association itself has substantial interests that will be affected by such harm.

Concerns:

This bill eliminates standing for a citizen to intervene as a party on the filing of a verified pleading asserting that the activity, conduct, or product to be licensed or permitted has or will have the effect of impairing, polluting, or otherwise injuring the air, water, or other natural resources of the state, unless his or her substantial interests have been determined under agency action.

Opponents claim that the current system has saved time and money by not requiring the witnesses and testimony regarding standing.[18] They assert that this bill will be much more expensive with little benefit to show for the added expense.

Section 12. Amends s. 403.973, F.S., regarding expedited permitting. This bill makes conforming changes by replacing the term "summary" with the term "expedited." This bill **requires** the use of the expedited hearing process, within the context of the expedited permit process, with regard to challenges to state agency action "for projects processed under this section." This bill also adds that the use of the expedited hearing process does not require consent of the affected agency or a determination by the administrative law judge as to the propriety of the use of the expedited process. However, the hearing schedule may be extended by written agreement of all parties.

Concerns:

This bill requires the use of the expedited hearing process within the context of the expedited permit process, as governed by Ch. 403, F.S., relating to environmental control and permitting. The affected agency, the Department of Environmental Protection, cannot object to the use of the expedited hearing.

Opponents assert that this provision will have an additional chilling affect on a citizen's ability to participate in a process that where participation is already difficult.[19]

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See "Fiscal Comments" section.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

[18] *Id.*
[19] *Id.*

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill could increase the cost of certain administrative procedures. See "Fiscal Comments" section.

D. FISCAL COMMENTS:

Comments by the Division of Administrative Hearings:

Section 4 of this bill could result in a fiscal impact on the Division of Administrative Hearings (DOAH). This section repeals the existing summary hearing process, available for a limited number of cases and statutorily required to be utilized in disputes between HMOs [health maintenance organizations] and their subscribers. Section 4 substitutes a procedure under which potentially all cases filed with DOAH must be heard within 30 days. (Under the bill, comprehensive plan amendments must be tried within 30 days without fail). Further, the new procedure precludes parties from engaging in discovery, which means that the hearings themselves will take longer because none of the parties will have had the opportunity to interview witnesses or meet with the opposing party to narrow the issues remaining to be tried. Thus, the impact on DOAH of expediting potentially all proceedings with the likelihood that all evidentiary hearings will require more hearing time could be significant but cannot be quantified at this time.

The agencies litigating before DOAH will also experience the same impacts as their legal staffs lose case preparation time and spend more time in evidentiary hearings. The bill also makes agencies responsible for larger attorney's fee awards under more circumstances than are available now under the Administrative Procedure Act.[20]

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

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

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

[20] Memorandum, March 29, 2001, From Sharyn L. Smith, Director and Chief Judge, DOAH, to Richard Herring, Legislative Research Director, House Fiscal Responsibility Council.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

The Florida Home Builders Association, Associated Industries of Florida, Florida Association of Realtors, Florida Phosphate Council, the Florida Chamber of Commerce, and others. support this bill.

The Florida Wildlife Federation, Florida League of Anglers, Save the Manatee Club, Florida Audubon Society, the Florida Sierra Club, and others, oppose this bill.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

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