SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 910

SPONSOR: Judiciary Committee and Senator King

SUBJECT: Administrative Procedure

DATE: April 19, 2001 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Fav/3 amendments
2.	Forgas	Johnson	JU	Favorable/CS
3.			AGG	
4.			AP	
5.				
6.				

I. Summary:

This committee substitute modifies various provisions of the Administrative Procedure Act, Ch. 120, F.S., including:

- Modifying the Equal Access to Justice Act to increase the number of small businesses that may receive attorney's fees awards, and increase the maximum amounts of those awards from $15,000 to $50,000.
- Removing authority from the Land and Water Adjudicatory Commission to review orders resulting from evidentiary hearings pursuant to ss. 120.57 and 120.69, F.S.
- Modifying s. 403.412(5), F.S., to provide that a resident who is not substantially affected by the permitted activity may not initiate, institute, petition or request a proceeding pursuant to ss. 120.569 or 120.57, F.S.

This bill substantially amends the following sections of the Florida Statutes: 57.111, 120.52, 120.569, 120.595, 373.114, and 403.412.

II. Present Situation:

Florida Equal Access to Justice Act: Section 57.111, F.S., provides for the award of attorney's fees and costs to prevailing small business parties in administrative hearings pursuant to ch. 120, F.S., that are initiated by a state agency, except where the agency was substantially justified or special circumstances existed to make the award unjust. A small business party is currently defined in relevant part as:

- A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or

professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than $2 million, including both personal and business investments; or

- A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than $2 million.[1]

Attorney's fees for a prevailing party in an action initiated by a state agency are limited to $15,000.[2]

Ch. 120, F.S., the Administrative Procedures Act (APA): Chapter 120, F.S., allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions.[3] For purposes of ch. 120, F.S., the term "agency" is defined in s. 120.52, F.S. as each:

- State officer and state department, and each departmental unit described in s. 20.04, F.S.[4]
- Authority, including a regional water supply authority.
- Board and commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.
- Regional planning agency.
- Multicounty special district with a majority of its governing board comprised of nonelected persons.
- Educational units.
- Entity described in chapters 163 (Intergovernmental Programs), 373 (Water Resources), 380 (Land and Water Management), and 582 (Soil and Water Conservation) and s. 186.504 (regional planning councils).
- Other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

The definition expressly excludes any legal entity or agency created in whole or in part pursuant to chapter 361, part II (Joint Electric Power Supply Projects), an expressway authority pursuant to chapter 348, any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in the section, or any multicounty special district with a majority of its governing board comprised of elected persons. The definition expressly includes a regional water supply authority.

Administrative hearings involving disputed issues of fact are generally referred to the Division of Administrative Hearings (DOAH), an independent group of administrative law judges (ALJs)

[1] Section 57.111(3)(d), F.S.
[2] Section 57.111(4)(d)2., F.S.
[3] *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, by Judge Linda M. Rigot, The Florida Bar Journal, Jan. 2001, at 14.
[4] Section 20.04, F.S., sets for the structure of the executive branch of state government.

who hear cases involving most state agencies.[5] The DOAH's ALJs also determine whether 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.[6]

In the mid-1990s, ch. 120, F.S., underwent sweeping review, analysis, and amendment. The Legislature, after receiving a report from the Governor's APA Review Commission, enacted significant amendments for the purposes of simplifying the APA, and increasing flexibility in the application of administrative rules and procedures, and 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."[7] 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.[8]

In adjudicatory cases, where a decision affects "substantial interests," the ALJ 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.[9] As a consequence of recent amendments, however, an ALJ'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 ALJs continue to enjoy the confidence of the legislature."[10] 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.[11]

The APA 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 the DOAH

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[5] Although DOAH is administratively assigned to the Department of Management Services (DMS), *see* s. 20.22, F.S., the 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 Senate. Section 120.65, F.S. The 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.

[6] *Id*.

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

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

[9] Section 120.57(1), F.S.

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

[11] Section 120.57(1), F.S.

of a request for hearing, and a recommended order generally must be entered within 30 days after receipt of the transcript of the hearing.[12] 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.[13] Summary hearing procedures have expedited provisions as well.

Summary hearings are governed by s. 120.574, F.S. This procedure is analogous to the federal procedure that permits a U.S. magistrate judge to try a civil case and enter final judgment with the consent of the parties.[14] Within five business days following the DOAH's receipt of a petition or request for hearing, the DOAH must issue and serve on all original parties an initial order that assigns the case to a specific ALJ, 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 a motion for summary hearing with the DOAH. 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; e.g., 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.[15]

III. Effect of Proposed Changes:

Section 1. The bill amends s. 57.111, F.S., the Equal Access to Justice Act, to change the definition of a "small business party" that may be entitled to an award of attorney's fees to an employer who may not have more than 25 full-time employees or a net worth in excess of $5 million. The bill also increases the award of attorney's fees under this act from $15,000 to $50,000.

Section 2. The bill clarifies the definition of "agency" contained in s. 120.52(1), F.S., to provide that only state authorities, state boards and state commissions are subject to ch. 120, F.S.

[12] Section 120.57(3)(e), F.S.
[13] Section 120.56(1)(c), F.S.
[14] *See* 28 U.S.C. s. 636. The Florida Division of Administrative Hearings, fn 26, at 27.
[15] *Id*.

Section 3. The bill amends s. 120.569, F.S., to add new language that requires either the party or an attorney or qualified representative to sign every pleading, motion, or paper filed. The signator must certify that the document is not filed for any improper purpose, is not frivolous, is factual with evidentiary support, or is likely to have evidentiary support, and that any denials of factual contentions are warranted. If a "presiding officer" finds a violation of one of these certification requirements, the officer must impose sanctions that include an order to pay the other party's or parties' costs and reasonable attorney's fees due to the filing of the pleading, motion or other paper. Monetary sanctions are not allowed for discovery violations. The sanctions may be initiated on motion or on the presiding officer's own initiative. A motion shall not be acted upon by a presiding officer for at least 14 days. During this period, the party may correct or withdraw the paper. If the presiding officer determines to impose a sanction on his or her own initiative, the officer must first enter an order to show cause.

Section 4. The bill amends s. 120.595, F.S., which provides that an ALJ shall award the prevailing party costs and attorney's fees where a nonprevailing adverse party has participated in the proceeding for an improper purpose, to modify the definition of "improper purpose" to include needlessly increasing the cost of litigation.

Section 5. The bill 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. The bill removes authority from the commission to review orders or rules of water management districts resulting from evidentiary hearings held pursuant to ss. 120.569 or 120.57, F.S.

Section 6. The bill 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 upon filing a verified pleading that asserts 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. The bill provides that it does not limit the associational standing of a nonprofit corporation where a substantial number, although not necessarily a majority, of its members have their substantial interests determined by the activity, conduct, or product to be permitted or licensed.

Section 7. The bill provides an effective date of July 1, 2001..

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:

Opponents[16] of the bill argue that the bill's amendments to:

- Section 373.114, F.S., which remove the Land and Water Adjudicatory Commission's authority to review orders or rules of water management districts resulting from ss. 120.569 or 120.57, F.S., evidentiary hearings, results in eliminating the Governor's and Cabinet's authority to make certain that water management decisions are consistent among districts.
- Section 403.412(5), F.S., will require environmental groups to unnecessarily spend substantial amounts of money to hire attorneys and put on evidence to prove standing in the manner required under the bill.

Under the bill's amendments to s. 57.111, F.S., the "Equal Access to Justice Act," a greater number of small businesses will be subject to the act as the net worth limitation of $2 million is raised to $5 million. Moreover, the amount of attorneys' fees awarded under the act will be higher because the attorneys' fees award limit is increased from $15,000 to $50,000. Accordingly, these amendments will result in private attorneys being able to collect a greater amount of fees from the governmental entity.

C. Government Sector Impact:

The bill makes agencies responsible for larger attorney's fee awards under more circumstances than are available now under the APA.

[16]The Florida Wildlife Federation, Florida League of Anglers, Save the Manatee Club, Florida Sierra Club, Florida Audubon Society, Florida League of Conservation Voters, and the Florida Consumer Action Network

VI. Technical Deficiencies:

None.

VII. Related Issues:

In Section 3., the bill amends s. 120.569, F.S., to add new language that requires the party, attorney, or qualified representative to certify that every pleading, motion, or paper filed is not filed for an improper purpose, is not frivolous and is warranted by existing law, is factual with evidentiary support, and that any denials of factual contentions contained therein are warranted. Much of this new language mirrors Rule 11, F.R.C.P., the long standing federal rule that was enacted to deter abuses in the signing of civil pleadings. The bill's amendment, however, does differ in at least one significant way. Under Rule 11, F.R.C.P., the decision to impose sanctions is within the discretion of the court; thus, the court has the ability to determine what, if any sanctions, are appropriate based on the nature of the violation. Under the bill, however, monetary sanctions ***must*** be imposed when a violation occurs, notwithstanding whether the presiding officer believes such sanctions are appropriate based on the violation. The bill does not require a finding that the violation was in bad faith nor that it was intentional.

VIII. Amendments:

None.