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HOUSE OF REPRESENTATIVES

SMARTER GOVERNMENT COUNCIL
ANALYSIS

BILL #: HB 257

RELATING TO: Administrative Procedures

SPONSOR(S): Representatives Spratt & others

TIED BILL(S): None

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

(1) STATE ADMINISTRATION YEAS 5 NAYS 0
(2) JUDICIAL OVERSIGHT YEAS 8 NAYS 1
(3) SMARTER GOVERNMENT COUNCIL
(4)
(5)

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

This bill amends the Administrative Procedures Act. The APA allows a person who has been substantially affected by a preliminary decision of an administrative agency to challenge that agency's decision. The APA sets forth the procedures and requirements governing such a challenge. This bill:

- Raises the cap on attorney's fees and costs, from $15,000 to $50,000, that can be awarded to a "prevailing small business party" in an adjudicatory or administrative proceeding initiated by a state agency, conducted pursuant to the APA.
- Clarifies the current requirement that "specific rules or statutes" must be cited in petitions for administrative hearings.
- Reorganizes and further elaborates upon what a signed pleading, written motion, or other paper filed in an administrative proceeding means; *e.g.*, that the allegations and other factual contentions have evidentiary support or, if specifically identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery.
- Allows a party in an administrative proceeding to move for sanctions against the other party for (1) taking a frivolous position with regard to the factual allegations or (2) presenting a pleading, motion, or other document for an improper purpose. *Monetary* sanctions cannot be imposed for discovery violations or for taking a frivolous legal position.
- Requires an administrative law judge to enter an initial scheduling order regarding discovery deadlines and identification of expert witnesses and their opinions, if any party so requests.
- Adds "needlessly increasing the cost of litigation" to the definition of "improper purpose."
- Provides for automatic approval and issuance of licenses under certain circumstances.

This bill does not appear to have a fiscal impact on local governments. The fiscal impact on state government, although indeterminate, should be minimal.

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"

In s. 57.111, F.S., Florida's 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. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state are different from the standard for an award against a private litigant in cases involving a small business party.[1] Section 57.111, F.S., provides that unless otherwise provided by law, an award of attorney's fees and costs must be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to Chapter 120, F.S., (the Administrative Procedure Act) initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust. Section 57.111, F.S., further provides that no award of attorney's fees and costs for an action initiated by a state agency can exceed $15,000. It should also be noted that any prevailing party (not just a small business party) in an administrative proceeding can be awarded the entire amount of their attorney's fees and costs, provided that amount is reasonable, if the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose pursuant to 120.595, F.S..

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, for example, that a person should not receive a permit to build a dock and boathouse in the waters of the state, that person has the right to participate in that decision before it becomes final.[2] The way this is accomplished is through an administrative hearing.

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[1] Section 57.111, F.S., defines "small business party" in part as a sole proprietor of an unincorporated business, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has not more than 25 full-time employees or a net worth of not more than $2 million, and a partnership or corporation which has its principal office in this state and has no more than 25 full-time employees or a net worth of not more than $2 million.

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

In Florida, agencies that need to conduct administrative hearings involving disputed issues of material fact generally refer those cases to the Division of Administrative Hearings (DOAH).[3] DOAH's administrative law judges 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 Chapter 120, F.S., the Administrative Procedure Act, and the rules adopted by DOAH to implement those statutory provisions.[4]

In cases requiring a decision that affects the substantial interests of a party, the administrative law judge normally makes findings of fact and draws conclusions of law as well as drafts a recommended order. The affected agency is responsible for entering a final order. Findings of fact made by an administrative law judge are 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.[5]

C. EFFECT OF PROPOSED CHANGES:

See "Section-By-Section Analysis"

D. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 57.111, F.S., to increase, from $15,000 to $50,000, the amount of attorneys' fees that can be awarded to a prevailing small business party against a state agency, in an action initiated by that state agency against the small business party. The current attorney's fee cap was established when this section was created in 1984,[6] the present value of $15,000 is $25,567.85.[7]

Section 2. Amends s. 120.54(5), F.S., regarding rulemaking.

Present Situation:

Section 120.54(5), F.S., requires the Administration Commission[8] to adopt uniform rules of procedure by July 1, 1997, which are the rules of procedure for each agency subject to Chapter 120, F.S., unless the Administration Commission grants an exception to the agency. Section 120.54(5), F.S., specifies what the rules are to cover; for example, the scheduling of public meetings, hearings, and workshops; the filing of notices of protest and formal written protests; and the filing of petitions for administrative hearings, which petitions must include references to the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action. The Administration Commission has adopted such rules, and the rule regarding the filing of petitions for administrative hearings can be found at Rule 28-106.201, Florida Administrative Code (Initiation of Proceedings). That rule, in part, simply echoes the statutory

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[3] 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; DOAH is responsible directly to the Governor and Cabinet. DOAH's 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. 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.

[4] *Id*.

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

[6] Chapter 84-78, Laws of Florida (CS/SB 438)

[7] Present value computation available at: [www.aier.org], last accessed January 22, 2002.

[8] The Administration Commission is part of the Executive Office of the Governor and is composed of the Governor and the Cabinet. The Governor is chair of the commission. s. 14.202, F.S.

requirement that a petition initiating a proceeding must contain "[a] statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action."

Effect of Proposed Changes:

This bill clarifies that citing "specific rules or statutes" *requires a reference to the specific section, subsection, paragraph, or subparagraph, as appropriate*. Proponents of this bill state that if this level of specificity is not required and a petitioner simply references, for example, a section or chapter number, and that section or chapter is very long and complicated, it would be difficult for the respondent to discern what provision the petitioner was using to support his or her argument, and therefore more difficult to defend the respondent's actions. Opponents of this bill argue that adding greater complexity and specificity to pleading requirements will make it more difficult for petitioners who do not have an attorney representing them.

Section 3. Amends s. 120.569, F.S., relating to agency decisions that affect a person's substantial interests.

Present Situation:

Section 120.569, F.S., applies to all proceedings in which the substantial interests of a party are determined by an agency, with certain exceptions.[9] Section 120.569, F.S., sets forth, for example, various notice requirements, pleading requirements, and the time parameter within which a final order must be completed. There is no specific provision allowing a party to move for sanctions for violating the provisions of s. 120.569, F.S. There is also no exception prohibiting an administrative law judge from sanctioning someone who violates discovery requirements or who asserts frivolous legal positions in a pleading, claim, or defense. Also, there is no requirement that administrative law judges enter an initial scheduling order to address such things as the deadline for all discovery or the date by which the parties must identify who their expert witnesses are and the opinions of those expert witnesses. Some administrative law judges do, however, enter scheduling orders.

Effect of Proposed Changes:

This bill reorganizes and further elaborates upon what a signed pleading, written motion, or other paper filed in a proceeding means; *e.g.*, that the allegations and other factual contentions have evidentiary support or, if specifically identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and that that the denials of factual contentions are warranted on the evidence or, if specifically identified, are reasonably based on lack of information or belief.

This bill also provides that a party may move for sanctions against the opposing party for (1) taking a frivolous position with regard to the factual allegations or (2) presenting a pleading, motion, or other document for an improper purpose. However, *monetary* sanctions may not be imposed for discovery violations or for taking a frivolous legal position. Opponents of this bill argue that this provision will interfere with the process that leads up to the hearing of the case on its merits, and will further frustrate pro se litigants (litigants without legal representation who represent themselves) in developing and determining their case. Proponents of the bill rebut that administrative law judges are not required to grant sanctions, and will do so only when they think appropriate, which will take into consideration the lack of expertise of a pro se litigant.

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[9] 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 (or unless the parties are proceeding under ss. 120.573 or 120.574, F.S.). If waived, then the hearing is conducted by the agency, or if the issue does not involve a disputed issue of fact.

Finally, this bill expressly requires an administrative law judge to enter an initial scheduling order which must establish a discovery period, including a deadline by which all discovery must be completed, and the date by which the parties must identify expert witnesses and their opinions. The initial scheduling order also may require the parties to meet and file a joint report by a date certain.

Section 4. Amends s. 120.57, F.S., regarding additional procedures for certain administrative cases. Currently, upon a motion by any party, the administrative law judge, "in ruling on such a motion," can relinquish jurisdiction over the case if a dispute of material fact no longer exists. This bill rephrases that provision to provide that "an order relinquishing jurisdiction *shall be* rendered if the administrative law judge determines . . . that no genuine issue as to any material fact exists."

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. Currently, s. 120.60, F.S., specifies a certain period of time within which an agency must approve or deny a license application. If, however, the agency does not approve or deny the license application within that period of time, s. 120.60, F.S., further instructs that "the agency must approve [such] application." Since the agency failed to act within the statutorily required timeframe, to then further statutorily require that the agency approve the application may fall on equally deaf ears. Accordingly, this bill provides that if an agency does not act within the specified time period, then the application is "considered approved," and a license must be issued. However, if satisfactory completion of an examination is a prerequisite to licensure, then the license must be issued upon satisfactory completion of that examination. This new provision regarding the examination prerequisite is not clearly drafted.

Section 7. Provides an effective date of "upon becoming law."

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The fiscal impact should be minimal. However, raising the cap on attorney's fees in s. 57.111, F.S., may result in state agencies having to pay more in attorney's fees and costs in some cases.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. 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:

This 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.

IV. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

Opponents of the bill include 1000 Friends of Florida, Florida Wildlife Federation, Florida League of Anglers, Save the Manatee Club, Sierra Club, Florida League of Conservation Voters, and the Florida Consumer Action Network.

Proponents of the bill include the Florida Chamber, the Florida Fruit & Vegetable Association, and the Florida Minerals Association.

V. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On January 24, 2002 the Committee on Judicial Oversight adopted 3 amendments which:

1. This amendment is a technical amendment changing the tense of a single word from past to present tense.

2. This amendment changes the allowable time from 14 to 21 days within which a party can correct or withdraw a challenged paper, claim, defense, contention, allegation or denial, prior to the presiding officer acting on a motion for sanctions or the moving party requesting a hearing.

3. This amendment removes the requirement that a party to an administrative proceeding specifically cite to any section of law applicable to the claim, thereby maintaining existing statutory language.

The bill was then reported favorably as amended.

VI. SIGNATURES:

COMMITTEE ON STATE ADMINISTRATION:

Prepared by:	Staff Director:
J. Marleen Ahearn, Ph.D., J.D.	J. Marleen Ahearn, Ph.D., J.D.

AS REVISED BY THE COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:	Staff Director:
Noelle M. Melanson	Nathan L. Bond J.D.

AS FURTHER REVISED BY THE SMARTER GOVERNMENT COUNCIL:

Prepared by:	Staff Director:
J. Marleen Ahearn, Ph.D.,J.D.	Don Rubotttom