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 280

SPONSOR: Governmental Oversight and Productivity Committee and Senator Pruitt

SUBJECT: Administrative Procedure

DATE: March 5, 2002 REVISED: _____ _____ _____ _____

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

I. Summary:

This bill amends section 57.111(4)(d), F.S., to raise 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 that is conducted pursuant to ch. 120, F.S.

This bill also amends several provisions of ch. 120, F.S, which is known as the Administrative Procedures Act (APA). Specifically, the bill:

- Amends the current requirement that "specific rules or statutes" be cited in petitions for administrative hearings to also require a statement explaining how the alleged facts relate to the specific rules or statutes, as appropriate.

- 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 taking a frivolous position with regard to the factual allegations or presenting a pleading, motion, or other document for an improper purpose. Monetary sanctions cannot be imposed for discovery violations or against a represented party 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.

- Specifies that an administrative law judge must enter an order relinquishing jurisdiction to the agency when the judge determines that no genuine issue as to any material fact exists.

- Requires an agency to deny an exception that does not clearly identify the disputed portion of a recommended order.

- Provides that a court may award reasonable attorney's fees and costs to the prevailing appellant if the court finds that the agency improperly rejected or modified a conclusion of law or an interpretation of a rule over which it does not have jurisdiction.

- Adds "needlessly increasing the cost of litigation" to the definition of "improper purpose."

- Provides for automatic approval and issuance of licenses under certain circumstances.

- Provides legislative intent for act.

This bill substantially amends the following sections of the Florida Statutes: 57.111; 120.54; 120.569; 120.57; 120.595; 120.60; and 120.68.

II. 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. 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 APA,) 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 s. 120.595, F.S.

Chapter 120, F.S., The Administrative Procedure Act (APA)

The APA allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions.[1] 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.[2]
- 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.

The Division of Administrative Hearings (DOAH), which consists of an independent group of administrative law judges (ALJs), conducts hearings under ch. 120, F.S., when certain agency decisions are challenged by substantially affected persons.[3] [4] Pursuant to s. 120.56, F.S., an ALJ must conduct a hearing when a person, who is substantially affected by a rule or proposed rule, files a petition alleging that the rule or proposed rule is an invalid exercise of delegated legislative authority. Further, cases in which the substantial interests of a party are determined by

[1] *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, by Judge Linda M. Rigot, The Florida Bar Journal, Jan. 2001, at 14.
[2] Section 20.04, F.S., sets for the structure of the executive branch of state government.
[3] DOAH proceedings are conducted like nonjury trials and are governed by ch. 120, F.S.
[4] 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.

an agency and in which there is a disputed issue of material fact, are generally referred by an agency to the DOAH.

Section 120.569, F.S., applies to all proceedings in which the substantial interests of a party are determined by an agency.[5] This section requires petitions for hearings to be filed with the agency, and states that an agency request for an ALJ must be made to the DOAH within 15 days after receiving the petition.[6] In general, agencies request ALJs for cases in which there is a disputed issue of material fact. Section 120.569, F.S., also specifies notice and pleading requirements, and the time parameter within which a final order must be completed. Further, the section provides that all pleadings, motions, or other papers filed in the proceeding must be signed by the party or his or her representative. The signature constitutes a certificate that the filings are not interposed for an improper purpose, ". . . such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation."[7] An "improper purpose" is defined to include filings to harass, to cause unnecessary delay, for frivolous purposes, or to needlessly increase the cost of litigation. If the presiding officer finds a violation of this certificate, the officer shall impose an appropriate sanction, which may include an order to pay the other party's expenses, including attorney's fees, due to the improper filing.[8]

Section 120.57(1), F.S., applies to hearings in which there is a disputed issue of material fact. Generally, these hearings are conducted by an ALJ. The subsection sets forth evidentiary procedures, specifies what the record may consist of, and specifies what should occur in the event a dispute of material fact no longer exists. Further, the subsection provides that the ALJ is to issue a recommended order that contains findings of fact and conclusions of law. The agency may adopt the recommended order as its final order, or in its final order the agency may: (a) reject or modify the order's conclusions of law and interpretations of rules over which the agency has jurisdiction if it states its reasons for doing so with particularity, and finds that its substituted conclusion is as reasonable than that which it rejected or modified; or (b) may reject or modify findings of fact if, after a review of the entire record, it states with particularity that the findings of fact were not based on competent substantial evidence or that the proceedings on which the finding were based did not comply with essential requirements of law.[9]

Section 120.57(2), F.S., applies to hearings that do not involve a disputed issue of material fact. Generally, these hearings are conducted by the agency, and the subsection requires that the agency: (a) provide reasonable notice to affected persons of its action; (b) provide the parties an opportunity to present evidence in opposition to the agency action; and (c) provide a written explanation to the parties if it overrules the parties' objections.

Section 120.595, F.S., provides for an award of costs and attorney's fees in certain ch. 120, F.S., as follows[10]:

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[5] Section 120.569, F.S., applies except when mediation is elected by all parties pursuant to s. 120.573, or when a summary hearing is elected by all parties pursuant to s. 120.574, F.S.
[6] Section 120.569(2)(a), F.S.
[7] Section 120.569(2)(e), F.S.
[8] Section 120.569(2)(e), F.S.
[9] Section 120.57(1)(L), F.S.
[10] The section specifies that it is merely supplemental, and does not abrogate other provisions allowing the award of fees or costs. Section 120.595(1)(a), F.S.

- In a proceeding pursuant to s. 120.57(1), F.S., the final order shall award reasonable costs and attorney's fees to the prevailing party if the ALJ has determined that the nonprevailing adverse party has participated in the proceeding for an improper purpose. The ALJ is to determine whether any party has participated for an improper purpose as defined in the subsection and in s. 120.569(2)(e), F.S., upon motion. The subsection's definition of "improper purpose" is very similar to that applicable to filings in s. 120.569(2)(e), F.S. It provides that an, "'Improper purpose' means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity."
- In a proceeding to challenge proposed agency rules pursuant to s. 120.56(2), F.S., or to challenge existing agency rules pursuant to s. 120.56(3), F.S., the court or ALJ that finds a rule or proposed rule invalid is required to order the agency to pay reasonable costs and attorney's fees, unless the agency can demonstrate that such an award would be unjust. Further, the court or ALJ shall award reasonable costs and attorney's fees to a prevailing agency if the court or ALJ finds that a party participated for an improper purpose as defined in subsection (1)(e). The attorney's fee awards are capped at $15,000.
- In a proceeding to challenge, under s. 120.56(4), F.S., an agency statement that the petitioner alleges should have been adopted as a rule, the ALJ is required to award the petitioner reasonable costs and attorney's fees, unless the agency demonstrates that the statement is required by the federal government.
- On appeal of a proceeding under ch. 120, F.S., the court is given the discretion to award prevailing party attorney's fees and costs if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action, which precipitated the appeal, was a gross abuse of the agency's discretion. Further, if the court during an appeal finds that an agency improperly rejected or modified findings of fact in a recommended order, the court must award reasonable attorney's fees and costs to a prevailing appellant for both the administrative and appellate proceeding.

Section 120.60, F.S., which pertains to licensing, specifies that an agency must approve or deny a license application within 90 days after receipt, unless a shorter period of time is otherwise prescribed by law, within 15 days after the conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and parties, whichever is later. The 90-day period is tolled by the initiation of a proceeding under ss. 120.569 or 120.57, F.S. Further, the section states that the agency must approve an application for a license or for an examination for license if the agency has not approved or denied the application within the prescribed time periods.

III. Effect of Proposed Changes:

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

Section 2. Amends s. 120.54(5), F.S., to amend the requirement that "specific rules or statutes" be cited in petitions for administrative hearings under ss. 120.569 and 120.57, F.S., to also require a statement explaining how the alleged facts relate to the specific rules or statutes.

Section 3. Amends s. 120.569, F.S., relating to agency decisions that affect a person's substantial interests. The bill adds new language that requires an attorney or qualified representative of a party, or an unrepresented party to sign every pleading, motion, or paper filed. By signing, filing, submitting, or later advocating a document, the attorney, qualified representative, or unrepresented party certifies that the document is not presented 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. The bill further provides that this certification does not prohibit the amendment of a petition during or after discovery.

If a "presiding officer" finds a violation of one of the certification requirements, the officer may 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. These sanctions may be imposed against the person who signed it, the represented party, or both. Under the bill, sanctions:

- Are not allowed for discovery violations, nor against a represented party for frivolous filings.
- Are not permitted to be awarded for submitting written comments or objections during an authorized period for public comment or at a public meeting, including, but not limited to, the submission of comments or objections regarding draft permits.
- Must be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated.

The bill also specifies that an agency may indemnify its attorney for sanctions imposed if the conduct giving rise to the sanction was taken within the scope of employment and the indemnification is in the agency's interest.

The sanctions may be initiated on motion or on the presiding officer's own initiative. If by motion, the motion shall initially be served upon the attorney, qualified representative, or unrepresented party. If the party served chooses to oppose a motion, he or she must file a copy of the motion and its written objection with the presiding officer within 14 days after service of the motion. If the challenged document is not withdrawn or appropriately corrected within 21 days or if the party has not filed its written objection, the movant may then file the motion with the presiding officer. 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.

This bill also requires an ALJ, when requested by any party, to enter an initial scheduling order, which establishes 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(1)(i), F.S., regarding additional procedures for hearings involving disputed issues of material fact. Currently, any party may move to have the ALJ relinquish jurisdiction to the agency if there is no longer a dispute of material fact, and the ALJ is instructed to rule on the motion. Under the bill this provision is rephrased to require an ALJ to relinquish jurisdiction if he or she finds that no genuine issue as to any material fact exists.

The bill also amends s. 120.57(1)(k), F.S., to provide that an agency may not grant an exception to a recommended order if it does not clearly identify the disputed portion of the recommended order by page number and paragraph, does not identify the legal basis for the exception, or does not include appropriate and specific citations to the record.

Section 5. Amends s. 120.595, F.S., which provides for an award of costs and attorney's fees where a non-prevailing party has participated in a s. 120.57(1), F.S. proceeding for an "improper purpose." The bill expands the definition of "improper purpose" to include needlessly increasing the cost of litigation. The bill also eliminates the reference to s. 120.569(2)(e), F.S., in defining "improper purpose" so that filing pleadings for an improper purpose is no longer a condition precedent to an award of attorney's fees under this section.

Further, the bill provides that a court may award a prevailing appellant reasonable attorney's fees and costs if it finds that an agency improperly rejected or modified a conclusion of law or an interpretation of an administrative rule over which it does not have substantive jurisdiction.

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. The section does not, however, currently specify what occurs if the agency does not approve or deny the license application within that period of time. Under the bill, if an agency does not act within the specified time period, the application is "considered approved" and the license must be issued. However, if satisfactory completion of an examination is a prerequisite to licensure, the bill specifies that issuance of the license is subject to satisfactory completion of that examination.

Section 7. Amends s. 120.68, F.S., to clarify that an agency's findings of immediate danger, necessity, and procedural fairness that are a prerequisite to the adoption of an emergency rule are judicially reviewable. This is also currently provided in s. 120.54(4)(a)3., F.S.

Section 8. Provides that it is the intent of the Legislature that this act shall not affect the outcome of the case, *Pinecrest Lakes, Inc. v. Shidel*, 795 So.2d 191 (Fla. 4th DCA 2001).

Section 9. Provides an effective date of "upon becoming a law."

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:

Under the bill's amendments to s. 57.111, F.S., the "Equal Access to Justice Act," the amount of costs and attorney's fees that may be awarded to a small business party is increased from $15,000 to $50,000. Accordingly, private attorneys may collect greater fees from governmental entities.

C. Government Sector Impact:

The bill's amendment of s. 57.111, F.S., which increases to $50,000 the amount of costs and attorney's fees that can be awarded to a prevailing small business party, could result in government agencies incurring greater expenditures for costs and attorney's fees in cases where the government agency initiated the action. The amendment could also have a chilling effect on agency action. The exact fiscal impact is indeterminate.

The DOAH indicates that the bill is not expected to have a meaningful impact on its caseload or case management responsibilities, and that it should not have any fiscal impact on the Division.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The bill amends s. 120.54, F.S., to require a greater level of specificity in petitions for administrative hearings pursuant to ss. 120.569 and 120.57, F.S. Under the bill, a petitioner is required to state how the alleged facts relate to the specific rules or statutes that the petitioner contends require reversal or modification of an agency's proposed action. Current law requires only, "[a] statement of the specific rules or statutes . . . ." Proponents of this bill state that the bill's requirement of greater specificity is needed, as current law permits petitioners to simply reference a section or chapter number. Such vague citation, particularly when the citation is to a lengthy or complicated section or chapter, makes it difficult for the respondent to discern what the petitioner is arguing, and in turn, more difficult to defend the respondent's actions. Opponents of this bill argue that requiring more specificity in the pleading requirements will be onerous on petitioners who do not have an attorney representing them.

VIII. Amendments:

None.