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: SB 280

SPONSOR: Senator Pruitt

SUBJECT: Administrative Procedure

DATE: December 21, 2001 REVISED: 01/08/02

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

I. Summary:

This bill amends s. 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, 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:

- Clarifies the current requirement that "specific rules or statutes" must be cited in petitions for administrative hearings by requiring reference to the specific section, subsection, paragraph, or subparagraph, 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 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.

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

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.

[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.

- 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) who hear cases involving most state agencies.[3] 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.[4]

Currently, s. 120.54(5), F.S., requires the Administration Commission to adopt uniform rules of procedure, which apply to each agency subject to ch. 120, F.S., unless the Administration Commission grants an exception to the agency. Section 120.54(5), F.S., specifies that the rules are to cover: 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 rule regarding the filing of petitions for administrative hearings is Rule 28-106.201, Florida Administrative Code. That rule, in part, simply echoes the statutory requirement that a petition initiating a proceeding must

[3] 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.

[4] *Id*.

contain "[a] statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action."

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."[5] 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.[6]

In adjudicatory cases, where a decision affects "substantial interests," the administrative law judge (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.[7] 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."[8] 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.[9]

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 of a request for hearing, and a recommended order generally must be entered within 30 days after receipt of the transcript of the hearing.[10] 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.[11] Summary hearing procedures have expedited provisions as well.

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[5] *Why Florida Needs the Administrative Procedure Act*, by William E. Williams and S. Curtis Kiser, The Florida Bar Journal, Jan. 2001, at 20.
[6] *The Florida Division of Administrative Hearings*, at 24.
[7] Section 120.57(1), F.S.
[8] *The Florida Division of Administrative Hearings*, at 24.
[9] Section 120.57(1), F.S.
[10] Section 120.57(3)(e), F.S.
[11] Section 120.56(1)(c), F.S.

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.[12] 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.

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. 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 as a matter of routine.

Section 120.60, F.S., which pertains to licensing, 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."

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 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.

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

[12] *See* 28 U.S.C. s. 636. *The Florida Division of Administrative Hearings*, fn 26, at 27.

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 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.

This bill also 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., which provides for an award of attorney's fees where a non-prevailing party has participated in the 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 necessary condition precedent to an award of attorney's fees under this section.

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 issue the license 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 the 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.

Section 7. 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 attorneys' fees that could potentially be awarded to a small business party is increased from $15,000 to $50,000. Accordingly, these amendments could result in private attorneys being able to collect a greater amount of fees from governmental entities.

Regarding the amendments to the pleading requirements in s. 120.54, F.S., proponents 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 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.

Regarding the amendments to s. 120.569, F.S., which provide for sanctions for frivolous filings, opponents argue that these provisions will interfere with the process that leads up to the hearing of the case on its merits, and will further frustrate litigants without legal representation who represent themselves in developing and determining their case. Proponents contend 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.

C. Government Sector Impact:

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

The Division of Administrative Hearings indicates the bill is not expected to have a meaningful impact on the caseload or case management responsibilities of the Division, nor any fiscal impact on the Division.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Judiciary:
This amendment changes the time from 14 days to 21 days within which a motion for sanctions may be acted upon by the presiding officer or called up for hearing by the moving party.