

By the Committees on Judiciary; Governmental Oversight and Productivity; and Senator Aronberg

308-2383-03

1 A bill to be entitled
2 An act relating to administrative procedures;
3 amending s. 120.52, F.S.; revising definition
4 of invalid exercise of delegated legislative
5 authority; amending s. 120.54, F.S.; revising
6 provisions with respect to uniform rules;
7 providing requirements with respect to the
8 application of alleged facts to specific rules
9 or statutes; amending s. 120.56, F.S.; revising
10 rule challenges; providing hearings of such
11 challenges to be held de novo; providing for
12 the standard of proof to be used; revising
13 procedures for agency response in unadopted
14 rule proceedings; amending s. 120.569, F.S.;
15 revising provisions with respect to decisions
16 that affect substantial interest; providing for
17 initial scheduling orders by the administrative
18 law judge; providing for a discovery period;
19 amending s. 120.57, F.S.; revising provisions
20 with respect to additional procedures
21 applicable to hearings involving disputed
22 issues of material fact; revising procedures in
23 unadopted rule proceedings; providing that an
24 order relinquishing jurisdiction shall be
25 rendered under certain circumstances; providing
26 when an agency must rule on exceptions;
27 amending s. 120.595, F.S.; redefining the term
28 "improper purpose" and conforming a
29 cross-reference; declaring that other
30 provisions relating to attorney's fees and
31 costs are unaffected by s. 120.595, F.S.;

1 amending s. 120.60, F.S.; revising provisions
2 with respect to licensing; providing for
3 license issuance by default in specified
4 circumstances; amending s. 120.68, F.S.;
5 revising provisions with respect to judicial
6 review; providing additional grounds for
7 certain petitions challenging an agency rule as
8 an invalid exercise of delegated legislative
9 authority; amending s. 57.105, F.S.; providing
10 administrative law judge authority to award
11 attorney's fees and damages; amending s.
12 57.111, F.S.; revising attorney's fees on civil
13 actions and administrative proceedings
14 initiated by state agencies; providing an
15 effective date.

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17 Be It Enacted by the Legislature of the State of Florida:

18
19 Section 1. Subsection (8) of section 120.52, Florida
20 Statutes, is amended to read:

21 120.52 Definitions.--As used in this act:

22 (8) "Invalid exercise of delegated legislative
23 authority" means action which goes beyond the powers,
24 functions, and duties delegated by the Legislature. A proposed
25 or existing rule is an invalid exercise of delegated
26 legislative authority if any one of the following applies:

27 (a) The agency has materially failed to follow the
28 applicable rulemaking procedures or requirements set forth in
29 this chapter;

30 (b) The agency has exceeded its grant of rulemaking
31 authority, citation to which is required by s. 120.54(3)(a)1.;

1 (c) The rule enlarges, modifies, or contravenes the
2 specific provisions of law implemented, citation to which is
3 required by s. 120.54(3)(a)1.;

4 (d) The rule is vague, fails to establish adequate
5 standards for agency decisions, or vests unbridled discretion
6 in the agency;

7 (e) The rule is arbitrary or capricious. A rule is
8 arbitrary if it is not supported by logic or the necessary
9 facts; a rule is capricious if it is adopted without thought
10 or reason or is irrational; or

11 ~~(f) The rule is not supported by competent substantial~~
12 ~~evidence; or~~

13 (f)(g) The rule imposes regulatory costs on the
14 regulated person, county, or city which could be reduced by
15 the adoption of less costly alternatives that substantially
16 accomplish the statutory objectives.

17
18 A grant of rulemaking authority is necessary but not
19 sufficient to allow an agency to adopt a rule; a specific law
20 to be implemented is also required. An agency may adopt only
21 rules that implement or interpret the specific powers and
22 duties granted by the enabling statute. No agency shall have
23 authority to adopt a rule only because it is reasonably
24 related to the purpose of the enabling legislation and is not
25 arbitrary and capricious or is within the agency's class of
26 powers and duties, nor shall an agency have the authority to
27 implement statutory provisions setting forth general
28 legislative intent or policy. Statutory language granting
29 rulemaking authority or generally describing the powers and
30 functions of an agency shall be construed to extend no further
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1 than implementing or interpreting the specific powers and
2 duties conferred by the same statute.

3 Section 2. Paragraph (b) of subsection (5) of section
4 120.54, Florida Statutes, is amended to read:

5 120.54 Rulemaking.--

6 (5) UNIFORM RULES.--

7 (b) The uniform rules of procedure adopted by the
8 commission pursuant to this subsection shall include, but are
9 not ~~be~~ limited to:

10 1. Uniform rules for the scheduling of public
11 meetings, hearings, and workshops.

12 2. Uniform rules for use by each state agency that
13 provide procedures for conducting public meetings, hearings,
14 and workshops, and for taking evidence, testimony, and
15 argument at such public meetings, hearings, and workshops, in
16 person and by means of communications media technology. The
17 rules shall provide that all evidence, testimony, and argument
18 presented shall be afforded equal consideration, regardless of
19 the method of communication. If a public meeting, hearing, or
20 workshop is to be conducted by means of communications media
21 technology, or if attendance may be provided by such means,
22 the notice shall so state. The notice for public meetings,
23 hearings, and workshops utilizing communications media
24 technology shall state how persons interested in attending may
25 do so and shall name locations, if any, where communications
26 media technology facilities will be available. Nothing in this
27 paragraph shall be construed to diminish the right to inspect
28 public records under chapter 119. Limiting points of access to
29 public meetings, hearings, and workshops subject to the
30 provisions of s. 286.011 to places not normally open to the
31 public shall be presumed to violate the right of access of the

1 public, and any official action taken under such circumstances
2 is void and of no effect. Other laws relating to public
3 meetings, hearings, and workshops, including penal and
4 remedial provisions, shall apply to public meetings, hearings,
5 and workshops conducted by means of communications media
6 technology, and shall be liberally construed in their
7 application to such public meetings, hearings, and workshops.
8 As used in this subparagraph, "communications media
9 technology" means the electronic transmission of printed
10 matter, audio, full-motion video, freeze-frame video,
11 compressed video, and digital video by any method available.

12 3. Uniform rules of procedure for the filing of notice
13 of protests and formal written protests.

14 4. Uniform rules of procedure for the filing of
15 petitions for administrative hearings pursuant to s. 120.569
16 or s. 120.57. Such rules shall require the petition to
17 include:

18 a. The identification of the petitioner.
19 b. A statement of when and how the petitioner received
20 notice of the agency's action or proposed action.

21 c. An explanation of how the petitioner's substantial
22 interests are or will be affected by the action or proposed
23 action.

24 d. A statement of all material facts disputed by the
25 petitioner or a statement that there are no disputed facts.

26 e. A statement of the ultimate facts alleged,
27 including a statement of the specific facts the petitioner
28 contends warrant reversal or modification of the agency's
29 proposed action.

30 f. A statement of the specific rules or statutes that
31 the petitioner contends require reversal or modification of

1 the agency's proposed action, including an explanation of how
2 the alleged facts relate to the specific rules or statutes.

3 g. A statement of the relief sought by the petitioner,
4 stating precisely the action petitioner wishes the agency to
5 take with respect to the proposed action.

6 5. Uniform rules of procedure for the filing and
7 prompt disposition of petitions for declaratory statements.

8 6. Provision of a method by which each agency head
9 shall provide a description of the agency's organization and
10 general course of its operations.

11 7. Uniform rules establishing procedures for granting
12 or denying petitions for variances and waivers pursuant to s.
13 120.542.

14 Section 3. Paragraph (e) of subsection (1), paragraph
15 (a) of subsection (3), and paragraph (e) of subsection (4) of
16 section 120.56, Florida Statutes, are amended to read:

17 120.56 Challenges to rules.--

18 (1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF
19 A RULE OR A PROPOSED RULE.--

20 (e) Hearings held under this section shall be de novo
21 in nature. The standard of proof shall be the preponderance of
22 the evidence. Hearings shall be conducted in the same manner
23 as provided by ss. 120.569 and 120.57, except that the
24 administrative law judge's order shall be final agency action.
25 The petitioner and the agency whose rule is challenged shall
26 be adverse parties. Other substantially affected persons may
27 join the proceedings as intervenors on appropriate terms which
28 shall not unduly delay the proceedings. Failure to proceed
29 under this section shall not constitute failure to exhaust
30 administrative remedies.

31 (3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.--

1 (a) A substantially affected person may seek an
2 administrative determination of the invalidity of an existing
3 rule at any time during the existence of the rule. The
4 petitioner has a burden of proving by a preponderance of the
5 evidence that the existing rule is an invalid exercise of
6 delegated legislative authority as to the objections raised.

7 (4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES;
8 SPECIAL PROVISIONS.--

9 (e)1. If, prior to a final hearing to determine
10 whether all or part of any agency statement violates s.
11 120.54(1)(a), an agency publishes, pursuant to s.
12 120.54(3)(a), proposed rules that address the statement, then
13 for purposes of this section, a presumption is created that
14 the agency is acting expeditiously and in good faith to adopt
15 rules that address the statement, and the agency shall be
16 permitted to rely upon the statement or a substantially
17 similar statement as a basis for agency action if the
18 statement meets the requirements of s. 120.57(1)(e).

19 2. If, prior to the final hearing to determine whether
20 all or part of an agency statement violates s. 120.54(1)(a),
21 an agency publishes a notice of rule development which
22 addresses the statement pursuant to s. 120.54(2), or certifies
23 that such a notice has been transmitted to the Florida
24 Administrative Weekly for publication, then such publication
25 shall constitute good cause for the granting of a stay of the
26 proceedings and a continuance of the final hearing for 30
27 days. If the agency publishes proposed rules within this
28 30-day period or any extension of that period granted by an
29 administrative law judge upon showing of good cause, then the
30 administrative law judge shall place the case in abeyance
31 pending the outcome of rulemaking and any proceedings

1 involving challenges to proposed rules pursuant to subsection
2 (2).

3 3. If, following the commencement of the final hearing
4 and prior to entry of a final order that all or part of an
5 agency statement violates s. 120.54(1)(a), if an agency
6 publishes, pursuant to s. 120.54(3)(a), proposed rules that
7 which address the statement and proceeds expeditiously and in
8 good faith to adopt rules that ~~which~~ address the statement,
9 the agency shall be permitted to rely upon the statement or a
10 substantially similar statement as a basis for agency action
11 if the statement meets the requirements of s. 120.57(1)(e).

12 4. If an agency fails to adopt rules that ~~which~~
13 address the statement within 180 days after publishing
14 proposed rules, for purposes of this subsection, a presumption
15 is created that the agency is not acting expeditiously and in
16 good faith to adopt rules. If the agency's proposed rules are
17 challenged pursuant to subsection (2), the 180-day period for
18 adoption of rules is tolled until a final order is entered in
19 that proceeding.

20 5. If the proposed rules addressing the challenged
21 statement are determined to be an invalid exercise of
22 delegated legislative authority as defined in s.
23 120.52(8)(b)-(g), the agency must immediately discontinue
24 reliance on the statement and any substantially similar
25 statement until the rules addressing the subject are properly
26 adopted.

27 Section 4. Paragraph (o) is added to subsection (2) of
28 section 120.569, Florida Statutes, to read:

29 120.569 Decisions which affect substantial
30 interests.--

31 (2)

1 (o) On the request of any party, the administrative
2 law judge shall enter an initial scheduling order to
3 facilitate the just, speedy, and inexpensive determination of
4 the proceeding. The initial scheduling order shall establish a
5 discovery period, including a deadline by which all discovery
6 shall be completed, and the date by which the parties shall
7 identify expert witnesses and their opinions. The initial
8 scheduling order also may require the parties to meet and file
9 a joint report by a date certain.

10 Section 5. Paragraphs (e), (i), and (k) of subsection
11 (1) of section 120.57, Florida Statutes, are amended to read:

12 120.57 Additional procedures for particular cases.--

13 (1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS
14 INVOLVING DISPUTED ISSUES OF MATERIAL FACT.--

15 (e)1. Any agency action that determines the
16 substantial interests of a party and that is based on an
17 unadopted rule is subject to de novo review by an
18 administrative law judge.

19 2. The agency action shall not be presumed valid or
20 invalid. The agency must demonstrate that the unadopted rule:

21 a. Is within the powers, functions, and duties
22 delegated by the Legislature or, if the agency is operating
23 pursuant to authority derived from the State Constitution, is
24 within that authority;

25 b. Does not enlarge, modify, or contravene the
26 specific provisions of law implemented;

27 c. Is not vague, establishes adequate standards for
28 agency decisions, or does not vest unbridled discretion in the
29 agency;

30 d. Is not arbitrary or capricious. A rule is arbitrary
31 if it is not supported by logic or the necessary facts; a rule

1 is capricious if it is adopted without thought or reason or is
2 irrational;

3 e. Is not being applied to the substantially affected
4 party without due notice; and

5 ~~f. Is supported by competent and substantial evidence;~~
6 ~~and~~

7 ~~f.g.~~ Does not impose excessive regulatory costs on the
8 regulated person, county, or city.

9 3. The recommended and final orders in any proceeding
10 shall be governed by the provisions of paragraphs (k) and (l),
11 except that the administrative law judge's determination
12 regarding the unadopted rule shall not be rejected by the
13 agency unless the agency first determines from a review of the
14 complete record, and states with particularity in the order,
15 that such determination is clearly erroneous or does not
16 comply with essential requirements of law. In any proceeding
17 for review under s. 120.68, if the court finds that the
18 agency's rejection of the determination regarding the
19 unadopted rule does not comport with the provisions of this
20 subparagraph, the agency action shall be set aside and the
21 court shall award to the prevailing party the reasonable costs
22 and a reasonable attorney's fee for the initial proceeding and
23 the proceeding for review.

24 (i) When, in any proceeding conducted pursuant to this
25 subsection, a dispute of material fact no longer exists, any
26 party may move the administrative law judge to relinquish
27 jurisdiction to the agency. An order relinquishing
28 jurisdiction shall be rendered if the administrative law judge
29 determines from ~~in ruling on such a motion, the administrative~~
30 ~~law judge may consider~~ the pleadings, depositions, answers to
31 interrogatories, and admissions on file, together with

1 supporting and opposing affidavits, if any, that no genuine
2 issue as to any material fact exists. If the administrative
3 law judge enters an order relinquishing jurisdiction, the
4 agency may promptly conduct a proceeding pursuant to
5 subsection (2), if appropriate, but the parties may not raise
6 any issues of disputed fact that could have been raised before
7 the administrative law judge. An order entered by an
8 administrative law judge relinquishing jurisdiction to the
9 agency based upon a determination that no genuine dispute of
10 material fact exists, need not contain findings of fact,
11 conclusions of law, or a recommended disposition or penalty.

12 (k) The presiding officer shall complete and submit to
13 the agency and all parties a recommended order consisting of
14 findings of fact, conclusions of law, and recommended
15 disposition or penalty, if applicable, and any other
16 information required by law to be contained in the final
17 order. All proceedings conducted pursuant to this subsection
18 shall be de novo. The agency shall allow each party 15 days in
19 which to submit written exceptions to the recommended order.
20 An agency need not rule on an exception that does not clearly
21 identify the disputed portion of the recommended order by page
22 number or paragraph, that does not identify the legal basis
23 for the exception, or that does not include appropriate and
24 specific citations to the record.

25 Section 6. Paragraphs (c) and (e) of subsection (1) of
26 section 120.595, Florida Statutes, are amended, and subsection
27 (6) is added to that section, to read:

28 120.595 Attorney's fees.--

29 (1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION
30 120.57(1).--

31

1 (c) In proceedings pursuant to s. 120.57(1), and upon
2 motion, the administrative law judge shall determine whether
3 any party participated in the proceeding for an improper
4 purpose as defined by this subsection ~~and s. 120.569(2)(e)~~. In
5 making such determination, the administrative law judge shall
6 consider whether the nonprevailing adverse party has
7 participated in two or more other such proceedings involving
8 the same prevailing party and the same project as an adverse
9 party and in which such two or more proceedings the
10 nonprevailing adverse party did not establish either the
11 factual or legal merits of its position, and shall consider
12 whether the factual or legal position asserted in the instant
13 proceeding would have been cognizable in the previous
14 proceedings. In such event, it shall be rebuttably presumed
15 that the nonprevailing adverse party participated in the
16 pending proceeding for an improper purpose.

17 (e) For the purpose of this subsection:

18 1. "Improper purpose" means participation in a
19 proceeding pursuant to s. 120.57(1) primarily to harass or to
20 cause unnecessary delay or for frivolous purpose or to
21 needlessly increase the cost of litigation,licensing,or
22 securing the approval of an activity.

23 2. "Costs" has the same meaning as the costs allowed
24 in civil actions in this state as provided in chapter 57.

25 3. "Nonprevailing adverse party" means a party that
26 has failed to have substantially changed the outcome of the
27 proposed or final agency action which is the subject of a
28 proceeding. In the event that a proceeding results in any
29 substantial modification or condition intended to resolve the
30 matters raised in a party's petition, it shall be determined
31 that the party having raised the issue addressed is not a

1 nonprevailing adverse party. The recommended order shall
2 state whether the change is substantial for purposes of this
3 subsection. In no event shall the term "nonprevailing party"
4 or "prevailing party" be deemed to include any party that has
5 intervened in a previously existing proceeding to support the
6 position of an agency.

7 (6) OTHER SECTIONS NOT AFFECTED.--Other provisions,
8 including ss. 57.105 and 57.111, authorize the award of
9 attorney's fees and costs in administrative proceedings.
10 Nothing in this section shall affect the availability of
11 attorney's fees and costs as provided in those sections.

12 Section 7. Subsection (1) of section 120.60, Florida
13 Statutes, is amended to read:

14 120.60 Licensing.--

15 (1) Upon receipt of an application for a license, an
16 agency shall examine the application and, within 30 days after
17 such receipt, notify the applicant of any apparent errors or
18 omissions and request any additional information the agency is
19 permitted by law to require. An agency shall not deny a
20 license for failure to correct an error or omission or to
21 supply additional information unless the agency timely
22 notified the applicant within this 30-day period. An
23 application shall be considered complete upon receipt of all
24 requested information and correction of any error or omission
25 for which the applicant was timely notified or when the time
26 for such notification has expired. Every application for a
27 license shall be approved or denied within 90 days after
28 receipt of a completed application unless a shorter period of
29 time for agency action is provided by law. The 90-day time
30 period shall be tolled by the initiation of a proceeding under
31 ss. 120.569 and 120.57. Any ~~An~~ application for a license that

1 is not ~~must be~~ approved or denied within the 90-day or shorter
2 time period, within 15 days after ~~the~~ conclusion of a public
3 hearing held on the application, or within 45 days after a
4 recommended order is submitted to the agency and the parties,
5 whichever action and timeframe is latest and applicable, is
6 considered approved unless the recommended order recommends
7 that the agency deny the license. Subject to the satisfactory
8 completion of an examination if required as a prerequisite to
9 licensure, any license that is considered approved shall be
10 issued and may include such reasonable conditions as are
11 authorized by law. Any applicant for licensure seeking to
12 claim licensure by default under this subsection shall notify
13 the agency clerk of the licensing agency, in writing, of the
14 intent to rely upon the default license provision of this
15 subsection, and shall not take any action based upon the
16 default license until after receipt of such notice by the
17 agency clerk later. The agency must approve any application
18 ~~for a license or for an examination required for licensure if~~
19 ~~the agency has not approved or denied the application within~~
20 ~~the time periods prescribed by this subsection.~~

21 Section 8. Subsection (9) of section 120.68, Florida
22 Statutes, is amended to read:

23 120.68 Judicial review.--

24 (9) No petition challenging an agency rule as an
25 invalid exercise of delegated legislative authority shall be
26 instituted pursuant to this section, except to review an order
27 entered pursuant to a proceeding under s. 120.56 or an
28 agency's findings of immediate danger, necessity, and
29 procedural fairness prerequisite to the adoption of an
30 emergency rule pursuant to s. 120.54(4), unless the sole issue
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1 presented by the petition is the constitutionality of a rule
2 and there are no disputed issues of fact.

3 Section 9. Present subsections (5) and (6) of section
4 57.105, Florida Statutes, as amended by chapter 2002-77, Laws
5 of Florida, are renumbered as subsections (6) and (7),
6 respectively, and a new subsection (5) is added to that
7 section, to read:

8 57.105 Attorney's fee; sanctions for raising
9 unsupported claims or defenses; service of motions; damages
10 for delay of litigation.--

11 (5) In administrative proceedings under chapter 120,
12 an administrative law judge shall award a reasonable
13 attorney's fee and damages to be paid to the prevailing party
14 in equal amounts by the losing party and a losing party's
15 attorney or qualified representative in the same manner and
16 upon the same basis as provided in subsections (1)-(4). Such
17 award shall be a final order subject to judicial review
18 pursuant to s. 120.68. If the losing party is an agency as
19 defined in s. 120.52(1), the award to the prevailing party
20 shall be against and paid by the agency. A voluntary dismissal
21 by a nonprevailing party does not divest the administrative
22 law judge of jurisdiction to make the award described in this
23 subsection.

24 Section 10. Paragraph (d) of subsection (4) of section
25 57.111, Florida Statutes, is amended to read:

26 57.111 Civil actions and administrative proceedings
27 initiated by state agencies; attorneys' fees and costs.--

28 (4)

29 (d) The court, or the administrative law judge in the
30 case of a proceeding under chapter 120, shall promptly conduct
31 an evidentiary hearing on the application for an award of

1 attorney's fees and shall issue a judgment, or a final order
2 in the case of an administrative law judge. The final order
3 of an administrative law judge is reviewable in accordance
4 with the provisions of s. 120.68. If the court affirms the
5 award of attorney's fees and costs in whole or in part, it
6 may, in its discretion, award additional attorney's fees and
7 costs for the appeal.

8 1. No award of attorney's fees and costs shall be made
9 in any case in which the state agency was a nominal party.

10 2. No award of attorney's fees and costs for an action
11 initiated by a state agency shall exceed \$50,000~~\$15,000~~.

12 Section 11. This act shall take effect upon becoming a
13 law.

14
15 STATEMENT OF SUBSTANTIAL CHANGES CONTAINED IN
16 COMMITTEE SUBSTITUTE FOR
17 Senate Bill CS/1584

18 Provides that the administrative law judge retains
19 jurisdiction for purposes of awarding attorney fees under s.
20 57.105, F.S., upon the voluntary dismissal of an action by a
21 non-prevailing party.
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