HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 23 w/CS Administrative Procedures
SPONSOR(S): Spratt
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1584

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Judiciary	15 Y, 0 N w/CS	Jaroslav	Halicak
2) State Administration	5 Y, 0 N w/CS	Bond	Everhart
3) Commerce & Local Affairs Apps. (Sub)	11 Y, 0 N	Belcher	Belcher
4) Appropriations	40 Y, 0 N w/CS	Belcher	Hansen
5)			

SUMMARY ANALYSIS

This bill amends the Administrative Procedure Act ("APA") to: define the terms "arbitrary and capricious" and "competent substantial evidence"; require additional information in papers filed under the APA; require scheduling orders; hold an APA case challenging an agency policy in the nature of a rule while the agency pursues formal rulemaking; provide for automatic issue of professional licenses upon delay by the licensing agency; allow judicial review of emergency rules; provide for an award of attorney's fees for frivolous pleadings; revise language with respect to incorporation of rules by reference; and, increase from $15,000 to $50,000 the cap on attorneys' fees that may be awarded to a "prevailing small business party" in APA litigation.

This bill has an indeterminate fiscal impact on state government and on special districts subject to the APA due to the increase in the cap on attorney fees that may be awarded to a small business party who prevails in an action initiated by a state agency unless the agency can show that the action was substantially justified. The cost estimates are in excess of $50,000 annually; however, it cannot be foreseen what agencies might have to absorb the higher attorneys fees provisions in any particular year. The bill does not appear to have a fiscal impact on counties or municipalities.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[x]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[]	No[]	N/A[x]
4. Increase personal responsibility?	Yes[x]	No[]	N/A[]
5. Empower families?	Yes[]	No[]	N/A[x]

For any principle that received a "no" above, please explain:

This bill appears to raise the complexity of, and thus the cost of, administrative proceedings.

B. EFFECT OF PROPOSED CHANGES:

Background

Executive branch agencies make decisions that affect persons in two ways. They make decisions affecting a person or persons in a particular situation; typically in the form of the issuance of, or denial of, a license to do something. These are termed "decisions which affect substantial interests." Agencies also make decisions that affect many persons in a broad way; these decisions are generally in the form of administrative rules.

The Administrative Procedure Act ("APA"), ch. 120, F.S., provides the methods, procedures, and standards to resolve challenges to these agency decisions. The Department of Administrative Hearings ("DOAH") generally conducts the administrative hearings required by the APA.[1] Hearings before DOAH are conducted similar to how nonjury trials are conducted in the state courts.

In rulemaking cases, the DOAH hearing officer makes a final ruling as to the validity of a rule. As to a proposed rule being challenged (or as to an agency position in the nature of an unadopted rule), the hearing officer conducts a de novo hearing,[2] that is, the agency is expected to come forward with evidence and prove the legality of the proposed rule. As to an existing rule, such rule is presumed valid and the person challenging the rule must prove why the rule is invalid.

In cases involving a decision that affects the substantial interests of a person (typically licensing), the administrative law judge may only enter a recommended final order that makes findings of fact and draws conclusions of law based on those facts. The affected agency must then enter a final order making the final decision. The findings of fact that were made by the administrative law judge are presumed correct, and may not be lightly set aside by the agency.

[1] 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 Cabinet—and the appointment must be confirmed by the Senate. *See* 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. *See generally* Judge William C. Sherrill, Jr., *The Florida Division of Administrative Hearings*, 75-Jan. FLA. BAR J. 22 (2001).

[2] Black's Law Dictionary, 6th Ed., defines "hearing de novo" as "a new hearing or a hearing for the second time, contemplating an entire trial in the same manner in which [the] matter was originally heard and a review of previous hearing. Trying [the] matter anew the same as if it had not been heard before and as if no decision had been previously rendered."

Effect of Bill

Section 120.52, F.S., is the APA's definitional section. Subsection (8) of that section defines the term "invalid exercise of delegated legislative authority." To challenge an agency rule, a person must show that the rule is an invalid exercise of delegated legislative authority. Upon such a finding, the rule will be deemed invalid. See s. 120.56, F.S. The definition includes a list of factors which define a rule as an invalid exercise of delegated legislative authority, including if the rule is "arbitrary or capricious", s. 120.52(8)(e), F.S., or not supported by "competent substantial evidence." s. 120.52(8)(f). These terms are not statutorily defined, but have been defined in Florida case law.[3] This bill generally follows case law in specifying that a rule is "arbitrary and capricious", and is thus an "invalid exercise of delegated legislative authority", by stating that a "rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational." This bill also eliminates the factor of "the rule is not supported by competent substantial evidence" from the list of things that would define a rule as an "invalid exercise of delegated legislative authority."

Section 120.54(1), F.S., currently allows a rule to incorporate material by reference, but only as the material exists on the date the rule is adopted and requires that a rule may not be amended by reference only. The bill requires, notwithstanding any contrary provision in the section, that when a rule of the Department of Environmental Protection or a water management district is incorporated by reference in the other agency's rule to implement a provision of ch. 373, subsequent amendments to the rule are not effective as to the incorporating rule unless the agency incorporating by reference notifies the committee and the Department of State of its intent to adopt the subsequent amendment, publishes notice of such intent in the Florida Administrative Weekly, and files with the Department of State a copy of the amendment rule incorporated by reference. It also specifies notice, objection, and response timeframes and related procedures.

Section 120.54(5), F.S., requires the Administration Commission ("Commission")[4] to adopt uniform rules of procedure for use in all APA cases, and specifies what some of those rules must generally contain. This bill adds a requirement that the uniform rules must require that a petition for an administrative hearing must explain how the facts alleged relate to rules or statutes that are alleged to have been violated.

Section 120.56, F.S., specifies procedures for challenging an agency's existing or proposed rule. This bill amends s. 120.56(1)(e), F.S., to re-state current law, that is, that hearings on a rule challenge are de novo in nature, and that the standard of proof is the preponderance of the evidence.

State agencies, like any other form of organization, adopt internal policies and procedures, both formally and informally. An agency may not utilize such internal policies and procedures, however, to avoid the formal rulemaking process where rulemaking is required by law. Termed an "agency statement" and included in the definition of a "rule" found in s. 120.52(15), F.S., current law provides that a rule "means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. . . ." A person may object to an agency statement that should have been adopted as a rule. In such a challenge, this bill amends s. 120.56(4), F.S., to establish a presumption that the agency is acting expeditiously and in good faith if the agency timely commences and pursues formal rulemaking of the challenged agency statement. The administrative law judge must hold the case challenging the agency statement in abeyance while the agency completes the rulemaking

[3] *See Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc*., 808 So.2d 243 (Fla. 1st DCA 2002); *Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks*, 721 So.2d 317 (Fla. 1st DCA 1998), for discussion of "arbitrary and capricious." *See De Groot v. Sheffield*, 95 So.2d 912 (Fla. 1957), for a description of "competent substantial evidence."

[4] 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. *See* s. 14.202, F.S.

process. If no challenge to the formal rulemaking process is filed and the agency statement is adopted as a rule, then the agency statement case would be dismissed. If someone successfully challenges the proposed rule during the rulemaking process, then the outcome of the separate rulemaking case prevails and the agency must immediately discontinue reliance on the challenged agency statement.

This bill amends s. 120.569, F.S., to add a procedural requirement to cases before DOAH[5] by which an administrative law judge must enter an initial scheduling order upon request of a party.

This bill amends s. 120.57(1), F.S., to mirror the change to the definition of the term "invalid exercise of delegated legislative authority" by specifying that a "rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational." This bill also eliminates the factor of "the rule is not supported by competent substantial evidence".

In a case involving a decision that affects the substantial interests of a person, current law provides that the administrative law judge may relinquish jurisdiction over such case if it appears that there is no material fact in issue. Relinquishing of jurisdiction is somewhat analogous to ruling on a case in the civil courts upon a motion for summary judgment. When an administrative law judge relinquishes jurisdiction, the matter returns to the agency for final agency action. In general, this follows the theory that the purpose of DOAH is to assist agencies in orderly hearings on disputed findings of fact, while retaining in agencies the final right and ability to interpret the law and issue final rulings on matters that affect the substantial interests of a person. This bill amends s. 120.57(1)(i), F.S., to require that an order relinquishing jurisdiction must be entered where there is no genuine issue of material fact.

In a case involving a decision that affects the substantial interests of a person, current law requires the administrative law judge to prepare a recommended final order for the agency. The parties then have 15 days to file written exceptions (objections) with the agency. This bill amends s. 120.57(1)(k), F.S., to provide that an agency is not required to rule on an exception unless the party specifically cites to the record the party's support for the exception.[6]

Section 120.595(1)(c), F.S., provides for attorney's fees that may be awarded to the prevailing party in an administrative hearing involving fact-finding where the nonprevailing adverse party participated in the case for an "improper purpose." Current law defines "improper purpose" as "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." This bill amends the definition of "improper purpose" to add that needlessly increasing the cost of litigation is an improper purpose. This bill also adds a new subsection (6) to specify that attorney's fees may be awarded under other available provisions of law in addition to being awarded under this section.

Current law at s. 120.60, F.S., requires agencies to examine an application for licensure, and to give notice to the applicant of any omissions, within 30 days of receipt. An agency has 90 days from receipt of a completed application within which to issue or deny a license (which is extended if the parties enter into a formal administrative case on the application). If by the conclusion of the applicable time period, the agency has not issued or denied the license application, the agency must issue the license. While this essentially issues a license by default, current law does not, however, specify the mechanism of how to formally issue or recognize a license by default. This bill amends s. 120.60(1), F.S., to provide that a license by default does not issue if the parties had engaged in the formal administrative hearing process, the recommended order was denial of the license, and the agency merely failed to enter a final order confirming the recommended order. This bill also provides no such license by default is deemed issued if an examination is required before issuance of the license, in which case the applicant must still satisfactorily complete the appropriate examination before the license is issued. Further, this

[5] Not all cases involving agency decisions that 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, or if the issue does not involve a disputed issue of fact, then the hearing is conducted by the agency.

[6] Attorneys who specialize in administrative law have, as a matter of course and professionalism, always done this.

bill requires that a person claiming licensure by default must notify the agency that the person believes that a license by default is deemed to have been issued, and must receive confirmation of receipt of the notice from the agency.

Section 120.54, F.S., sets forth the rulemaking process. Normal process requires publication of notice in the Florida Administrative Weekly, an opportunity for public comment, and the possibility of a formal rulemaking challenge. Section 120.54(4), F.S., provides for emergency rulemaking in order that an agency may respond to an immediate danger. Under current law, such emergency rules cannot be immediately challenged. This bill amends s. 120.68(9), F.S., to allow judicial review of an emergency rule.

Section 57.105, F.S., governs sanctions that can be imposed for raising frivolous claims or defenses in civil court proceedings. The losing party, and in some cases the losing party's attorney, may be sanctioned. This bill adds s. 57.105(5), F.S., to provide for the same sanctions, under the same standard of proof, in administrative actions. However, if the losing party to which sanctions apply is an agency, an attorney representing the agency cannot be held personally liable for a portion of the sanction. This bill provides that a voluntary dismissal by a non-prevailing party does not divest the administrative law judge of jurisdiction to make the award.

Section. 57.111, F.S., provides that a prevailing "small business party"[7] in an administrative hearing initiated by a state agency may be awarded attorney's fees against the state, limited to $15,000. This bill amends s. 57.111, F.S., to increase the limit to $50,000.

C. SECTION DIRECTORY:

Section 1 amends s. 120.52(8), F.S., regarding the definition of what constitutes an "invalid exercise of delegated legislative authority".

Section 2 amends s. 120.54(1) and (5), F.S., regarding what must be included in a petition for administrative review; adding a provision related to the Department of Environmental Protection or a water management district with respect to incorporation of rules of another agency by reference.

Section 3 amends s. 120.56, F.S., regarding rule challenges.

Section 4 amends s. 120.569, F.S., creating a requirement for entry of an initial scheduling order on request of a party.

Section 5 amends s. 120.57(1)(e), F.S., regarding hearings on an allegation that a rule is an "invalid exercise of delegated legislative authority", consistent with the changes in Section 1; a summary judgment procedure; and exceptions to proposed final orders.

Section 6 amends s. 120.595, F.S., regarding attorney's fees in administrative hearings.

Section 7 amends s. 120.60, F.S., requiring issuance of a license by an administrative agency in certain circumstances.

Section 8 amends s. 120.68, F.S., allowing judicial review of an emergency rule.

Section 9 amends s. 57.105, F.S., regarding attorney's fees in administrative hearings.

[7] Section 57.111, F.S., defines "small business party" 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, or 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.

Section 10 amends s. 57.111, F.S., increasing the cap from $15,000 to $50,000 on awards of attorney's fees and costs in administrative proceedings that can be awarded to a small business party.

Section 11 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:

Increasing the cap on attorney's fees from $15,000 to $50,000 in s. 57.111, F. S., will result in increased costs to state agencies; but the precise cost is difficult to estimate. Since the law was enacted in 1984, approximately 300 claims have been handled by DOAH in which s. 57.111, F. S. issues were raised. The Department of Community Affairs conducted a review of cases from 1999-2002. Results showed that across all agencies, 43 claims were made under s. 57.111, F. S. during that period. The 43 claims resulted in 9 awards of fees. Fees at the $15,000 cap were awarded in five of those cases. If all five cases were awarded at $50,000, the increased cost would have been $175,000 during the 4-year period.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None.

FISCAL COMMENTS:

The fiscal impact to the Department of Administrative Hearings of this bill is expected to be minimal.[8]

This bill appears to make procedures under chapter 120, F.S. more burdensome, which may have the effect of increasing costs for agencies.

D. III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision: Not applicable.

2. Other: None.

B. RULE-MAKING AUTHORITY: None.

C. DRAFTING ISSUES OR OTHER COMMENTS: None.

[8] Telephone conference with Sharyn Smith, director of DOAH. The one section that would be expected to cost DOAH is the provision requiring pre-trial scheduling orders; however, most of the current administrative hearing officers already issue such orders routinely.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On February 20, 2003, the House Committee on Judiciary adopted one amendment to this bill, which added the following sections:

- Section 1 amends s. 120.52(8), F.S., to clarify the definition of "invalid exercise of delegated legislative authority" by explaining the terms "arbitrary and capricious" and "competent substantial evidence."

- Section 3 amends s. 120.56, F.S., to specify that hearings challenging an agency's rule are de novo before the administrative law judge, and to clarify procedures involving administrative challenges to agencies' statements.

- Section 9 amends s. 57.105, F.S., to allow sanctions for filing unfounded claims or defenses in civil litigation to be applied in administrative proceedings.

- Section 10 amends s. 57.111, F.S., to eliminate the cap on awards of attorney's fees and costs in administrative proceedings.

The amendment also amended section 6 to allow an award of costs for appellate proceedings as well as administrative hearings. The bill was then reported favorably with a committee substitute.

On March 31, 2003, the Committee on State Administration adopted one amendment to HB 23 w/CS. The amendment made the following significant changes:

- Removed the reference in section 1 to the standard of proof in administrative cases.

- Created a definition of arbitrary and capricious, and removed the factor of a rule not supported by competent and substantial evidence, within the definition of an invalid exercise of delegated legislative authority.

- Added that the appropriate standard of review in a challenge to an existing rule is the preponderance of the evidence.

- Rewrote the provision on challenges to agency statements defined as rules.

- Added a requirement of specificity in an exception to a recommended order.

- Removed the provision that would have awarded attorney's fees against an agency where the agency improperly rejected or modified a recommended order.

- Added clarification that attorney's fees under s. 120.595, F.S., are not an exclusive remedy.

- Rewrote the provision on licensure by default, and included a notice requirement in that provision.

- Added that an attorney employed by an agency is not personally liable for attorney's fees for filing a frivolous pleading.

- Changed the attorney's fees that can be awarded to a small business party.

The bill was then reported favorably with a committee substitute.

On April 11, 2003, the Subcommittee of Commerce and Local Affairs Appropriations adopted two amendments as follows:

- Clarifying language related to rule challenges.
- Clarifying jurisdiction of administrative law judge.

The bill was then reported favorably with amendments.

On April 21, 2003, the Committee of Appropriations adopted the two amendments recommended by the appropriations subcommittee on April 11, 2003, and adopted an additional amendment related to administrative rules incorporated by reference specific to the Department of Environmental Protection or a water management district. The Committee reported the bill as a committee substitute.