



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

#### B. EFFECT OF PROPOSED CHANGES:

##### **General Background on the Administrative Procedure Act**

The Administrative Procedure Act (“APA”), ch. 120, F.S., allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions. When a state agency, acting in its regulatory capacity, has determined, for example, that a person should not receive a permit to build a dock and boathouse in the waters of the state, that person has the right to participate in that decision before it becomes final.<sup>1</sup> The way this is accomplished is through an administrative hearing.

In Florida, agencies that need to conduct administrative hearings involving disputed issues of material fact generally refer those cases to the Division of Administrative Hearings (“DOAH”).<sup>2</sup> DOAH’s administrative law judges also determine whether proposed and existing agency rules are invalid exercises of delegated legislative authority based on certain statutory grounds, and based on constitutional grounds in the case of proposed rules. DOAH proceedings are conducted like nonjury trials and are governed by the APA, and by rules adopted by DOAH to implement the APA.<sup>3</sup>

In cases requiring a decision that affects the substantial interests of a party, the administrative law judge normally makes findings of fact and draws conclusions of law as well as drafts a recommended order. The affected agency is responsible for entering a final order. Findings of fact made by an administrative law judge are presumptively correct, and may not be lightly set aside by the agency. An agency may enter a final order rejecting or modifying findings of fact upon review of the entire record and after stating with particularity that the findings were not based upon competent substantial evidence or did not comply with essential requirements of law.<sup>4</sup>

##### **Section-by-Section Analysis**

**Section 1. Present Situation:** Section 120.54(5), F.S., requires the Administration Commission (“Commission”)<sup>5</sup> to adopt uniform rules of procedure by July 1, 1997, which are the rules of procedure for

<sup>1</sup> See Judge Linda M. Rigot, *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, 75-Jan. FLA. BAR J. 14 (2001).

<sup>2</sup> 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).

<sup>3</sup> See *id.*

<sup>4</sup> See s. 120.57(1), F.S.

<sup>5</sup> 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.

each agency subject to the APA, unless the Commission grants an exception to the agency. Section 120.54(5), F.S., specifies what the rules are to cover: for example, the scheduling of public meetings, hearings, and workshops; the filing of notices of protest and formal written protests; and the filing of petitions for administrative hearings, which petitions must include references to the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action. The Commission has adopted such rules, and the rule regarding the filing of petitions for administrative hearings can be found at Rule 28-106.201, Fla. Admin. Code (Initiation of Proceedings). That rule, in part, simply echoes the current statutory requirement that a petition initiating a proceeding must contain "[a] statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action."

**Effect of Proposed Changes:** This bill requires that the rules of procedure governing the filing of petitions for administrative hearings contain a requirement that the petition explain how the facts alleged relate to those rules or statutes.

**Section 2. Present Situation:** Section 120.569, F.S., applies to all proceedings in which the substantial interests of a party are determined by an agency, with certain exceptions.<sup>6</sup> Section 120.569, F.S., sets forth, for example, various notice and pleading requirements, and the timeframe within which a final order must be completed. There is currently no requirement that administrative law judges enter an initial scheduling order to address such things as the deadline for completing discovery or for when parties must identify their expert witnesses and those witnesses' opinions. Some administrative law judges do, however, enter scheduling orders.

**Effect of Proposed Changes:** This bill expressly requires an administrative law judge, on the request of any party, 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 3. Present Situation:** Under s. 120.57(1), F.S., an administrative law judge currently may, upon motion by any party, relinquish jurisdiction over a case if a dispute of material fact no longer exists.

**Effect of Proposed Changes:** This bill provides that an order relinquishing jurisdiction is mandatory if the administrative law judge determines that no genuine dispute of material fact exists.

**Section 4. Present Situation:** Section 120.595(1)(b), F.S., provides that the final order in an administrative proceeding involving disputed issues of material fact "shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose." Under current law, an "improper purpose" is defined 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."<sup>7</sup>

**Effect of Proposed Changes:** This bill amends the definition of "improper purpose" to include needlessly increasing the cost of litigation. In addition, this bill requires courts hearing appeals from administrative decisions to award reasonable attorney's fees and costs if an agency improperly rejects or modifies conclusions of law or interpretations of administrative rules over which that agency does not have substantive jurisdiction.

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<sup>6</sup> 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.

<sup>7</sup> Section 120.595(1)(e)1, F.S.

**Section 5. Present Situation:** Section 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, the statute further instructs that “the agency must approve [such] application.”

**Effect of Proposed Changes:** Since the agency failed to act within the statutorily required timeframe, to then further require that the agency approve the application may fall on equally deaf ears; accordingly, this bill amends s. 120.60, F.S., to provide that if an agency does not act within the specified time period, then the application is “considered approved” and the license shall 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 and the license may include reasonable conditions as are authorized by law.

**Section 6. Present Situation:** Section 120.54, F.S., establishes the process by which administrative agencies adopt rules. This normally requires publication of notice of a proposed rule in the Florida Administrative Weekly well in advance of the rule being issued, as well as extensive hearings. However, under s. 120.54(4), F.S., an agency may more quickly adopt emergency rules needed to respond to immediate danger

by any procedure which is fair under the circumstances if:

1. The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.
2. The agency takes only that action necessary to protect the public interest under the emergency procedure.
3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances.

Section 120.56, F.S., provides procedures by which an affected party may seek to challenge the validity of administrative rules (current or proposed) rather than specific agency decisions.

Section 120.68(2)(a), F.S., allows petitioners to seek judicial review of administrative action “in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.” Subsection (9) of that section further specifies that a petition for judicial review will not lie if the petition challenges an administrative rule as an invalid exercise of delegated legislative authority, “except to review an order entered pursuant to a proceeding under s. 120.56, unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact.”

**Effect of Proposed Changes:** This bill amends s. 120.68(9), F.S., to allow petitions for judicial review challenging administrative rules as an invalid exercise of delegated legislative authority to be heard when such petitions appeal the agency’s findings of danger, necessity and procedural fairness required to adopt emergency rules under s. 120.54(4), F.S.

**Section 7.** Provides an effective date of “upon becoming law.”

#### C. SECTION DIRECTORY:

**Section 1.** Amends s. 120.54(5), F.S., to require that the rules of procedure for the filing of petitions for administrative hearings contain a requirement that the petition relate the alleged facts to the law.

**Section 2.** Amends s. 120.569, F.S., to require an administrative law judge, on the request of any party, to enter an initial scheduling order.

**Section 3.** Amends s. 120.57, F.S., to provide that relinquishment of jurisdiction is mandatory if an administrative law judge determines that no genuine dispute of material fact exists.

**Section 4.** Amends s. 120.595, F.S., regarding attorney's fees, to amend the definition of "improper purpose" to include needlessly increasing the cost of litigation and to require the appeals court to award reasonable attorney's fees and costs if the agency improperly rejects or modifies conclusions of law or interpretations of administrative rules over which that agency does not have substantive jurisdiction.

**Section 5.** Amends s. 120.60, F.S., to provide that if a licensing agency does not act within the specified application period for a license, then the application is "considered approved" and the license shall issue, although issuance of licenses requiring success on examinations may be deferred until passage of the examination.

**Section 6.** Amends s. 120.68, F.S., to allow petitions for judicial review challenging administrative rules as an invalid exercise of delegated legislative authority to be heard when such petitions appeal the findings of danger, necessity and procedural fairness that are required for an agency to adopt emergency rules.

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

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues: None
2. Expenditures: None

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None
2. Expenditures: None

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR: None

### D. FISCAL COMMENTS: None

## III. COMMENTS

### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision

This bill does not require counties or municipalities to spend funds or to take action requiring the expenditure of funds.

2. Other

None

### B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

None

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES**

N/A