HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 23 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	Havlicak
(2) State Administration			
(3)			
(4)			
(5)			

SUMMARY ANALYSIS

This bill amends the Administrative Procedure Act ("APA"). The APA allows a person who has been substantially affected by a preliminary decision of an administrative agency to challenge that agency's decision. The APA sets forth the procedures and requirements governing such a challenge. This bill:

- Clarifies the definitions of "arbitrary and capricious" and "competent substantial evidence" as those terms pertain to an APA proceeding determining whether there has been an invalid exercise of delegated legislative authority by an agency;
- Requires that the administrative rules governing the filing of a petition require petitioner to explain how the alleged facts relate to the specific rule or statute under which relief is sought;
- Clarifies that challenges to agency rules are to be de novo hearings before an administrative law judge;
- Establishes a presumption that an agency is acting expeditiously and in good faith if the agency publishes a proposed rule prior to a final hearing;
- Requires an administrative law judge to enter an initial scheduling order regarding discovery deadlines and identification of expert witnesses and their opinions upon the request of any party;
- Adds "needlessly increasing the cost of litigation" to the definition of "improper purpose" with respect to when a final administrative order may require the payment of reasonable costs and attorneys' fees;
- Provides for automatic approval and issuance of licenses under certain circumstances;
- Requires courts hearing petitions for judicial review of administrative decisions to award attorney's fees and costs if an agency improperly rejects or modifies conclusion of law or interpretations of administrative rules over which is does not have substantive jurisdiction;
- Allows petitions for judicial review challenging administrative rules as unlawful delegations of legislative authority to be heard when such petitions appeal an agency's findings of danger, necessity and procedural fairness that are required for an agency to adopt emergency rules.
- Clarifies the law allowing administrative law judges to award attorney's fees and damages against parties' unsupported claims or defenses; and
- Eliminates the $15,000 cap on attorneys' fees that may be awarded to a "prevailing small business party" in any administrative or adjudicatory hearing under the APA initiated by an agency.

This bill appears to have an indeterminate, although probably minimal, fiscal impact on state government. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

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

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.[1] 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").[2] 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.[3]

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.[4]

Section-by-Section Analysis

Section 1. Present Situation: 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." Part of that definition includes circumstances where a proposed or existing rule is "arbitrary or capricious" or not supported by

[1] *See* Judge Linda M. Rigot, *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, 75-Jan. FLA. BAR J. 14 (2001).
[2] 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).
[3] *See id.*
[4] *See* s. 120.57(1), F.S.

"competent substantial evidence." The terms "arbitrary or capricious" and "competent substantial evidence" are used multiple times throughout the APA.[5] While these terms are not statutorily defined, they are defined in Florida case law.[6]

Effect of Proposed Changes: This bill clarifies the definition of "invalid exercise of delegated legislative authority" by explaining the terms "arbitrary and capricious" and "competent substantial evidence." These definitions are consistent with Florida appellate court decisions. This bill also specifies that the standard of review is a preponderance of the evidence for a determination of whether a proposed or existing rule is an invalid exercise of delegated legislative authority.[7]

Section 2. Present Situation: Section 120.54(5), F.S., requires the Administration Commission ("Commission")[8] to adopt uniform rules of procedure by July 1, 1997, which are the rules of procedure for 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 requires 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 3. Present Situation: Section 120.56, F.S., defines the procedures for challenging an agency's existing or proposed rule. It also provides a basis for a challenge to an agency statement by a person claiming that the agency statement constitutes a rule as defined by s. 120.52(15), F.S.,[9] but the statement has not been adopted by the rule-making procedure mandated by s. 120.54, F.S.

Effect of Proposed Changes: This bill clarifies that hearings challenging an agency's rule will be de novo before the administrative law judge.[10] It also clarifies procedures involving administrative challenges to agencies' statements. It establishes a presumption that the agency is acting expeditiously and in good faith if the agency publishes a proposed rule prior to the final hearing challenging its statement. An administrative law judge may hold in abeyance the challenge to the statement while the agency seeks to adopt a proposed rule addressing the challenged statement. Additionally, the agency must immediately discontinue reliance on the challenged statement if the proposed rule addressing the challenge is determined to be invalid.

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[5] The APA uses the term "arbitrary and capricious" in two sections: ss. 120.52(8)9e); 120.57(1)(e)2.d., F.S. The term "competent substantial evidence" appears in ss. 120.53(8)(f), 120.54(8), 120.57(1)(l) and 120.68(7)(b), F.S.

[6] *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."

[7] *See Island Harbor Beach Club, Ltd. v. Department of Natural Resources*, 495 So.2d 209 (Fla. 1st DCA 1986) (holding that preponderance of the evidence is the appropriate standard). *See generally* 1 FLA. JUR. 2D ADMINISTRATIVE LAW § 41.

[8] 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.

[9] An "agency statement" is included in the definition of a "rule" found in s. 120.52(15), F.S., which states: "'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. . . ."

[10] Currently, s. 120.57(e)1, F.S., requires a de novo hearing before an administrative law judge when any agency action that affects the substantial interests of a party is based on an unadopted rule.

Section 4. 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.[11] 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 5. Present Situation: Section 120.57, F.S., spells out a variety of procedures applicable to challenges of agencies' actions involving disputed issues of fact. 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 clarifies the meaning of the terms "arbitrary or capricious" and "competent and substantial evidence" in s. 120.57(1)(e), F.S.[12] It also provides that an order relinquishing jurisdiction is mandatory if the administrative law judge determines that no genuine dispute of material fact exists. Finally, this bill deletes the provision in s. 120.57(1)(l), F.S., that limits an agency's ability to reject or modify conclusions of law or interpretation of administrative rules in an administrative law judge's recommended order to matter within the agency's substantive jurisdiction. This change broadens the authority of agencies to reject or modify administrative law judges' recommended orders.

Section 6. 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."[13]

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 of the administrative hearing and the appellate proceeding if an agency improperly rejects or modifies conclusions of law or interpretations of administrative rules over which that agency does not have substantive jurisdiction.

Section 7. 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."

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[11] 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.

[12] These definitions are the same as those found in Section 1 of this bill.

[13] Section 120.595(1)(e)1, F.S.

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 8. 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:
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> 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 9. Present Situation: Section 57.105, F.S., governs sanctions that can be imposed for raising unsupported claims or defenses in civil proceedings. Section 57.105(1), F.S., provides that the court may, on its own initiative, or on the motion of a party, award attorney's fees to the prevailing party if the court finds that a claim or defense, when initially presented or at any time before trial, was not supported by the material facts necessary to establish the claim or defense, or would not be supported by the application of then-existing law to those material facts.

Subsection (2) of s. 57.105, F.S., provides an exception for those cases where a good faith argument for a change in the law with a reasonable expectation of success was initially presented to the court. However, the statute permits the court to impose sanctions if it finds that a pleading was filed or other action was taken primarily for dilatory purposes.[14]

Current law does not provide for these sanctions to be applied in proceedings under the APA.

[14] *See* s. 57.105(3), F.S.

Effect of Proposed Changes: The bill specifies that the sanctions provided for in s. 57.105, F.S. also apply to administrative proceedings brought under the APA.

Section 10. Present Situation: Section. 57.111, F.S., permits a litigant to recover attorney's fees and costs in administrative proceedings. Specifically, s. 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"[15] in any adjudicatory proceeding or administrative proceeding pursuant to 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 may exceed $15,000.

It should be noted, however, that pursuant to s. 120.595, F.S., any prevailing party (not just a small business party) in an administrative proceeding can be awarded the entire amount of their attorneys' 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." (See above under Section 6).

Effect of Proposed Changes: This bill amends s. 57.111, F.S., to eliminate the $15,000 cap on the award of attorney's fees and costs for actions brought by a state agency.

Section 11. Provides an effective date of "upon becoming law."

C. SECTION DIRECTORY:

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 2. 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 3. Amends s. 120.56, F.S., to clarify 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 4. 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 5. Amends s. 120.57(1)(e), F.S., to provide for mandatory relinquishment of jurisdiction in the absence of a genuine dispute of material fact, and to broaden the authority of agencies to reject or modify administrative law judges' recommended orders.

Section 6. 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 7. 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.

[15] 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 8. 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 9. Amends s. 57.105, F.S., allowing the sanctions for filing unfounded claims or defenses in civil litigation to be applied in administrative proceedings.

Section 10. Amends s. 57.111, F.S., eliminating the cap on awards of attorney's fees and costs in administrative proceedings.

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: The fiscal impact should be minimal. However, eliminating the $15,000 cap on attorney's fees I s. 57.111, F.S., may result in state agencies having to pay more in attorney's fees and costs in some cases.

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

On February 20,2003, the House Committee on Judiciary adopted one amendment to this bill, the substance of which is reflected in this analysis. In addition to the text of this bill as originally filed, this amendment added sections 1, 3, 9 and 10, and amended section 6 to allow an award of costs for appellate proceedings as well as administrative hearings.