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		Bond	Everhart
3) Commerce & Local Affairs Approp. (Sub)			
4) Appropriations			
5)			

SUMMARY ANALYSIS

This bill substantially amends the Administrative Procedure Act ("APA") to: define the terms "arbitrary and capricious" and "competent substantial evidence"; require pleading with specificity; provide for de novo challenges to agency rules; presume agency good faith in agency rulemaking; require scheduling orders; broaden the grounds for an award of attorney's fee to a prevailing party; provide for automatic issue of professional licenses upon delay by the licensing agency; award attorney's fees and costs against an agency that acts improperly; allow judicial review of emergency rules; and, eliminate the $15,000 cap on attorneys' fees awarded to a "prevailing small business party" in APA litigation.

This bill appears to have an indeterminate fiscal impact on state government and on special districts subject to the APA. This 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

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]

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." Part of that definition includes circumstances where

---

[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.

a proposed or existing rule is "arbitrary or capricious" or not supported by "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] 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 120.54(5), F.S., requires the Administration Commission ("Commission")[8] to adopt uniform rules of procedure by July 1, 1997, which are the general rules of procedure for each agency subject to the APA. This bill adds a requirement that a petition for administrative hearings must explain how the facts alleged relate to rules or statutes that are alleged to have been violated.

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. 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.

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] This bill adds a requirement that an administrative law judge must enter an initial scheduling order upon request of a party.

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. 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.

---

[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.

[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.

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 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] 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 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." 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 must be issued. This bill does provide, however, that no such license can be automatically issued if 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.

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. Under current law, such emergency rules cannot be immediately challenged. This bill amends s. 120.68(9), F.S., to allow judicial review of emergency rules.

Section 57.105, F.S., governs sanctions that can be imposed for raising unsupported claims or defenses in civil court 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. The bill provides that such sanctions may also be awarded in administrative proceedings.

Section. 57.111, F.S., provides that a prevailing "small business party"[14] 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 eliminate the $15,000 cap.

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

[14] 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.

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.

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 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:

The fiscal impact to the Department of Administrative Hearings of this bill is expected to be minimal.[15]

The fiscal impact to state agencies in general is unknown and cannot be determined with any reasonable accuracy. This bill appears to make pre-hearing preparation for hearings under ch. 120, F.S., more burdensome, which may have the effect of making it more expensive for agencies. Eliminating the $15,000 cap on attorney's fees in s. 57.111, F.S., could result in significant costs to state agencies, but no statistics are maintained on how often fees are awarded under this section, nor how often the fees awarded are at the cap.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues: None.

2. Expenditures: None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

This bill appears to make pre-hearing preparation for hearings under ch. 120, F.S., more burdensome, which may have the effect of making such hearings more expensive for private litigants.

D. FISCAL COMMENTS: None.

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.

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.

[15] Telephone conference with Sharon 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.

- 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.
.