CHAMBER ACTION

The Committee on Judiciary recommends the following:

Committee Substitute

Remove the entire bill and insert:

A bill to be entitled

An act relating to administrative procedures; amending s. 120.52, F.S.; revising the definition of “invalid exercise of delegated legislative authority"; amending s. 120.54, F.S.; revising language with respect to uniform rules; providing requirements with respect to the application of alleged facts to specific rules or statutes; amending s. 120.56, F.S.; providing that hearings on rule challenges shall be de novo in nature; changing the timeframe for publishing proposed rules where agency statements are challenged to moot such challenge; providing that challenges to agency statements may be abated pending rulemaking; providing that a determination that such rule is invalid shall prohibit the agency from enforcing its statement or certain similar statements; amending s. 120.569, F.S.; revising language with respect to decisions which affect substantial interests; providing for initial scheduling orders by the administrative law judge;

providing for a discovery period; amending s. 120.57, F.S.; revising language with respect to additional procedures applicable to hearings involving disputed issues of material fact; providing that an order relinquishing jurisdiction shall be rendered under certain circumstances; amending s. 120.595, F.S.; redefining the term “improper purpose” and conforming a cross reference; providing for the award of reasonable attorney’s fees and costs under certain circumstances; amending s. 120.60, F.S.; revising language with respect to licensing; providing that licenses considered approved as a condition of time may still be subject to satisfactory completion of an examination; amending s. 120.68, F.S.; revising language with respect to judicial review; providing additional grounds for certain petitions challenging an agency rule as an invalid exercise of delegated legislative authority; amending s. 57.105, F.S.; providing administrative law judges authority to award attorney's fees and damages in certain administrative proceedings; amending s. 57.111, F.S.; removing a cap on attorney’s fees in civil actions and administrative proceedings initiated by state agencies; providing an effective date.

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

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

120.52 Definitions.--As used in this act:

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if an administrative law judge determines by a preponderance of the evidence that any one of the following applies:

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

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

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

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

(e) The rule is arbitrary or capricious, meaning, for example, that it is not supported by fact or logic, is adopted without thought or reason, or is irrational;

(f) The rule is not supported by competent and substantial evidence, meaning that the factual basis for the rule is neither sufficiently relevant and material such that a reasonable mind would accept as adequate to support the conclusion reached nor substantial enough to establish a substantial basis of fact from which the ultimate facts at issue may be reasonably inferred; or

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

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

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

120.54 Rulemaking.--

(5) UNIFORM RULES.--

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

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

2. Uniform rules for use by each state agency that provide procedures for conducting public meetings, hearings, and workshops, and for taking evidence, testimony, and argument at such public meetings, hearings, and workshops, in person and by means of communications media technology. The rules shall provide that all evidence, testimony, and argument presented shall be afforded equal consideration, regardless of the method of communication. If a public meeting, hearing, or workshop is to be conducted by means of communications media technology, or if attendance may be provided by such means, the notice shall so state. The notice for public meetings, hearings, and workshops utilizing communications media technology shall state how persons interested in attending may do so and shall name locations, if any, where communications media technology facilities will be available. Nothing in this paragraph shall be construed to diminish the right to inspect public records under chapter 119. Limiting points of access to public meetings, hearings, and workshops subject to the provisions of s. 286.011 to places not normally open to the public shall be presumed to violate the right of access of the public, and any official action taken under such circumstances is void and of no effect. Other laws relating to public meetings, hearings, and workshops, including penal and remedial provisions, shall apply to public meetings, hearings, and workshops conducted by means of communications media technology, and shall be liberally

construed in their application to such public meetings, hearings, and workshops. As used in this subparagraph, "communications media technology" means the electronic transmission of printed matter, audio, full-motion video, freeze-frame video, compressed video, and digital video by any method available.

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

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

a. The identification of the petitioner.

b. A statement of when and how the petitioner received notice of the agency's action or proposed action.

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

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

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

f. A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action and to explain how the alleged facts relate to the specific rules or statutes.

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

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

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

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

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

120.56 Challenges to rules.--

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

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

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

(e) Prior to a final hearing to determine whether ~~entry of a final order that~~ all or part of an agency statement violates s. 120.54(1)(a), if an agency publishes, pursuant to s. 120.54(3)(a), proposed rules which address the statement, then for purposes of this subsection, a presumption is created that the agency is acting ~~and proceeds~~ expeditiously and in good faith to adopt rules which address the statement, and the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e). If an agency fails to successfully adopt rules which address the statement within 180 days after publishing proposed rules, for purposes of this subsection, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules. If the agency's proposed rules are challenged pursuant to subsection (2), the 180-day period for adoption of rules is tolled until a final order is entered in that proceeding. Upon request, the administrative law judge may place in abeyance challenges brought under this subsection pending the outcome of rulemaking and the outcome of any proceedings involving challenges to the proposed rules pursuant to s. 120.56(2). If the proposed rules addressing the challenged statement are determined to be invalid, the agency must immediately discontinue reliance on the statement and any substantially similar statement.

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

120.569 Decisions which affect substantial interests.--

(2)

(o) On the request of any party, the administrative law judge shall enter an initial scheduling order to facilitate the just, speedy, and inexpensive determination of the proceeding. The initial scheduling order shall establish a discovery period, including a deadline by which all discovery shall be completed, and the date by which the parties shall 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. Paragraphs (e), (i), and (l) of subsection (1) of section 120.57, Florida Statutes, are amended to read:

120.57 Additional procedures for particular cases.--

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

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

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

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

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

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

d. Is not arbitrary or capricious, meaning, for example, it is not supported by fact or logic, is adopted without thought or reason, or is irrational;

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

f. Is supported by competent and substantial evidence, meaning that the factual basis for the rule is sufficiently relevant and material such that a reasonable mind would accept as adequate to support the conclusion reached and substantial enough to establish a substantial basis of fact from which the ultimate facts at issue may be reasonably inferred; and

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

3. The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (k) and (l), except that the administrative law judge's determination regarding the unadopted rule shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not

comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding and the proceeding for review.

(i) When, in any proceeding conducted pursuant to this subsection, a dispute of material fact no longer exists, any party may move the administrative law judge to relinquish jurisdiction to the agency. An order relinquishing jurisdiction shall be rendered if the administrative law judge determines from ~~In ruling on such a motion, the administrative law judge may consider~~ the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting and opposing affidavits, if any, that no genuine issue as to any material fact exists. If the administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to subsection (2), if appropriate, but the parties may not raise any issues of disputed fact that could have been raised before the administrative law judge. An order entered by an administrative law judge relinquishing jurisdiction to the agency based upon a determination that no genuine dispute of material fact exists, need not contain findings of fact, conclusions of law, or a recommended disposition or penalty.

(l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law ~~over which it has~~

~~substantive jurisdiction~~ and interpretation of administrative rules ~~over which it has substantive jurisdiction~~. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

Section 6. Paragraphs (c) and (e) of subsection (1) and subsection (5) of section 120.595, Florida Statutes, are amended to read:

120.595 Attorney's fees.--

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

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

(e) For the purpose of this subsection:

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

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

3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial

modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

(5) APPEALS.--When there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney's fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding. If the court finds that the agency improperly rejected or modified a conclusion of law or an interpretation of an administrative rule over which it does not have substantive jurisdiction, the court shall award reasonable attorney’s fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

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

120.60 Licensing.--

(1) Upon receipt of an application for a license, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency shall not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period. An application shall be considered complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired. Every application for a license shall be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period shall be tolled by the initiation of a proceeding under ss. 120.569 and 120.57. Any ~~An~~ application for a license that is not ~~must be~~ approved or denied within the 90-day or shorter time period, within 15 days after ~~the~~ conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever action and timeframe is latest and applicable, is considered approved unless the recommended order recommends that the agency deny the license. Subject to the satisfactory completion of an examination if required as a prerequisite to licensure, any license that is considered approved shall be issued and may include such reasonable

conditions as are authorized by law ~~later. The agency must approve any application for a license or for an examination required for licensure if the agency has not approved or denied the application within the time periods prescribed by this subsection~~.

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

120.68 Judicial review.--

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

Section 9. Subsections (5) and (6) of section 57.105, Florida Statutes, are renumbered as subsections (6) and (7), respectively, and a new subsection (5) is added to said section to read:

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

(5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages against the losing party and the losing party's

attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4).

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

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

(4)

(d) The court, or the administrative law judge in the case of a proceeding under chapter 120, shall promptly conduct an evidentiary hearing on the application for an award of attorney's fees and shall issue a judgment, or a final order in the case of an administrative law judge. The final order of an administrative law judge is reviewable in accordance with the provisions of s. 120.68. If the court affirms the award of attorney's fees and costs in whole or in part, it may, in its discretion, award additional attorney's fees and costs for the appeal.

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

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

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