

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/SB 1352

INTRODUCER: Governmental Oversight and Accountability Committee and Senator Young

SUBJECT: Division of Administrative Hearings

DATE: April 18, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Ferrin</u>	<u>Ferrin</u>	<u>GO</u>	<u>Fav/CS</u>
2.	<u>Brown</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>AP</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1352 changes the employment classification of Administrative Law Judges (ALJ) at the Division of Administrative Hearings, creates a statewide nominating commission for the appointment of ALJs, and specifies procedures for the appointment, reappointment, and removal of ALJs.

Employment Classification of ALJs

Current law provides that ALJs are classified as Career Service employees in the state personnel system. This bill changes the employment classification of ALJs from Career Service to Senior Management Service.

Statewide Nominating Commission

The bill creates a statewide nominating commission for the nomination of ALJs. Under the bill, the chief ALJ, who serves as the DOAH director, must appoint ALJs from the list of individuals nominated by the statewide nominating commission. Current law provides that the chief ALJ is himself or herself appointed by the Governor and Cabinet.

The statewide nominating commission must be composed of the following members:

- Three members appointed by the Governor, at least one of whom must be a minority person;
- Two members appointed by the Attorney General;

- Two members appointed by the Chief Financial Officer; and
- Two members appointed by the Commissioner of Agriculture.

Appointment, Reappointment, and Length of Service of ALJs

The bill also establishes a process by which the chief ALJ must appoint, reappoint, or remove ALJs and specifies the length of ALJs' terms, which are not to exceed 8 years. The bill requires DOAH to maintain the 33 ALJ positions as they exist on June 30, 2017, and allows each currently serving ALJ to continue to serve until June 30, 2018. Each ALJ currently serving may be appointed under the reappointment process.

The bill is effective on July 1, 2017.

II. Present Situation:

Administrative Law Judges

Administrative Law Judges (ALJs) preside over disputes arising under the Administrative Procedure Act (APA)¹ and other state laws in which the substantial interests of a person are determined by an agency² and which involve a disputed issue of material fact.³ When a state agency proposes to take some action that is adverse to a person, the affected person is usually entitled to request an administrative hearing to determine the matter.⁴

Each ALJ is employed by the Division of Administrative Hearings (DOAH) and must have been a member of The Florida Bar in good standing for the preceding 5 years.⁵ DOAH is administratively housed under the Department of Management Services (DMS); however,

¹ Chapter 120, F.S.

² Section 120.52(1), F.S., defines the term "agency" to include the following officers or governmental entities if acting pursuant to powers other than those derived from the Constitution:

(a) The Governor; each state officer and state department, and each departmental unit described in s. 20.04, F.S.; the Board of Governors of the State University System; the Commission on Ethics; the Fish and Wildlife Conservation Commission; a regional water supply authority; a regional planning agency; a multicounty special district, but only if a majority of its governing board is comprised of nonelected persons; educational units; and each entity described in chs. 163, 373, 380, and 582, F.S., and s. 186.504, F.S.

(b) Each officer and governmental entity in the state having statewide jurisdiction or jurisdiction in more than one county.

(c) Each officer and governmental entity in the state having jurisdiction in one county or less than one county, to the extent they are expressly made subject to this chapter by general or special law or existing judicial decisions.

This definition does not include a municipality or legal entity created solely by a municipality; a legal entity or agency created in whole or in part pursuant to part II of ch. 361, F.S.; a metropolitan planning organization created pursuant to s. 339.175, F.S.; a separate legal or administrative entity created pursuant to s. 339.175, F.S., of which a metropolitan planning organization is a member; an expressway authority pursuant to ch. 348, F.S. or any transportation authority or commission under ch. 343, F.S., or ch. 349, F.S.; or a legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), F.S., unless any party to such agreement is otherwise an agency pursuant to this definition. Section 120.52(1), F.S.

³ Section 120.57(1), F.S.

⁴ DOAH, *Representing Yourself Before the Division of Administrative Hearings*, pg. 1, <https://www.doah.state.fl.us/ALJ/RepYourself.pdf> (last visited Apr. 12, 2017).

⁵ Section 120.65(4), F.S.

DOAH is not subject to the control, supervision, or direction of DMS.⁶ The head of DOAH is a director who also serves as chief ALJ. The director must be appointed by the Administration Commission⁷ and confirmed by the Senate. The director and any deputy chief ALJ must possess the same minimum qualifications as the ALJs employed by DOAH.⁸

Career Service System

Chapter 110, F.S., establishes the state's personnel management system. The system must adopt means to recruit, select, train, develop, and maintain an effective and responsible workforce. In so doing, the system must provide policies and procedures for:

- Employee hiring and advancement;
- Training and career development;
- Position classification, salary administration, benefits, affirmative action; and
- Employee performance evaluations, discipline, and discharge.⁹

The Department of Management Services is charged with establishing and maintaining a classification and compensation program addressing Career Service, Selected Exempt Service, and Senior Management Service positions.¹⁰ The classification of a position determines the types of benefits assigned to the position and the compensation and collective bargaining status of the position. A position must be classified as Career Service unless it is specifically exempted by statute.¹¹

A Career Service employee who has satisfactorily completed at least a 1-year probationary period may be suspended or dismissed only for cause. Cause includes poor performance, negligence, inefficiency or inability to perform assigned duties, insubordination, violation of the provisions of law or agency rules, conduct unbecoming a public employee, misconduct, habitual drug abuse, or conviction of any crime.¹² Career Service employees who have completed the probationary period are also entitled to a grievance process¹³ and have the right to appeal to the Public Employees Relations Commission a suspension, reduction in pay, demotion, involuntary transfer of more than 50 miles by highway, or dismissal.¹⁴

Selected Exempt Service is a separate system of personnel administration for positions that are exempt from the Career Service System.¹⁵ Employees in the Selected Exempt Service serve at the pleasure of the agency head and are subject to suspension, dismissal, reduction in pay, demotion, transfer, or other personnel action at the discretion of the agency head.¹⁶ The Selected Exempt Service provides greater pay and benefits overall than those provided for Career Service

⁶ *Id.*

⁷ Section 14.202, F.S., establishes the Administration Commission as part of the Executive Office of the Governor. The Administration Commission is comprised of the Governor and Cabinet. Section 14.202, F.S.

⁸ Section 120.65(1), F.S.

⁹ Section 110.105(1), F.S.

¹⁰ Section 110.2035(1), F.S.

¹¹ Section 110.205(1), F.S.

¹² Section 110.227(1), F.S.

¹³ Section 110.227(4)(a), F.S.

¹⁴ Section 110.227(5)(a) and (6), F.S.

¹⁵ Section 110.602, F.S.

¹⁶ Section 110.604, F.S.

employees, but less pay and benefits overall than those provided for the Senior Management Service.¹⁷

Current law exempts from the Career Service System all positions that require as a prerequisite to employment a Bachelor of Laws or Juris Doctor degree from a law school accredited by the American Bar Association and membership in The Florida Bar. However, attorneys who serve as ALJs within DOAH are specifically excluded from this exemption; therefore, they are classified as Career Service employees.¹⁸

III. Effect of Proposed Changes:

Section 1 repeals the provision that excludes attorneys who serve as ALJs from the Career Service exemption, and classifies ALJs as Senior Management Service employees.

Section 2 requires full-time ALJs to be appointed by the chief ALJ, and prohibits an ALJ from engaging in the private practice of law during his or her term of office. The ALJ must be appointed from a list of three individuals nominated by a statewide nominating commission created by the bill.

The statewide nominating commission must be composed of the following members:

- Three members appointed by the Governor, at least one of whom must be a minority person as defined in s. 288.703, F.S.;¹⁹
- Two members appointed by the Attorney General;
- Two members appointed by the Chief Financial Officer; and
- Two members appointed by the Commissioner of Agriculture.

Beginning July 1, 2017, the Governor and each member of the Cabinet must appoint one member to serve a 2-year term and appoint the remaining members to serve 4-year terms. Thereafter, each member must be appointed for a 4-year term. If a vacancy occurs on the nominating commission, it must be filled by the original appointing authority for the unexpired balance of the term. The bill administratively houses the nominating commission within DOAH and requires the meetings and determinations of the nominating commission to be open to the public.

The bill requires each ALJ to be appointed for an 8-year term, but authorizes the chief ALJ to remove an ALJ at any time for cause. Before the expiration of an ALJ's term, the nominating

¹⁷ See s. 110.603(2), F.S.

¹⁸ Section 110.205(2)(r), F.S.

¹⁹ Section 288.703(4), F.S., classifies as a minority person a lawful, permanent resident of Florida who is:

- (a) An African American, a person having origins in any of the black racial groups of the African Diaspora, regardless of cultural origin.
- (b) A Hispanic American, a person of Spanish or Portuguese culture with origins in Spain, Portugal, Mexico, South America, Central America, or the Caribbean, regardless of race.
- (c) An Asian American, a person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands, including the Hawaiian Islands before 1778.
- (d) A Native American, a person who has origins in any of the Indian Tribes of North America before 1835, upon presentation of proper documentation thereof as established by rule of the Department of Management Services.
- (e) An American woman.

commission must review the ALJ's conduct and determine whether the ALJ's performance is satisfactory. In determining whether an ALJ's performance is satisfactory, the commission must consider the extent to which the ALJ has met the requirements of the Administrative Procedures Act. The nominating commission must report its findings to the chief ALJ at least 6 months before the ALJ's term expires. The chief ALJ must review the commission's report and may reappoint the ALJ for an additional 8-year term. If the chief ALJ does not reappoint the ALJ, he or she must inform the nominating commission. The ALJ must continue serving until a successor is appointed. If a vacancy occurs during an ALJ's unexpired term, if the nominating commission does not find the ALJ's performance satisfactory, or if the chief ALJ does not reappoint the ALJ, the chief ALJ must appoint a successor judge for an 8-year term in accordance with the process described below.

Appointments must be made to each of the 33 authorized ALJ positions by June 30, 2018, for terms beginning on July 1, 2018. For the term beginning on July 1, 2018, ALJs must be appointed in the following manner:

- Eight ALJs appointed to a 2-year term;
- Eight ALJs appointed to a 4-year term;
- Eight ALJs appointed to a 6-year term; and
- Nine ALJs appointed to an 8-year term.

Thereafter, each term of office must be 8 years, and there is no limit on the number of terms an ALJ may serve.

The bill requires DOAH to maintain the 33 ALJ positions in existence as of June 30, 2017, and allows each ALJ who is currently serving to continue to serve until June 30, 2018. The bill specifies that an ALJ serving before July 1, 2018, is eligible for reappointment as an ALJ by the chief ALJ.

The bill takes effect July 1, 2017.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Terms of Service of Officers

Art. III, s. 13, of the Florida Constitution provides:

Term of office.—No office shall be created the term of which shall exceed four years except as provided herein.

Although Florida law is silent on the issue of whether administrative law judges are public officers, the Attorney General's Office has classified as officers persons who preside over administrative hearings, such as special masters sitting for either value adjustment board hearings or probable cause determinations on the impoundment of vehicles used in crimes.²⁰

In determining whether to classify members of the State Board of Bar Examiners as officers, the Florida Supreme Court focused on the nature of the functions to be served by the person employed:

That if the duty, charge and trust to be performed is conferred by public authority, for public purposes of important character, and are not transient, occasional, or incidental, but durable, permanent and continuous, then it is a public office, and the person having power to perform it is a public officer.²¹

In 1928, the Florida Supreme Court additionally stated as relevant to a determination of whether someone serves the state as an employee or an officer,

An employment does not authorize the exercise in one's own right of any sovereign power or any prescribed independent authority of a governmental nature; and this constitutes perhaps the most decisive difference between an employment and an office, and between an employee and an officer.²²

Lines 146 through 176 of the bill authorize, in certain instances, the appointment of an administrative law judge for a term of service greater than a 4-year term (either to a 6-year term or an 8-year term of office). To the extent that an administrative law judge is an officer, and the bill provides for a term of office of greater than 4 years, these provisions may be challenged as unconstitutional. Further, if the ALJ offices are unconstitutional then orders from these ALJs may be challenged as invalid.

²⁰ Office of the Attorney General, *Dual Officeholding, An Informational Pamphlet on Florida's Dual Officeholding Prohibition*, http://myfloridalegal.com/_85256CC5006DFCC3.nsf/0/92E25864D475966F85256CC6007B96CB?Open&Highlight=0.dual.office.holding (last visited Apr. 14, 2017).

²¹ *State ex rel. Clyatt v. Hocker*, 22 So. 721, 722-723 (Fla. 1891).

²² *Dade County v. State*, 116 So. 72, 76 (Fla. 1928).

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The change in the classification of the 33 ALJ positions from Career Service employees to Senior Management Service employees will likely have a negative fiscal impact to the state because the Senior Management classification provides greater pay and benefits than Career Service or Select Exempt Service.²³

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends sections 110.205 and 120.65 of the Florida Statutes.

IX. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Governmental Oversight and Accountability on April 3, 2017:

- Places ALJs in the Senior Management Service;
- Retains existing law for the appointment of the chief ALJ and DOAH director by the Governor and Cabinet;
- Authorizes the chief ALJ to appoint, reappoint, and remove ALJs; and
- Increases the regular term for ALJs from 4 years to 8 years.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

²³ See s. 110.603(2), F.S.