

# Section 120.58

---

## CHAPTER 74-310

Section 1. Chapter 120, Florida Statutes, consisting of sections 120.50, 120.51, 120.52, 120.53, 120.54, 120.55, 120.56, 120.57, 120.58, 120.59, 120.60, 120.61, 120.62, 120.63, 120.64, 120.65, 120.66, 120.68, 120.69, 120.70, and 120.71, is created to read:

Section 120.58 is created to read:

120.58 Agency action; evidence, record and subpoenas.--

(1) In agency proceedings for a rule or order:

(a) Irrelevant, immaterial, or unduly repetitious evidence shall excluded, but all other evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(b) An agency or its duly empowered presiding officer or a hearing officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas upon written request of any party or upon its own motion, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure.

(c) Documentary evidence may be received in the form of a copy or excerpt if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

(d) If a majority of those who are to render the final order have not heard the case or read the record, a decision adverse to a party other than the agency itself shall not be made until a proposed order is served upon the parties and they are given an opportunity to file exceptions and present briefs and oral arguments to those who are to render the decision. The proposed order shall contain necessary findings of fact and conclusions of law and a reference to the source of each. The proposed order shall be prepared by the individual who conducted the hearing, if available, or by one who has read the record. The parties by written stipulation may waive compliance with this paragraph.

(e) A party shall be permitted to conduct cross examination when testimony is taken or documents are made a part of the record.

(2) Any person subject to a subpoena or order directing discovery may, before compliance and on timely petition, request the agency having jurisdiction of the dispute to invalidate the subpoena or order on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material, but the decision of the agency on any such request shall not be proposed agency action governed by s. 120.57.

(3) Any person failing to comply with a subpoena or order directing discovery issued under the authority of this act shall be in contempt of the agency issuing the subpoena or order and subject to any penalties which the agency is authorized by law to prescribe; however, no person shall be in contempt while the subpoena or order is being challenged under subsection (2). In the absence of agency action on the default within thirty days the party requesting the subpoena or order may bring proceedings in an appropriate court for enforcement of subpoena or order, and a failure to comply with an order of the court shall result in a finding of contempt of court. In the absence of statutory authority for remedy the violator may receive a fine not to exceed \$500.

### **CHAPTER 75-191**

Section 8. Subsection (1) of section 120.58, Florida Statutes, 1974 Supplement, is amended to read:

120.58 Agency action; evidence, record and subpoenas.--

(1) In agency proceedings for a rule or order:

(a) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent person in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. This paragraph only applies to proceedings under s. 120.57.

(b) An agency or its duly empowered presiding officer or a hearing officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas upon written request of any party or upon its own motion, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure.

(c) Any public employees subpoenaed to appear at an agency proceeding shall be entitled to per diem and travel expenses at the same rate as that provided for state employees under s. 112.061, if travel away from such public employee's headquarters is required. All other witnesses appearing pursuant to a subpoena shall be paid such fees and mileage for their attendance as is provided in civil actions in circuit courts of this state. In the case of a public

employee, such expenses shall be processed and paid in the manner provided for agency employee travel expense reimbursement, and in the case of a witness who is not a public employee, payment of such fees and expenses shall accompany the subpoena.

~~(d)~~(e) Documentary evidence may be received in the form of a copy or excerpt if the original is not readily available. Upon request, parties shall be given an opportunity to compare the copy with the original.

~~(e)~~(d) If a majority of those who are to render the final order have not heard the case or read the record, a decision adverse to a party other than the agency itself shall not be made until a proposed order is served upon the parties and they are given an opportunity to file exceptions and present briefs and oral arguments to those who are to render the decision. The proposed order shall contain necessary findings of fact and conclusions of law and a reference to the source of each. The proposed order shall be prepared by the individual who conducted the hearing, if available, or by one who has read the record. The parties by written stipulation may waive compliance with this paragraph.

~~(f)~~(e) A party shall be permitted to conduct cross examination when testimony is taken or documents are made a part of the record.

#### **CHAPTER 76-131**

Section 9. Paragraph (b) of subsection (1) of section 120.58, Florida Statutes, is amended to read:

120.58 Agency action; evidence, record and subpoenas.--

(1) In agency proceedings for a rule or order:

(b) An agency or its duly empowered presiding officer or a hearing officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas upon written request of any party or upon its own motion, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure. However, no agency or its duly empowered presiding officer or any hearing officer has the authority to issue any subpoena or order directing discovery to any member or employee of the Legislature when the subpoena or order commands the production of documents or materials or compels testimony relating to the legislative duties of the member or employee. Any subpoena or order directing discovery directed to a member or an employee of the Legislature shall show on its face that the testimony sought does not relate to legislative duties.

#### **CHAPTER 78-425**

Section 7. Paragraph (e) of subsection (1) and subsection (3) of section 120.58, Florida Statutes, are amended to read:

120.58 Agency action; evidence, record and subpoenas.--

(1) In agency proceedings for a rule or order:

(e) If a majority of those who are to render the final order have not heard the case or read the record, a decision adverse to a party other than the agency itself shall not be made until a proposed order is served upon the parties and they are given an opportunity to file exceptions and present briefs and oral arguments to those who are to render the decision. The proposed order shall contain necessary findings of fact and conclusions of law and a reference to the source of each. The proposed order shall be prepared by the individual who conducted the hearing, if available, or by the one who has read the record. The parties by written stipulation may waive compliance with this paragraph. The provisions of this paragraph shall not apply in the granting of parole or preliminary hearings for the revocation of parole.

(3) An agency may seek enforcement of a subpoena, or order directing discovery issued under the authority of this act by filing a petition for enforcement, pursuant to s. 120.69, in the circuit court of the judicial circuit wherein the person failing to comply with the subpoena or order resides. A failure to comply with an order of the court shall result in a finding of contempt of court. Any person failing to comply with a subpoena or order directing discovery issued under the authority of this act shall be in contempt of the agency issuing the subpoena or order and subject to any penalties which the agency is authorized by law to prescribe. However, no person shall be in contempt while the subpoena or order is being challenged under subsection (2). In the absence of agency action on the default within 30 days, the party requesting the subpoena or order may bring proceedings in an appropriate court for enforcement of the subpoena or order, and a failure to comply with an order of the court shall result in a finding of contempt of court. ~~In the absence of statutory authority for a remedy, the violator may receive a fine not to exceed \$500.~~

### **CHAPTER 84-173**

Section 3. Paragraph (b) of subsection (1) and subsections (2) and (3) of section 120.58, Florida Statutes, are amended to read:

120.58 Agency action; evidence, record and subpoenas.--

(1) In agency proceedings for a rule or order:

(b) An agency or its duly empowered presiding officer or a hearing officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas upon written request of any party or upon its own motion, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure, including the imposition of sanctions, except contempt. However, no agency or its duly empowered presiding officer or any hearing officer has the authority to issue any subpoena or order directing discovery to any member or employee of the Legislature when the subpoena or

order commands the production of documents or materials or compels testimony relating to the legislative duties of the member or employee. Any subpoena or order directing discovery directed to a member or an employee of the Legislature shall show on its face that the testimony sought does not relate to legislative duties.

(2) Any person subject to a subpoena ~~or order directing discovery~~ may, before compliance and on timely petition, request the agency or hearing officer having jurisdiction of the dispute to invalidate the subpoena ~~or order~~ on the ground that it was not lawfully issued, is unreasonable broad in scope, or requires the production of irrelevant material, but the decision of the agency or hearing officer on any such request shall not be proposed agency action governed by s. 120.57.

~~(3) A party~~ An agency may seek enforcement of a subpoena, ~~or order directing discovery, or order imposing sanctions~~ issued under the authority of this act by filing a petition for enforcement, ~~pursuant to s. 120.69,~~ in the circuit court of the judicial circuit wherein the person failing to comply with the subpoena or order resides. A failure to comply with an order of the court shall result in a finding of contempt of court. However, no person shall be in contempt while ~~a~~ the subpoena ~~or order~~ is being challenged under subsection (2). The court may award to the prevailing party all or part of the costs and attorney's fees incurred in obtaining the court order whenever the court determines that such an award should be granted under the Florida Rules of Civil Procedure. ~~In the absence of agency action on the default within 30 days, the party requesting the subpoena or order may bring proceedings in an appropriate court for enforcement of the subpoena or order, and a failure to comply with an order of the court shall result in a finding of contempt of court.~~

## **CHAPTER 94-161**

Section 1. Paragraph (a) of subsection (1) of section 120.58, Florida Statutes, is amended to read:

120.58 Agency action; evidence, record and subpoenas.-

(1) In agency proceedings for a rule or order:

(a)1 Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. This paragraph applies only to proceedings under s. 120.57.

2. Notwithstanding subparagraph 1., similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but

it is inadmissible when the evidence is relevant solely to prove bad character or propensity. When the state in an administrative proceeding intends to offer evidence of other acts or offenses under this subparagraph, the state shall furnish to the party whose substantial interests are determined and whose other acts or offenses will be the subject of such evidence, no fewer than 10 days before commencement of the proceeding, a written statement of the acts or offenses it intends to offer, describing them and the evidence the state intends to offer with particularity. Notice is not required for evidence of acts or offenses which is used for impeachment or on rebuttal.

3. Notwithstanding subparagraph 1., in a proceeding against a licensed professional or in a proceeding for licensure of an applicant for professional licensure which involves allegations of sexual misconduct:

a. The testimony of the victim of the sexual misconduct need not be corroborated.

b. Specific instances of prior consensual sexual activity between the victim of the sexual misconduct and any person other than the offender is inadmissible, unless:

(I) It is first established to the hearing officer in a proceeding in camera that the victim of the sexual misconduct is mistaken as to the identity of the perpetrator of the sexual misconduct, or

(II) If consent by the victim of the sexual misconduct is at issue and it is first established to the hearing officer in a proceeding in camera that such evidence tends to establish a pattern of conduct or behavior on the part of such victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.

c. Reputation evidence relating to the prior sexual conduct of a victim of sexual misconduct is inadmissible.

## **CHAPTER 96-159**

Section 1. It is the intent of the Legislature to consider the impact of any agency rulemaking required by proposed legislation and to determine whether the proposed legislation provides adequate and appropriate standards and guidelines to direct the agency's implementation of the proposed legislation.

Section 23. Section 120.58, Florida Statutes, as amended by chapter 94-161, Laws of Florida, is hereby repealed