SENATE BILL 553

When the new Administrative Procedure Act was enacted in 1974, it gave the Joint Administrative Procedures Committee (JAPC) authority to object to any administrative rule which does not have statutory authority. It was perceived that a formal objection by a joint committee of the Legislature, properly publicized, would be enough to prevent the promulgation of illegal rules, so the Act provides that the agency may refuse to modify or withdraw a rule to meet a committee objection. However, this was not a sufficient deterrent.

In the first year alone, agencies refused to modify 13 rules (less than 5%) to which the committee objected. During the next year, 1976, there were 56 occasions (36%) on which an agency insisted upon enforcing a rule which the committee had found to be without authority. Already in 1977, agencies have refused to modify 24 rules (more than 40%), indicating that there will probably be more than 100 additional illegal rules imposed upon the public unless prevented.

To meet this problem, the Joint Administrative Procedures Committee unanimously voted to have legislation introduced which would give the committee standing to bring an action in the courts to have such rules judicially declared to be invalid. As a result, the three senate members of the committee introduced Senate Bill 553.

Here is what the bill does:

1. It gives the Joint Administrative Procedures Committee standing to bring an action on behalf of the citizens of the state or on behalf of the Legislature, in any court in the state for one purpose only -- to have the validity of any rule to which the committee has objected and which the agency has refused to modify, determined by the courts.

2. It authorizes the committee to expend public funds for that purpose.

It should be noted that the bill does not require the committee to bring these actions; it merely gives the committee standing to do so when it deems it in the best interests of the people of the state. It is not likely that the committee would seek judicial review of an illegal rule unless it was convinced that the enforcement of that rule would bring some harm to the citizens before legislative action could be taken. The Legislature can also nullify an agency's illegal rule by enacting a law on the subject. This bill is designed to protect the public between sessions.

No appreciable increase in the committee budget as a result of this bill is expected. The committee has an adequate legal staff and does not foresee a need for expansion to perform its new duties under this act. The only increased cost will consist of filing fees, subpoena and deposition costs and limited travel expenses.

QUESTIONS AND ANSWERS

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1. **Is there a constitutional problem?**

Extensive research by the committee legal staff has led to the conclusion that there is not. It is the proper province of the courts to determine the validity of rules as well as the constitutionality of laws. The Legislature may properly determine by law who may invoke the court's jurisdiction.

2. **When the Constitution, at Article IV, Section l(b), states that the Governor may initiate judicial proceedings in the name of the state against any administrative officer to restrain an unauthorized act, doesn't that mean that only the Governor may bring such suits?**

No, it does not. Unlike the United States Constitution, the Florida Constitution is a limitation on the powers of the various branches of government. Unless a law is clearly contrary to a constitutional provision, the courts will not declare it to be invalid. It is clear that the Legislature has the power to enact a statute establishing the legal right of any person, including itself, to invoke the judicial power of the courts.

In addition, even if there were a limitation upon who is authorized to bring an action in the name of the state, the Legislature, by this bill is not taking that action. It is, instead, granting a committee standing to seek judicial review, on behalf of the citizens of the state or on behalf of the Legislature. There is a difference between "citizens of the state" and "in the name of the state," as the Supreme

Court informed the Attorney General in Shevin v. Yarborough.

3. Isn't this a new concept, untested in the courts?

No, there are numerous parallels. The Legislature has authorized the Public Counsel to bring actions "on behalf of the citizens of the state" and he has successfully done so before the Supreme Court on a number of occasions. The Legislature, in Section 60.05, Florida Statutes, grants standing to any person to bring an action to enjoin a public nuisance. That statute specifically permits these actions to be brought "in the name of the state." The Division of Mass Transit Operations of the Department of Transportation is authorized by Section 330.34, Florida Statutes, to bring actions in "the name of the state" to enforce statutes and rules relating to airport licensing. Any citizen is granted standing to seek judicial relief to compel administrative agencies to enforce environmental laws and regulations by Section 403.412, Florida Statutes. The legislative grant of standing to seek judicial review has stood the test of time.

4. Why does the bill say "the courts of the state?" Why is venue not set?

Venue for judicial review under the Administrative Procedure Act is set by Section 120.68, Florida Statutes, in the District Court of Appeal in the district in which the agency has its headquarters or where a party resides. Under ordinary circumstances, this venue provision would prevail, but since the appellate courts do not make determinations of fact, this bill leaves venue open to permit the committee to bring an

action in a Circuit Court in cases in which fact questions may arise.

5. **Why does the Committee not request an administrative determination by the Division of Administrative Hearings?**
The Legislature has already expressed its intent that the Division should not have jurisdiction over the Legislature or its members or its committees by its passage of legislation now appearing as Section 120.58(1) (b), Florida Statutes, in which it denied the Division jurisdiction to issue subpoenas to members or employees of the Legislature when the testimony sought related to legislative duties.

In addition, when an agency feels that a rule is of sufficient importance to its concept of how it should operate that it finds it necessary to refuse to take an action in response to an objection of a joint committee of the Legislature, it is not likely that it would accept the Division's administrative determination without taking an appeal on an adverse decision. By the same token, the Committee would be likely to appeal any decision adverse to it to the District Court. Thus, an action before the Division of Administrative Hearings would serve no useful purpose.

6. **Would this bill apply to proposed rules?**
This bill speaks to any administrative rule to which the committee has objected and which the agency has refused to modify, amend, withdraw or repeal. After a rule has become effective, it cannot be withdrawn or modified, thus the bill obviously contemplates actions on proposed as well as effective rules.

7. **Why couldn't the committee seek a determination of the validity or invalidity of these rules fr**om the Attorney General, rather than the courts?

First, the Department of Legal Affairs promulgates rules subject to committee review the same as any other executive agency. Second, an Attorney General's opinion has little, if any, effect. An agency willing to insist upon enforcing a rule in the face of an objection by a joint committee of the Legislature, is not likely to be inhibited by an opinion of the Attorney General. Third, many of the agencies of the Executive Branch are supplied legal counsel by the Attorney General. In fact, some of the rules to which the committee has objected have been written by Assistant Attorneys General.