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Revised:

HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENTAL OPERATIONS
STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

BILL # PCB # 27 OTHER COMMITTEES OF REFERENCE

SPONSOR Governmental Operations

RELATING TO Administrative Procedure Act

Overview

The 1974 revision of the Administrative Procedure Act (APA) created the Division of Administrative Hearings (DOAH), a central corps of neutral fact finders. DOAH hearing officers hear all cases in which agency action turns on the existence of facts that are disputed, except for the relatively few cases in which agency heads themselves sit. Under the APA, agency heads remain responsible for agency policy, even in those cases in which they are unable to sit. This is because the hearing officer, whose findings of fact are binding except in extraordinary circumstances, enters a recommended order in Section 120.57 cases which is only a recommendation to the agency head as to final disposition.

In 120.57 proceedings, the hearing officer's role is limited, but it is important. He is a neutral fact-finder, who ascertains facts in controversies between the state agencies and other parties, usually private citizens. It is in this forum that state agencies and citizens meet on an equal footing to ascertain the relevant facts. His job is to deliver reliable facts to the agency, which the agency can use as a basis for final agency action.

1. Section 1. Amending section l20.57(l)(b)3

A. Current Situation:

Section 120.57, Florida Statutes, provides for hearing on decisions by state agencies which affect substantial interests of parties, usually private citizens. It provides in s. 120.57(1)(b)3 that any petition or request for a hearing shall be filed with the agency. If an agency requests a hearing officer from the Division of Administrative Hearings, the agency must notify the division within 10 days of the receipt of the petition or request. The agency requests the assignment of a hearing officer and sets the time, date, and place of the hearing with the concurrence of the division.

B. Effect of Change:

This section would clarify that if an agency elects to request a hearing officer, then the agency would take no further action concerning the formal proceedings. The agency's status would be the same as a litigant, the same as all other parties involved in the administrative hearing.

Reason for Change:

This change would clarify that the submittal of a petition to the DOAH puts the parties on equal footing as party litigants by having the division set the time and place of the hearing.

2. Section 1. Amending section 120.57(1)(b)9

Current Situation:

Section 120.57(1)(b)9 provides the procedure when an agency receives a recommended order of a hearing officer. The agency may adopt the recommended order as a final order. In the final order the agency may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order. The agency may not reject or modify the findings of fact unless it reviews the complete record and states that the findings are not based upon competent substantial evidence or did not comply with essential requirements of law. If the recommended order includes a penalty, the agency may accept or reduce the recommended penalty, but the agency may not increase the penalty without a review of the complete record.

Effect of Change:

This section would require that an agency could not reduce or increase a recommended penalty without a review of the complete record, stating with particularity its reason for changing the hearing officer's recommended penalty by citing to the record for the reasons for its action.

Reason for Change:

This was recommended by the Administrative Law Conference sponsored by The Florida Bar. Currently, agencies are able to increase a penalty prescribed by a DOAH hearing officer with only a cursory review of the record. The agencies are only required to state that they have reviewed the record. This change would make sure that if the agency wants to change the penalty prescribed by the hearing officer, that they must review the record and identify specific reasons for changing the hearing officer's recommended penalty.

3. Section 2. Amending section 120.58(1)(b)

Current Situation:

Section 120.58(1), Florida Statutes, provides the procedures for the exclusion and receipt of evidence, the power of the presiding officer or hearing officer, witness fees, cross examination of witnesses and the elements of the proposed order in any proceedings for a rule or order. This subsection provides in part that the hearing officer. . . "has the power to swear witnesses and take their testimony under oath, to issue subpoenas upon written request of any part 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."

The First District Court of Appeal in Great American Banks, Inc. v. Division of Administrative Hearings, Department of Administration, 412 So.2d 373 (1st DCA 1981) held that section 120.58(1)(b), Florida Statutes, does not allow the hearing officers the authority to impose sanctions to enforce discovery orders or subpoenas. The court held that the Legislature intended to prescribe a similar procedure as set forth in s. 440.33, Florida Statutes, for the enforcement of process and orders by hearing officers. It held that the only remedy to enforce these orders is by filing a petition for enforcement in the circuit court pursuant to section 120.69, Florida Statutes. However, this procedure is only available to an agency. The court also held that if the parties did not agree with the decision that the proper recourse was "to the Legislature which has sole authority to make or amend a law."

Effect of Change:

This bill would restore the procedure for enforcing discovery orders and subpoenas by hearing officers under the APA. It would clarify that it was indeed the intent of the Legislature that hearing officers have the power to control their hearings through the use of sanctions. A hearing officer would not have the power to impose contempt for failure to obey his orders. Only the judicial branch has the power of contempt.

Reasons for Changes:

The administrative process increasingly reflects the complexity of the decisions state government must make. The hearing itself is only the tip of the iceberg. In order to present complex issues, parties must first gather information. This is done by depositions, requests for production, interrogatories, requests for admissions and other prehearing procedures known collectively as "discovery."

Until the decision in Great American Banks, Inc. v. Division of Administrative Hearings, Department of Administration, 412 So.2d 373 (Fla. 1st DCA 1981) (reh. den. 1982), most observers believed the existing language of the statute authorized hearing officers to impose sanctions. In adopting Rules 28-5.208 and 28-5.2 1, Florida Administrative Code, the Governor and Cabinet acted on the assumption that hearing officers had this authority. For example, hearing officers could decline to accept the testimony of a party who had refused to submit to a deposition before the hearing. In the Great American Banks case, however, the First District ruled that only a court could enter such an order. The proposed amendment would authorize the hearing officer himself to enter an order imposing sanctions. This change would restore the apparent status quo before the Great American Banks case and avoid many dilatory, collateral court proceedings.

Some discovery orders cannot be enforced by hearing officers and could not be under the proposed amendment. An example would be an order to a witness who is not a party requiring him to honor a subpoena. As mentioned above, hearing officers do not have the contempt power that courts have. The proposed amendment would ensure that the parties would stand on an equal footing if resort to a court proved necessary.

4. Section 2. Amending section 120.58(2)

Current Situation:

Section 120.58(2), Florida Statutes, provides that any person who is subject to a subpoena or discovery order may apply to the agency having jurisdiction of the dispute to invalidate the subpoena or discovery order under certain circumstances.

Effect of the Change:

This subsection would allow a hearing officer as well as an agency to invalidate a subpoena under certain circumstances. The references to orders directing discovery would be eliminated.

Reasons for Change:

This change is needed to conform the enforcement powers of the hearing officers to the rest of the section. An order directing discovery would be challenged in the court pursuant to subsection (3) of this section.

5. Amending s. 120.58(3)

Current Situation:

An agency may seek enforcement of a subpoena or order directing discovery by filing a petition in the circuit court.

Effect of Change:

This section would conform the procedure for enforcement of subpoenas, discovery orders and orders imposing sanctions to the other sections. It would also allow the court to award attorneys fees in its discretion, to the prevailing party pursuant to the existing procedures in the Florida Rules of Civil Procedure.

Reasons for Change:

See above numbers 3 and 4.

6. Section 3. Amending section 120.68(1), Florida Statutes

Current Situation:

Section 120.68 provides the procedures for judicial review of agency actions including review of "preliminary, procedural, or intermediate agency action" whenever "review of the final agency decision would not provide an adequate remedy." Since the 1974 revision, and as late as the Great American Banks case itself, the appellate courts have reviewed orders of hearing officers whenever, in their judgment, review of the final decision would not have afforded an adequate remedy. E.q., Vey v. Bradford Union Guidance Clinic, Inc., 399 So.2d 1137 (Fla. 1st DCA 1981); Florida Real Estate Commission v. Frost, 373 So.2d 939 (Fla. 4th DCA 1979); General Development Corporation v. Florida Land and Water Adjudicatory Commission, 3768 So.2d 1323 (Fla. 1st DCA 1979); State ex rel. Sarasota County v. Boyer, 360 So.2d 388 (Fla. 1978); and Department of Environmental Requ1ation v. Leon County, 344 So.2d 297 (Fla. 1st DCA 1977). However, the First District Court of Appeal in Boedy v. Department of Professional Regulation, 428 So. 2d 758 (1st DCA, 1983), and Department of Professional Regulation v. LeBaron, (case no. AQ-214, 1st DCA, December 14, 1983), held that this procedure was improper. The court held that a hearing officer's ruling or order under this section is not reviewable and it must be submitted to the agency for a final decision.

Effect of Change:

This section would provide that hearing officers, as well as agency action or rulings could be appealed immediately if the final agency decision does not provide an adequate remedy.

Reasons for Change:

This bill would re-establish the balance that existed prior to Boedy and LeBaron and would prevent excessive delays in the administrative process. It would re-establish the impartial balance of the fact findings by not allowing an agency to set aside or modify a hearing officer's order prior to the submission of a recommended order.

Essentially what the court did was require that interlocutory orders of a hearing officer must be submitted to the agency for approval. This has caused an interesting situation. For example, in Boedy, the petitioner, Mr. Boedy, appealed a DOAH hearing officer order denying his motion to dismiss. The court held that order was not appealable and must be acted upon by the agency. The agency, of course, affirmed the hearing officer's order and then the case was again appealed to the First District Court of Appeal. The court then affirmed the agency's action two months after the initial appeal. The agencies either affirm or deny the hearing officers' orders depending on how it affects them. This court mandated procedure adds another step in the administrative process which puts the agency in the position of ruling on matters that affect it as a party litigant and adds additional unnecessary time to the resolution of these administrative disputes.

7. Section 3. Amending section 120.68(13), Florida Statutes

Current Situation:

The APA has provided extensive procedures for the agencies to follow to promulgate rules pursuant to legislative authorization. Sections 120.54, Florida Statutes, provides ru1emaking procedures and section 120.68, Florida Statutes, provides for judicial review of agency rules. Subsection (12) provides that the court, after review, shall remand any case back to an agency for corrective action if it finds the agency's exercise of discretion is outside the range of discretion delegated to the agency by law, is "(i)nconsistent with an agency rule, an officially stated agency policy, or a prior agency practice, if deviation therefrom is not explained by the agency," or is in violation of a constitutional or statutory provision.

The First District Court of Appeal in Best Western Travel Inn v. Department of Transportation, 435 So.2d 321 (1st DCA 1983), held that an agency may excuse itself from the operation of its rules by amending its rules or by citing special circumstances peculiar to this case, "that in the Department's view, justify its departure from the rule."

This allows an agency to depart from its rules by citing special circumstances justifying the departure.

Effect of Changes:

This section would require that the court remand a case back to an agency for corrective action if it finds that the agency's exercise of its discretion is inconsistent with its own rules.

Reasons for Change:

The Legislature has provided an extensive rulemaking process in chapter 120, Florida Statutes, in order to appraise all citizens of the requirements of rules so that they can act accordingly. The court in its ruling in Best Western, allows an agency to depart from its rulemaking by stating its reasons for the departure, thereby bypassing the statutory rulemaking requirements and leaving the citizens not knowing what rules will be followed or what rules will be waived in special circumstances. This procedure adds confusion and uncertainty in dealing with agencies of state government which was not intended when the Legislature enacted the 1974 revision.

I I. ECONOMIC IMPACT:

None.

I I I. COMMENTS:

None.

I V. AMENDMENTS:

None.

V. PREPARED BY Booter Imhof

V I. STAFF DIRECTOR Jack C. Overstreet