SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Godwin	Stengle	GO	Fav/CS
2.			JU	
3.			AP	
4.				

SUBJECT: Administrative Procedure Act; Unpromulgated Rules

BILL NO. AND SPONSOR: CS/SB 1836 by Governmental Operations and Senators Jenne and Kiser

I. SUMMARY:

A. Present Situation

Under the current provisions of ch. 120, F.S., the Administrative Procedure Act (APA), all agency action is characterized either as a rule or as an order.

Section 120.52(16), F.S., provides that a rule, with some specified exceptions, is an agency statement of general applicability which "implements, interprets, or prescribes law or policy." Section 120.52(11), F.S., provides that an order is a final agency decision which does not have the effect of a rule, i.e., which is not a statement of general applicability and which is also not exempted from the definition of a rule.

Rules, as policies of general applicability, are subject to the notice, comment, and hearing provisions of s. 120.54, F.S. Rules may be challenged as proposed rules before they are adopted, or as they are applied as existing rules after they are adopted. A party may be granted an adjudicatory hearing to test the validity of a proposed rule or an agency's application of a rule. When an agency rule is opposed, the party challenging the rule and the agency are adversary parties. The hearing officer, not the agency, determines the validity of the rule, and the decision of the hearing officer is final agency action.

In 1977, however, judicial interpretation significantly altered this statutory scheme of the APA. In the case of McDonald v. Department of Banking and Finance, 346 So.2d 569 (Fla. 1st DCA 1977), the First District Court of Appeal obscured what had seemed to be a distinct division between the nature of rules and orders, and found that, under certain conditions, agencies would be permitted to establish their agency policy through administrative hearings, rather than through the procedures for adopting written rules.

The court articulated the justification for permitting agencies to adopt what is now termed "nonrule policy" as follows:

> There are quantitative limits to the detail of policy that can effectively be promulgated as rules, or assimilated. . . and even the

> agency that knows its policy may wisely sharpen its purposes through adjudication of individual cases. [Emphasis in original.]

McDonald, 346 So.2d at 581. The court thus recognized the validity of what it terms "incipient policymaking through adjudication of individual cases."

Subject to certain conditions, "incipient," or "emerging," nonrule policy is established in an adjudicatory proceeding, the policy that the agency seeks to establish must be stated, explained, and supported by evidence in that record of proceeding. When these conditions are met, however, agency policy is found not only in the rules, which are published in the *Florida Administrative Code,* but also in final orders entered by an agency.

In most cases, section 120.57, F.S., 1990 Supp., provides the mechanism by which parties adversely affected by agency action may request a hearing on issues of fact or law. When there are material questions of fact in dispute, s. 120.57(1), F.S., 1990 Supp., provides for "formal proceedings," which consist of a hearing to be conducted by a hearing officer provided by the Division of Administrative Hearings (DOAH), or other designated officer as provided by law. Provision is made for taking evidence and creating a permanent record. In most cases, the hearing officer submits a recommended order to the agency, which the agency may adopt or make modifications to in its final order.

Following entry of a recommended order under s. 120.57, F.S., 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 and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines, from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent and substantial evidence, or that the proceedings on which the findings were based did not comply with essential requirements of law.

Section 120.54(4), F.S., 1990 Supp., allows a substantially affected person to seek an administrative determination on the invalidity of a proposed rule. Section 120.54(5), F.S., 1990 Supp., provides that any person regulated by an agency or having a substantial interest in an agency rule may petition the agency to adopt, amend, or repeal the rule.

Hearings held under these provisions are specified to be conducted in the same manner as provided in s. 120.57, F.S., 1990 Supp., except that the hearing officer's order constitutes final agency action. Likewise, under s. 120.56, F.S., 1990 Supp., a person substantially affected by an existing rule may seek an administrative determination of the invalidity of the rule. In that case, as well, the administrative hearing in which the rule is contested is conducted in the same manner as provided in s. 120.57, F.S., 1990 Supp., except that the hearing officer's order is also final agency action.

Currently, each party in such a proceeding must bear his own costs and attorney's fees in administrative proceedings, except: (1) when there is an appeal of an agency's final order, the court may award a reasonable attorney's fee and costs under s. 120.57(1)(b)(10), F.S., 1990 Supp., to the prevailing party if the appeal was frivolous or

if the agency action which led to the appeal was a “gross” abuse of the agency’s discretion; (2) when the hearing officer has determined that a non-agency party has participated in a proceeding for an improper purpose, and where it is established that a nonprevailing adverse party has not established the factual or legal merits of its position in two or more proceedings involving the same parties, and where the factual or legal position relied upon was cognizable in the previous proceedings, the hearing officer, under s. 120.59(6), F.S., is directed to recommend the award of costs and attorney’s fees; and (3) under s. 57.111, F.S., when an agency brings an action against a small business and the small business prevails in the proceeding, the hearing officer must award costs and attorney’s fees to the small business if the agency did not have substantial justification at law and in fact for initiating the action, unless under the circumstances the award would be unjust.

Section 120.57(1)(b)(S), F.S, 1990 Supp., provides that, in formal administrative proceedings, all pleadings, motions, or other papers filed must be signed by the party filing them, his attorney, or other qualified representative. The signature is deemed to certify that the signatory has read the document and that to the best of his knowledge, information, and belief formed after reasonable inquiry, the document is not interposed for an improper purpose, such as for harassment, frivolity, or to cause unnecessary delay or needless increases in litigation costs. The hearing officer is required to impose an appropriate sanction for violation of the requirements, which may include ordering the offending party to pay the other party the amount of reasonable expenses incurred because of the filing, including a reasonable attorney’s fee. A like provision applies under ch. 163, pt. II, F.S., the “Local Government Comprehensive Planning and Land Development Regulation Act,” in formal administrative proceedings for administrative review of land development regulations.

The Administrative Procedures Committee (JAPC) was created as a check on delegated legislative authority; the committee examines executive agencies' proposed or existing rules to ascertain whether they comply with ch. 120, F.S. Should the committee object to a proposed or existing rule, within 5 days of that objection, the committee certifies that fact to the agency whose rule has been examined, and includes with the certification a statement detailing the specific objections of the committee.

If the agency does not withdraw the rule, it may continue to enforce the disputed rule, unless the committee chooses to take further action as contemplated by s. 11.60(2)(j), F.S.

Section 120.68, F. S., 1990 Supp., provides that any party that is adversely affected by final agency action is entitled to judicial review, pursuant to specified procedures. Section 120.68(3)(a), F.S., 1990 Supp., provides that the filing of a petition for judicial review does not in itself stay the enforcement of the agency's final order, but if the agency decision suspends or revokes a license, supersedes --or a stay of the proceedings --shall be granted as matter of right. The reviewing court, however, upon the agency's petition, may refuse supersedes to a non-agency party if it determines that it would constitute a probable danger to the health, safety, or welfare of the state.

In reviewing agency actions, courts give great deference to an agency’s interpretation of statutes that the agency is assigned to implement or enforce. The reviewing court defers

to the agency as long as the agency's interpretation is consistent with legislative intent and is supported by competent, substantial evidence. Department of Environmental Regulation v. Goldring, 477 So.2d 532 (Fla. 1985); Public Employees Relations Commission v. Dade County Police Benevolent Association, 467 So.2d 987 (Fla. 1985).

B. Effect of Proposed Changes

Rulemaking by executive agencies would be declared not to be a matter of agency discretion. Each agency statement of general applicability would be required to be adopted by the rulemaking procedures of s. 120.54, F.S., as soon as feasible and practicable.

The bill would create a new section in the APA, s. 120.535, F.S. The new section would declare a statutory presumption that rulemaking is both practicable and feasible, with certain limited exceptions. Rulemaking would be presumed to be feasible unless the agency could prove that: (1) the agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address an agency statement by rulemaking; or (2) related matters are not sufficiently resolved to permit an agency to address an agency statement by rulemaking; or (3) the agency is currently using the rulemaking procedure expeditiously, and in good faith, to adopt rules which address the agency statement. Rulemaking would be presumed practicable to the extent necessary to provide fair notice to affected parties of relevant agency procedures and applicable principles, criteria, or standards for agency decisions, unless the agency could prove that: (1) the detail or precision in the establishment of principles, criteria, or standards for agency decisions is reasonable under the circumstances; or (2) the questions which must be addressed are So narrow in scope that more detail or precision is precluded outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

A challenge to an agency statement under the new section would be instituted by petition filed with the Division of Administrative Hearings by any substantially affected person. The petition would be required to be in writing and to allege facts sufficient to demonstrate that the person is substantially affected by an agency statement, that the statement constitutes a rule under s. 120.52(16), F.S., and that the statement has not been adopted by the rulemaking procedure in s. 120.54, F.S.

The petition would be required to include the text of the challenged agency statement or a description of the statement sufficient to provide notice of its substance. Upon receipt of the petition, DOAH would forward copies of the petition to the agency whose statement is being challenged, the Administrative Procedures Committee, and the Department of State. The Department of State would then publish notice of the petition in the first available issue of the *Florida Administrative Weekly.*

If the director of DOAH finds that the allegations of the petition are sufficient, the petition would be assigned to a hearing officer within 10 days. The hearing officer would conduct a hearing within 30 days of the assignment, unless the petition was withdrawn. The hearing officer would be authorized to postpone the hearing date for good cause.

If a hearing were held, the petitioner would have the initial burden of proving the allegations of the petition against the agency. The petitioner would not be required to prove that rulemaking is feasible and practicable, since that would be presumed. If the allegations of the petition are proven, the burden would shift to the agency to prove that it was not feasible and practicable to adopt the challenged statement through rulemaking.

Within 30 days after the hearing, the hearing officer would issue a final order, in which all or part of the challenged agency statement could be found to violate rulemaking standards. Copies of the final order would be furnished to the JAPC, and to the Department of State for publication of notice of the final order in the *Florida Administrative Weekly.*

If the final order were to determine that the agency statement violates the rulemaking standard, the agency would be prohibited from further reliance on the statement, or any substantially similar statement, as a basis for agency action. If the agency were to continue to rely upon the statement or a substantially similar statement as the basis for agency action, and the substantial interests of a person are determined by the agency action, that person would be entitled to payment by the agency of all reasonable costs and attorney's fees. The award would be required to be paid from the budget entity of the agency head, and the agency would not be entitled to payment of the award, or for reimbursement for payment of the award, under any provision of law.

The agency would be permitted to rely upon the violative statement as a basis for agency action if the agency first initiates rulemaking under s. 120.54, F.S., and, in so doing, publishes proposed rules which would address the statement in question. An agency would be permitted to amend proposed rules prior to adoption, but rules that the agency ultimately adopts would be required to address the substance of the violative statement.

If the agency were to fail to adopt rules which address the violative statement within 180 days of publication of the proposed rules, a presumption would be created in the law that the agency is not acting expeditiously and in good faith to adopt rules. If an agency's proposed rules then are challenged under s. 120.54, F.S., the l80-day period would be tolled until the rule challenge proceeding were resolved and a final order is entered.

Prisoners as defined in s. 944.02(5), F.S., would be explicitly prohibited from seeking an administrative determination under the new s. 120.535, F.S.

Each agency statement of general applicability not adopted by the ru1emaking procedure in s. 120.54, F.S., which is relied upon by an agency to determine the substantial interests of a party, would be subject to de novo review by a hearing officer

In the formal hearing on such a statement, the agency would be required to demonstrate that the statement would not enlarge, modify, or contravene the provision of law implemented or otherwise would exceed delegated legislative authority. The statement which is applied as a result of a proceeding would be required to be demonstrated to be within the scope of delegated legislative authority.

Recommended and final orders would be required to explain the basis for all agency statements applied, would be required to identify the evidentiary basis for the statement,

and would be required to discuss generally why the statement applied is justified over alternative statements within the scope of the agency's delegated authority. Findings of fact that form the basis for the agency statement could not be rejected or modified in the final order without the review of the record, and the particular statement that the findings were not based on competent and substantial evidence, as provided in s. 120.57, F.S.

The bill would amend s. 120.68(3), F.S., 1990 Supp., to provide that the filing of a petition appealing a final order issued by a hearing officer, whether filed by the agency or a party, does not stay enforcement of the hearing officer's order. The bill would provide that the agency or a party may petition the appellate court to stay the final order of the hearing officer. The appellate court, however, could stay the hearing officer's final order if it determines that a stay would be necessary to avoid probable danger to the health, safety, or welfare of the state.

The bill also would authorize DOAH to direct a study and pilot project to implement a full-text retrieval system to provide access to recommended orders, final orders, and declaratory statements. This provision would allow DOAH to explore alternative means and available technologies to assure public access to agency orders.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

Indeterminable. A successful petitioner would be able to recoup his costs and attorney's fees in the administrative actions contemplated by the bill.

B. Government

Agencies would be subjected to awards of costs and attorney's fees to successful petitioners under the bill, but the estimated amount is indeterminable. Agencies would likely adopt a greater number of rules as a result of the bill, which would also increase costs.

The Division of Administrative Hearings states that the fiscal impact of this bill would not be immediate or substantial to the division until 1992. The division is concerned that the bill could increase hearing officer caseload.

The Department of State, which publishes the *Florida Administrative Weekly,* estimates that it would cost the department approximately $16,290 in FY 1992-93 to carry the mandates of the bill. These costs would include approximately $825 per year for publishing an anticipated 300 rule petitions, and $1,320 per year for publishing the notices of final orders, as well as an estimated $6,000 in postage and paper.

III. MUNICIPALITY/COUNTY MANDATES RESTRICTIONS:

None.

IV. COMMENTS:

None.

V. AMENDMENTS:

None.

STATEMENT OF SUBSTANTIAL CHANGES CONTAINED
IN COMMITTEE SUBSTITUTE FOR
Senate Bill 1836

Specifies that prisoners as defined in s. 944.02(5), F.S., are ineligible to seek an administrative determination of an agency statement under the new s. 120.535, F.S.

Deletes proposed requirement that an agency statement found to violate rulemaking standards, and which becomes the subject of agency rulemaking, is further subject to the requirements contained in proposed s. 120.57(1)(b)15., F.S., in order for agency to rely upon the statement.

Clarifies that agency statements subject to de novo hearing under s. 120.57(1)(b)15., F.S., are those statements which are defined as rules, i.e., are statements of general applicability. Deletes provision specifying that an agency statement shall not be presumed to be correct when reviewed by a hearing officer.

Deletes burden in de novo review of demonstrating that agency statement best complies with and promotes legislative intent.

Deletes requirement that administrative determination of agency statement in de novo review be based exclusively on evidence of record and matters officially recognized.

Committee on Governmental Operations

Staff Director

(FILE TWO COPIES WITH THE SECRETARY OF THE SENATE)