

SUMMARY OF CHANGES IN CHAPTER 120

1991 LEGISLATIVE SESSION

Five laws were enacted during the 1991 Legislative Session making changes to Chapter 120, Florida Statutes: Chapter 91-30, Chapter 91-45, Chapter 91-46, Chapter 91-112, Chapter 91-191, Laws of Florida.

The following summary of changes was prepared by the Senate Governmental Operations Committee:

Chapter 91-30, Laws of Florida

HB 1879 by House Governmental Operations and Rep. Figg-- Administrative Procedure Act (SB 900 by Senator Kiser, and CS/SB 1836 by Senate Governmental Operations and Senators Jenne and Kiser)

Chapter 120, F.S., the Administrative Procedure Act, is amended to clarify which final agency orders are required to be indexed, and to clarify the role of rulemaking by those agencies.

Agency orders are specified under the act to be documents of continuing legal significance, and are required to be permanently maintained by agencies under the guidance of the Department of State. The law clarifies that agency orders subject to the indexing requirement include those orders rendered as final agency action in proceedings under s. 120.57(1) or (2), F.S.; or entered pursuant to s. 120.57(3), F.S., which contain statements of agency policy or precedent; declaratory statements; or each final agency order resulting from a proceeding under s. 120.54(4) or s. 120.56, F.S.

The act requires final orders entered under s. 120.57(3), F.S., which informally dispose of proceedings, but which do not contain precedential statements or statements of agency policy, to be listed, and copies of the lists, and the listed orders, be made available upon request. Orders are required to be indexed or listed within 120 days of filing.

The Department of State is vested with the responsibility and authority to act as a central agency for providing overall leadership for indexing, management, and preservation of agency orders. The law requires that agencies submit proposals to the Department of State for indexing and for availability of agency orders for the department's written approval, and requires that approved proposals be promulgated in each agency's rules.

Agency rules will specify those types or categories which are excluded from the indexing and availability requirements of ch. 120, F.S.; the location at which indexes, lists, and orders are maintained and the procedure for inspecting and copying them; all systems in place for searching and locating orders, and mechanisms for obtaining assistance and information pertaining to orders; and the sequential numbering system the agency employs for orders.

The Department of State must approve the categories or types of agency orders to be excluded from the requirements, and will be allowed to authorize an agency to exclude by rule those orders which are of limited precedential value, which are of limited legal significance, or which are ministerial in nature.

Among the agency proposals which may specifically meet the indexing and availability requirements of the law is the designation of an official reporter which publishes a subject matter index and all orders required to be indexed. The agency may itself publish the reporter, or may contract for publishing. If an agency contracts with a publishing firm to publish its reporter, the agency is required to be responsible for the quality, timeliness, and usefulness of the reporter.

The Department of State is authorized to publish or to contract for publication of official reporters, and to assess equitable space rate and subscription charges to users of any reporters published by the department to cover costs of publication. The department is required to retain responsibility for the quality, timeliness, and usefulness of any reporter for which the department contracts.

The act authorizes the Division of Administrative Hearings 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 allows the division to explore alternative means and available technologies to assure public access to agency orders.

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

The act declares a statutory presumption that rulemaking is both practicable and feasible, with certain limited exceptions. Rulemaking will be presumed to be feasible unless an agency can 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 is 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 is able to 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 is authorized to be instituted by petition filed with the Division of Administrative Hearings by any substantially affected person. The petition is 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.

If a hearing is held, the petitioner will have the initial burden of proving the allegations of the petition against the agency. 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 will issue his final order, in which all or part of the challenged agency statement may be found to violate rulemaking standards.

If the final order determines that the agency statement violates the rulemaking standard, the agency will be prohibited from further reliance on the statement, or any substantially similar statement, as a basis for agency action. If the agency continues 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 will be required to be paid from the budget entity of the agency head, and the agency will not be entitled to payment of the award, or for reimbursement for payment of the award, under any provision of law.

The agency will 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. If the agency fails to adopt rules which address the violative statement within 180 days of publication of the proposed rules, a presumption will 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 are then challenged under s. 120.54, F.S., the 180-day period will be tolled until the rule challenge proceeding is resolved and a final order is entered.

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

In the formal hearing on such a statement, the agency will be required to demonstrate that the statement does 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 is required to be demonstrated to be within the scope of delegated legislative authority.

Recommended and final orders will be required to explain the basis for all agency statements applied, to identify the evidentiary basis for the statement, and to discuss generally why the statement applied is justified over alternative statements within the scope of the agency's delegated authority.

The act became a law -- chapter 91-30, Laws of Florida -- without the Governor's signature.

The following summary of change was prepared by the House Governmental Operations Committee:

#### Chapter 91-30, Laws of Florida

#### Administrative Procedure Act

HOUSE BILL 1879 by the Committee on Governmental Operations and Representative Figg and others addresses issues related to the implementation of delegated

legislative authority by administrative agencies. Judicial decisions have permitted agencies broad discretion to determine whether delegated authority will be implemented by the rulemaking procedure or through application of nonrule agency policy on an ad hoc basis. This bill sends a clear message to agencies and the courts that the means by which agencies implement delegated authority is not a matter of agency discretion. The bill provides a statutory standard for determining when rulemaking is required. The bill establishes the procedure for challenging agency policy alleged to violate the rulemaking standard and provides remedies for violations of the standard. The means of demonstrating a basis for nonrule policy in an administrative adjudication is codified by the bill. A pilot project geared towards the creation of an electronic data base of agency orders providing access to these orders statewide is authorized by the bill. Finally, the bill requires state agencies to index and maintain certain orders. The Department of State is required to establish minimum criteria for the indexing and availability of agency orders. Each state agency must establish by rule a system for the indexing and availability of orders that meets the minimum criteria established by the Department of State.

#### Chapter 91-191, Laws of Florida

##### Administrative Procedure Act

This law amends ss. 10, 11, 12, HB 1879, enacted in the 1991 regular session.

The law amends HB 1879 (Chapter 91-30) as follows:

Section 10. On or before ~~March~~ January 1, 1992, each agency shall submit to the Department of State for approval a plan for publishing or otherwise making agency orders available to the public, for sequentially numbering agency orders, for coordinating and establishing procedures for the compilation of subject-matter indexes and lists of agency orders, and for publishing such indexes and lists or providing alternative means of making such indexes and lists available to the public.

Section 11. This act applies to actions instituted on or after ~~March~~ January 1, 1992.

Section 12. This act shall take effect ~~March~~ January 1, 1992, except that this section and section 10 shall take effect upon this act becoming a law.

Section 2. This act shall take effect upon becoming a law.

The bill was approved May 28, 1991.

The following was prepared by the House Bill Drafting Service:

Chapter 91-112, Laws of Florida

General Tax Administration

The law contains several provisions relating to the authority of the Department of Revenue and the administration of the revenue laws of the state. This law amends Sections 72.001 and 215.26, F.S., to authorize taxpayers to contest the legality of any denial of refund of specified taxes, interest or penalties in circuit court or under Chapter 120, F.S., and to provide time limitations with respect thereto. This authorization applies to refund denials issued on or after July 1, 1991. Several other statute sections are amended to conform.

Chapter 91-45, Laws of Florida

Florida Statutes/Reviser's Bill

This bill deletes provisions which have expired, served their purpose, or have been impliedly repealed or superseded; revises or corrects cross-references; corrects grammatical, typographical, and like errors; removes inconsistencies, redundancies, and unnecessary repetition; improves clarity in statutes. In Chapter 120.55, F.S., the reference to Chapter 120.52(15), F.S., is changed to Chapter 120.52(16), F.S. It now reads as follows: "Any form or instruction which meets the definition of "rule" provided in s. 120.52(16) shall be incorporated by reference into the appropriate rule."

Chapter 91-46, Laws of Florida

Florida Statutes/Reviser's Bill

This bill amends statutes to conform to laws which redesignated workers' compensation Chief Commissioner as Chief Judge and deputy commissioners as judges of compensation claims; amends provisions to conform to redesignation of workers' compensation deputy commissioners as judges of compensation claims by certain provision. In Chapter 120.52(1)(c), F.S., it changes the terms "deputy commissioner" to "judge of compensation claims."