

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

<u>ANALYST</u>	<u>STAFF DIRECTOR</u>	<u>REFERENCE</u>	<u>ACTION</u>
1. <u>Godwin</u>	<u>Stengle</u>	1. <u>GO</u>	_____
2. _____	_____	2. _____	_____
3. _____	_____	3. _____	_____
4. _____	_____	4. _____	_____

SUBJECT:
The Administrative Procedure Act;
Glitches

BILL NO. AND SPONSOR:
Proposed CS/SB 1354 by Committee
on Governmental Operations
and Senator Kiser

I. SUMMARY:

A. Present Situation:

The Administrative Procedure Act (APA), ch. 120, F.S., is the procedural mechanism by which aggrieved parties may seek legal redress for actions of state agencies and certain units of local government. The act divides agency action into two broad categories, those of rules and orders. Rules are statements of general applicability that implement, interpret, or prescribe law or policy or which amend or repeal a rule. Orders are all other final agency decisions which do not have the effect of a rule; they are decisions of individual applicability which implement laws, rules, and policies.

Chapter 91-30, Laws of Florida, revised the statutory requirements for indexing agency orders. The law amended s. 120.53(2), F.S., to specify those orders which must be indexed and available to the public, to include each agency order resulting from a proceeding under s. 120.57(1) or (2), F.S.; final agency orders rendered pursuant to s. 120.57(3), F.S., which contain an agency policy statement that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value; declaratory statements; and final orders resulting from a proceeding under s. 120.54(4) or s. 120.56, F.S.

Chapter 91-30, L.O.F., also clarified the role of rulemaking by executive agencies. The act declares a statutory presumption that rulemaking is both practicable and feasible, with certain limited exceptions. Rulemaking is presumed to be feasible unless an agency can prove that: (1) the agency has not has 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, under newly-created s. 120.535, F.S., 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.

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. Chapter 91-30, L.O.F., however, did not explicitly require the indexing and preservation of orders entered under s. 120.535, F.S.

Section 120.54(2)(a), F.S., requires each agency in promulgating rules to consider the impact of its proposed action on small business as defined in the Florida Small and Minority Business Assistance Act of 1985 and, whenever possible, to tier its rule to reduce disproportionate impact on small businesses. Section 120.54(2)(a), F.S., provides that an agency may define "small business" to include more than 25 persons if it finds that the definition is necessary to adapt a rule to the needs and problems of small business. Section 288.703, F.S., a component of the Florida Small and Minority Business Assistance Act of 1985, until 1991 defined "small business" to include only those which employed 25 or fewer people; the section was amended by ch. 91-162, Laws of Florida, to define "small business" to be one which employs 50 or fewer people.

Whenever a legislative enactment requires implementation by rules of an executive agency of state government, the rules are required to be drafted and formally proposed, as provided in s. 120.54(12), F.S., within 180 days of the act's effective date unless the act provides otherwise. The requirement applies to agencies of the executive branch only, even though s. 120.52, F.S., defines "agency" for the purpose of the act to include a number of other agencies not within the executive branch, including the Commission on Ethics and the Public Service Commission, for example, which are legislative branch agencies. There appears to be no reason for the distinction, and there is effectively no time requirement for promulgation of rules to implement an enactment imposed on agencies not in the executive branch.

The Florida Public Employees Relations Commission (PERC), within the Department of Labor and Employment Security, designates by rule the *Florida Public Employee*

Reporter (FPER), published by the LRP Publications Division of Axon. Communications, headquartered in Fort Washington, Pennsylvania, for final orders issued in collective bargaining cases. The commission produces its own publication to report its orders arising from its specific statutory charges in chs. 110 and 447, F.S., to hear appeals arising out of certain disciplinary and dismissal actions of permanent employees in the Career Service System. The commission has designated *FPER* as its official reporter for collective bargaining orders since 1975.

LPR Publications receives, for publication in the *FPER*, all orders concerning collective bargaining that are issued by the Public Employees Relations Commission. All orders received by the *FPER*, which number nearly 500 per year, are indexed and published, and no editing or selecting of them takes place.

In deliberations regarding standards for indexing agency orders which ultimately were contained in ch. 91-30, L.O.F., the Senate Committee on Governmental Operations considered and commented favorably upon the PERC reporters. The reporters comply with the requirements of s. 120.53, F.S., in regard to indexing and availability. They do not technically comply with the rules promulgated by the Department of State under ch. 91-30, L.O.F., however, particularly in terms of the uniform numbering system adopted in the Department of State rules. Although the Department of State believes that the PERC reporters comply with the law, the department does not believe that it has the authority to exempt PERC from its rules, and desires a legislative statement that PERC is in compliance with the indexing law.

B. Effect of Proposed Changes:

Final orders issued by hearing officers of the Division of Administrative Hearings under s. 120.535, F.S., would be added to the list of orders required to be indexed and made available under s. 120.53, F.S.

An agency would be able to define "small business," pursuant to s. 120.54(2)(a), F.S., to include more than 50 persons if it finds that the definition would be necessary to adapt a rule to the needs and problems of small business. This subsection would be referenced to s. 288.307, F.S., of the Florida Small and Minority Business Assistance Act of 1985, which defines "small business."

The requirement that rules to implement a legislative enactment be drafted and formally proposed within 180 days would apply to all agencies subject to ch. 120, F.S., not simply those of the executive branch.

The Public Employees Relations Commission official reporters would be statutorily accepted as fulfilling the indexing and availability requirements for orders contained in s. 120.53, F. S.

REVISED: _____

DATE: February 7, 1992

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

None.

B. Government:

None.

III. MUNICIPALITY/COUNTY MANDATES RESTRICTIONS:

None.

IV. COMMENTS:

The indexing and availability requirements for orders were originally contained in SB 900 (1991). The specifications for agency rulemaking were contained in CS/SB 1836 (1991) and its companion, HB 1879 (1991).

When HB 1879 was taken up on the Senate floor, the substance of SB 900 was amended onto the bill; apparently inadvertently, however, the newly-created s. 120.535, F.S., contained in HB 1879, was not added into the indexing requirements amended onto the bill. Thus, ch. 91-30, L.O.F., became law without requiring final orders issued under s. 120.535, F.S., to be indexed and available as are other specified orders. SB 1354 would rectify the omission.

V. AMENDMENTS:

None.