



THE FLORIDA LEGISLATURE



# **JOINT ADMINISTRATIVE PROCEDURES COMMITTEE**

**2007 Annual Report**

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**KEN PRUITT**  
President



Representative Greg Evers, Chair  
Senator Michael S. "Mike" Bennett, Vice-Chair  
Senator M. Mandy Dawson  
Senator Don Gaetz  
Representative D. Alan Hays  
Representative Scott Randolph

**MARCO RUBIO**  
Speaker



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THE FLORIDA LEGISLATURE  
**JOINT ADMINISTRATIVE  
PROCEDURES COMMITTEE**

March 6, 2008

Honorable Ken Pruitt  
President, Florida Senate  
The Capitol, Room 409  
Tallahassee, Florida 32399

Honorable Marco Rubio  
Speaker, House of Representatives  
The Capitol, Room 420  
Tallahassee, Florida 32399

Mr. President and Mr. Speaker:

Pursuant to Section 11.60(2), Florida Statutes, we are pleased to submit to the Legislature the Joint Administrative Procedures Committee annual report, covering January 1, 2007 through December 31, 2007.

Sincerely,

A handwritten signature in black ink, appearing to read "Greg Evers".

Greg Evers  
Representative, District 1  
Chair

A handwritten signature in black ink, appearing to read "Mike Bennett".

Michael S. "Mike" Bennett  
Senator, District 21  
Vice-Chair

Enclosure

cc: All Senators  
All Representatives

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# **JOINT ADMINISTRATIVE PROCEDURES COMMITTEE MEMBERS**

**Representative Greg Evers, Chair**

**Representative D. Alan Hays**

**Representative Scott Randolph**



**Senator Michael S. "Mike" Bennett, Vice - Chair**

**Senator M. Mandy Dawson**

**Senator Don Gaetz**

# THE JOINT ADMINISTRATIVE PROCEDURES COMMITTEE

The Administrative Procedures Committee is a joint standing committee of the Legislature created by Section 11.60, F.S.

***It is composed of six members, three from the Senate, appointed by the President of the Senate, and three from the House of Representatives, appointed by the Speaker of the House.***

The Chair of the Committee is designated by the President of the Senate in even-numbered years and by the Speaker of the House in odd-numbered years. The Committee staff is headed by an Executive Director and General Counsel, and currently consists of seven attorneys and five administrative support staff.

The Committee is required to report annually to the Legislature. This report is published at the start of the regular session and covers the preceding calendar year. It contains statistical information regarding rulemaking in the various state agencies as well as summaries of all objections voted by the Committee during the preceding year.

The Committee maintains a continuous review of the statutory authority upon which each administrative rule is based and notifies the agency if its authority is eliminated or significantly changed by repeal, amendment or holding of a court of last resort. Following each session of the Legislature, the Committee reviews

each law signed by the Governor or allowed to become law without his signature and determines whether the law will have a probable effect on an agency's rules. If so, the affected agency is notified.

If the reviewing attorneys have concerns that a proposed or existing rule may not be authorized or exceeds the delegated rulemaking authority, the agency is contacted. Often, the agency agrees that there is no authority for the rule and withdraws or amends the rule to meet the staff concerns. If there is disagreement about whether or not there is authority for the rule, the rule is scheduled for consideration by the full Committee. The agency may appear before the Committee and present argument and evidence in support of its rule. If, after hearing the agency's argument, the Committee does not find statutory authority for the rule, an objection is voted and the agency has a statutory period in which to respond. If the agency refuses to modify or withdraw a rule to which the Committee has objected, public notice of the objection is given and a notation accompanies the rule when it appears in the Florida Administrative Code.

In the event that an agency fails to initiate administrative action to meet an objection voted by the Committee, the Committee is authorized to submit to the President of the Senate and Speaker of the House a recommendation that legislation be introduced to modify or suspend the adoption of a proposed rule,



or amend or repeal an existing rule. If the Committee votes to recommend the introduction of legislation, the Committee is required to notify the agency of its action, and may request that the agency temporarily suspend the rule or suspend the adoption of a proposed rule, pending consideration of proposed legislation during the next regular session of the Legislature. The agency must respond to the Committee within a specified time either by temporarily suspending the rule or suspending the adoption of a proposed rule, or by notifying the Committee that it refuses to suspend the rule or rule adoption. The Committee is required to prepare bills to modify or suspend the adoption of a proposed rule, or to amend or repeal an existing rule, in accordance with rules of the Senate and the House of Representatives for introduction in the next regular legislative session. The proposed bill is presented to the Senate President and House Speaker along with the Committee recommendation.

***The Committee constantly monitors judicial decisions in administrative law and advises the agency when either its statutory rulemaking authority or its rules are affected by these decisions.***

The Committee has a statutory duty to recommend needed changes in the Administrative Procedure Act to the Legislature. These recommendations may be based upon its review of judicial decisions as well as its daily interaction with executive agencies and with citizens as they participate in the administrative procedures of the state. As the result of a two-year Committee study on the use of unadopted rules by agencies, legislation is recommended for the 2008 session to strengthen the unadopted rule challenge

provisions of the Act. Legislation is also recommended to require electronic publication of the Florida Administrative Code and prescribe the requirements for material incorporated by reference in electronic form in agency rules. Similar legislation, HB 7183, was passed during the 2007 session but was vetoed by the Governor.

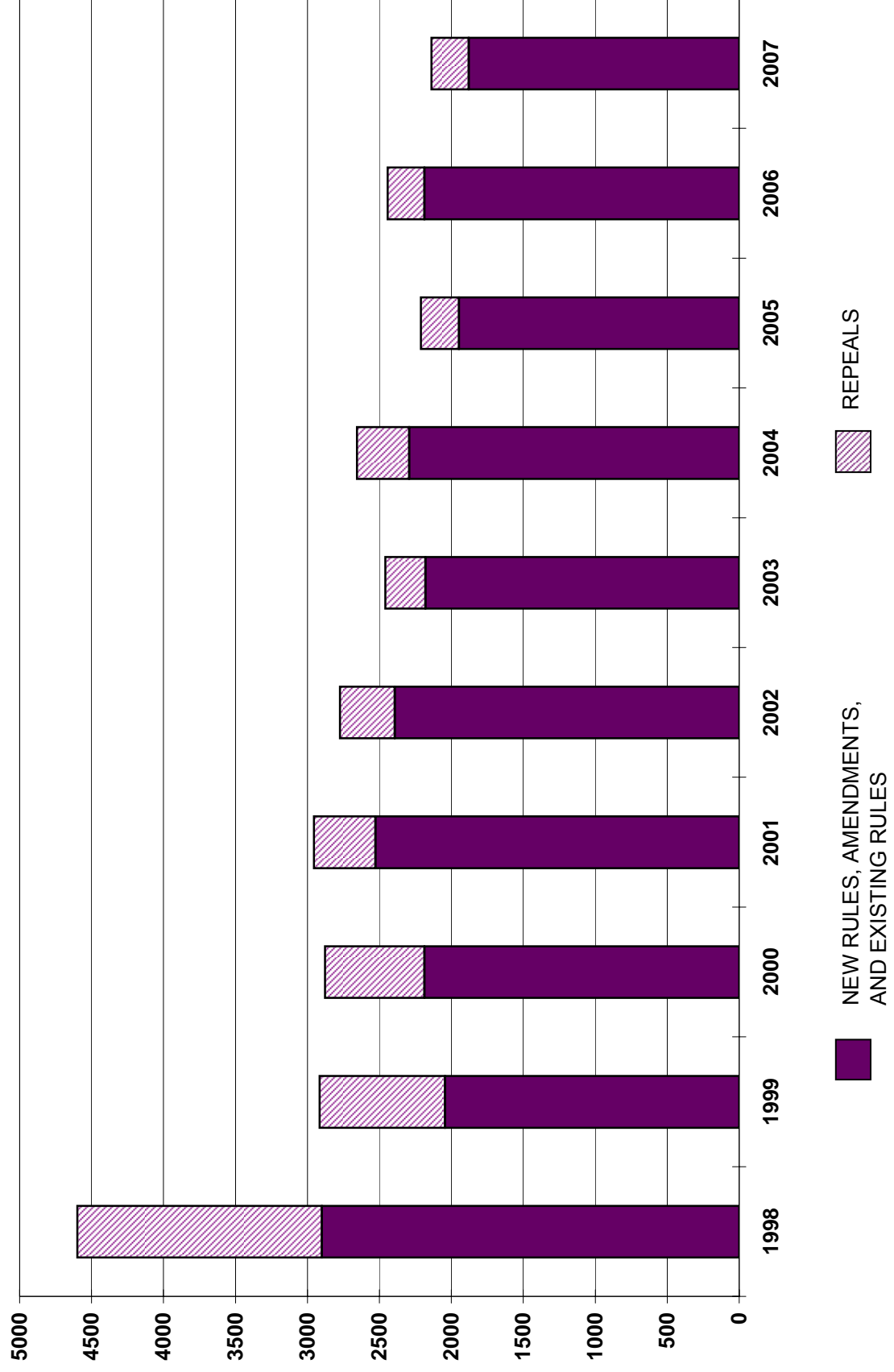
Subsection 11.60(4), F.S., directs the Committee to maintain a continuous review of the Florida Statutes that authorize agencies to adopt rules, and to make recommendations to the appropriate standing committees of the Senate and the House of Representatives as to the advisability of considering changes to the delegated legislative authority to adopt rules in specific circumstances. This report contains a summary of the areas of concern brought to the attention of standing committees in 2007.

The Committee has long had standing to seek judicial review of the validity of any rule to which it has objected and which has not been modified or repealed to meet the objection. To date, the Committee has never found it necessary to exercise this power. Before judicial review, the Committee must first notify the head of the agency involved, notify the Governor, and provide an opportunity for consultation with the Committee. If the issue cannot be resolved in this manner, the Committee can bring an action in the appropriate court asking that the rule be declared invalid.

***Thus, the Committee performs services for the Legislature, the administrative agencies of the state and the people whom they regulate.***

# **Statistical Information on Committee Review of Rules**

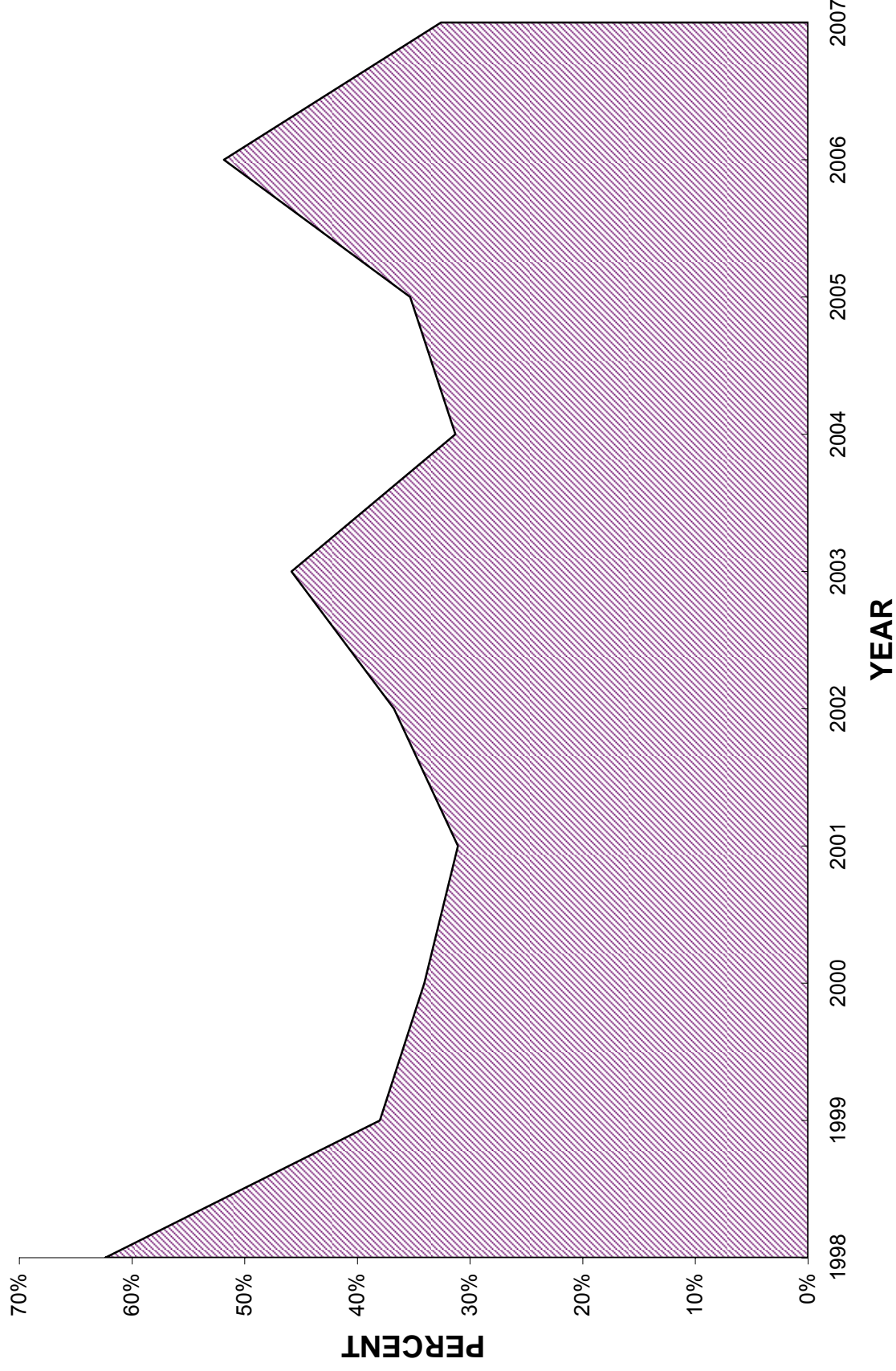
# NUMBER OF RULES UNDER REVIEW 1998 - 2007



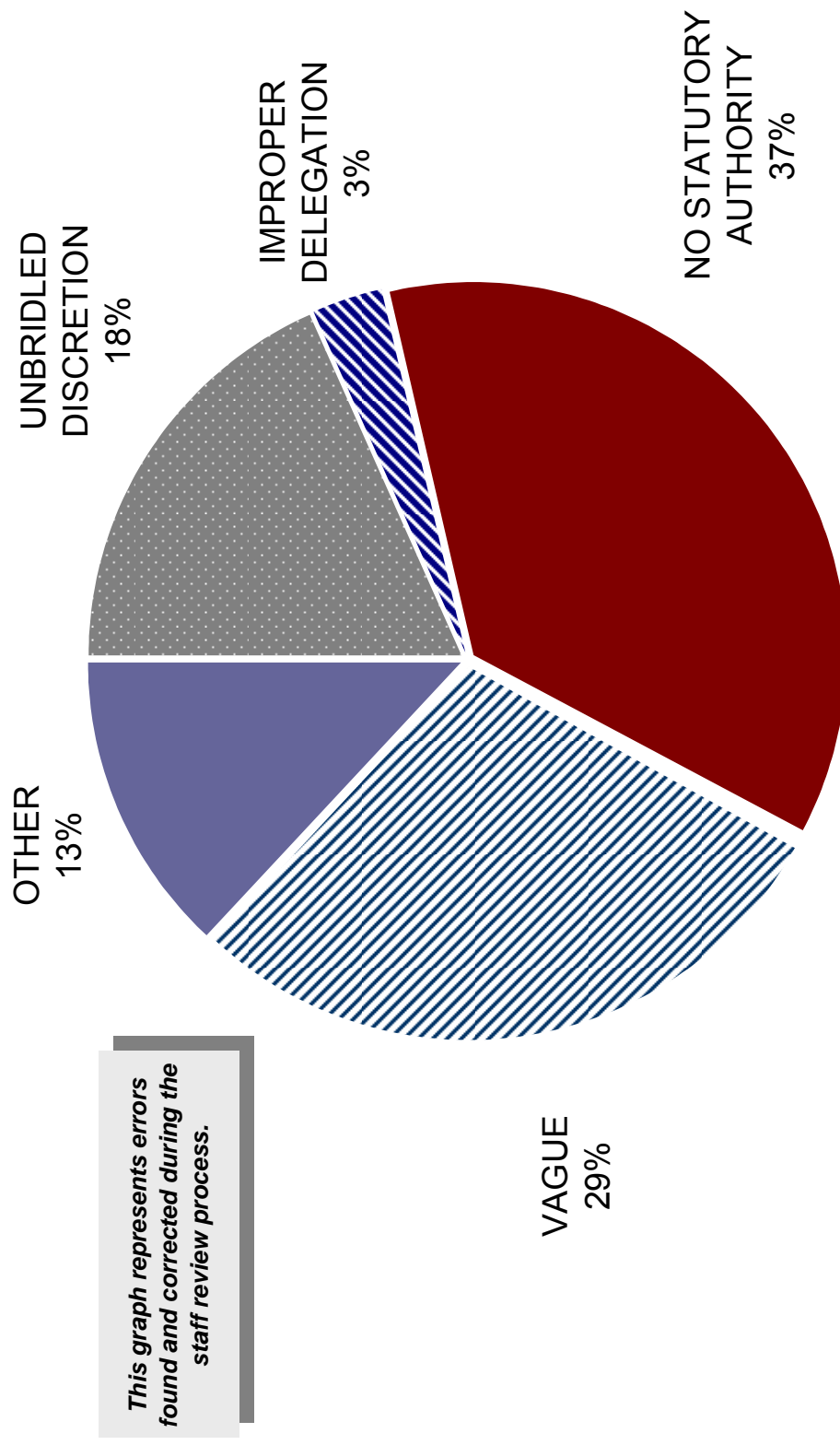


# SUBSTANTIVE ERROR RATE

## ERRORS AS A PERCENT OF RULES CLOSED BY YEAR

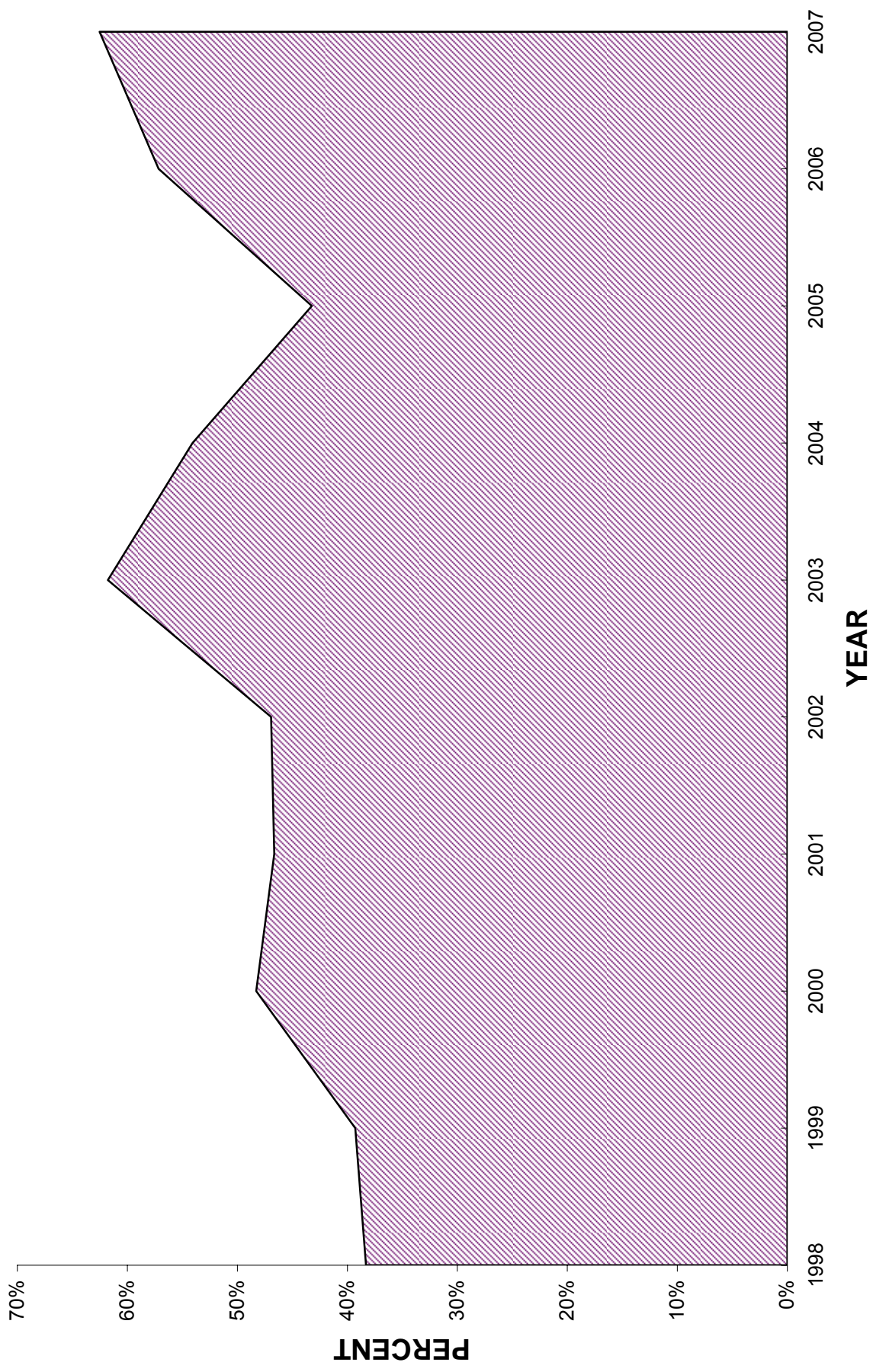


## TYPES OF SUBSTANTIVE ERRORS - 2007

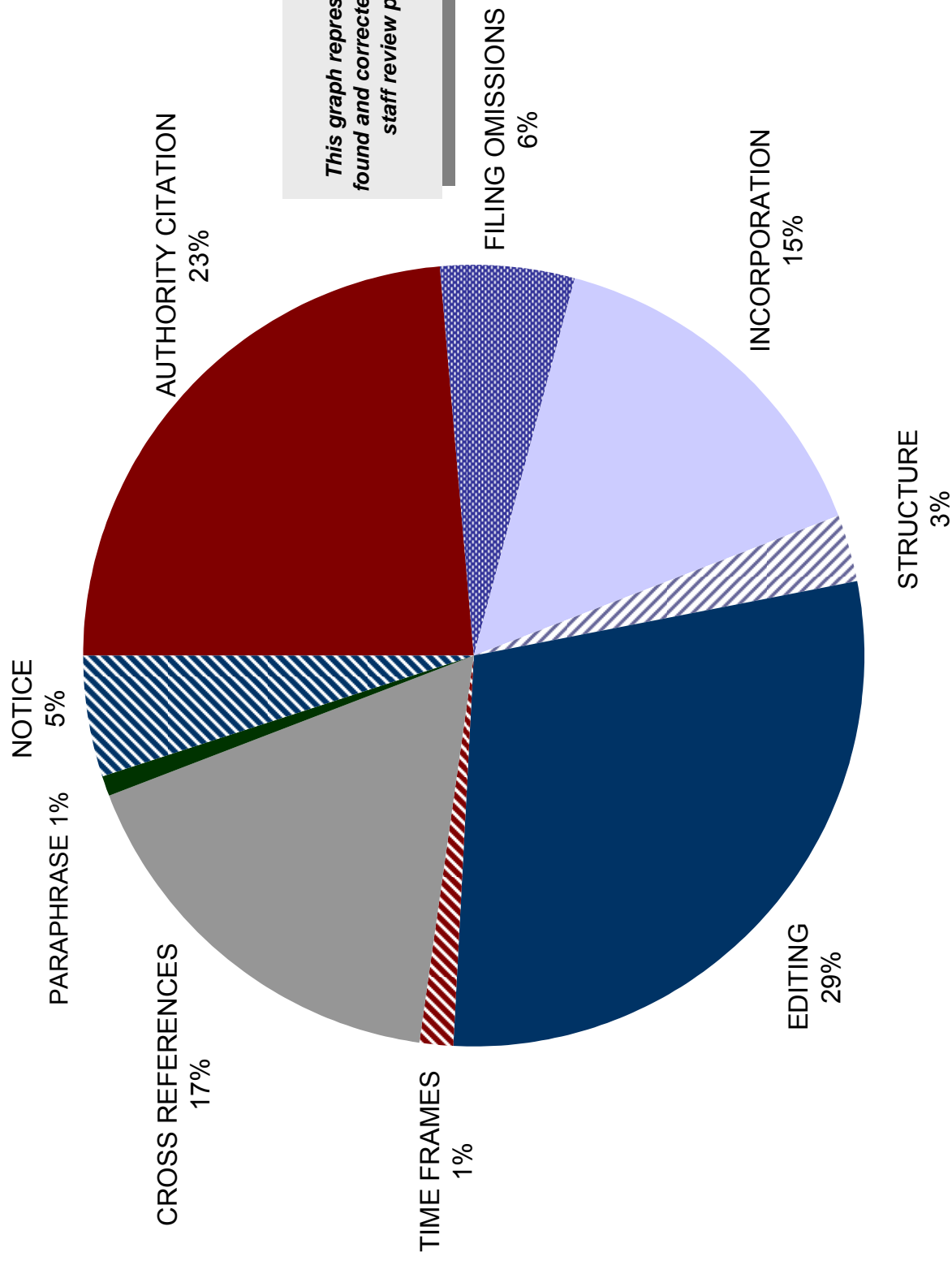


# TECHNICAL ERROR RATE

## ERRORS AS A PERCENT OF RULES CLOSED BY YEAR



# TYPES OF TECHNICAL ERRORS - 2007





# **Proposed Rules (1998 - 2007)**

# PROPOSED RULES 1998 THROUGH 2007

CHPT #	AGENCY	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	TOTAL
01	State	34	14	22	25	42	17	9	23	8	15	209
02	Legal Affairs	25	12	2	7	1	11	9	2	4	6	79
03	Banking and Finance	110	89	57	88	61	21	0	3	0	0	429
04	Insurance	229	64	173	350	186	60	0	0	0	0	1,062
05	Agriculture and Consumer Services	133	70	105	70	100	83	79	70	96	88	894
06	Education	350	334	299	131	429	254	253	138	62	114	2,364
07	Business Regulation	0	0	0	0	0	0	0	0	0	0	0
08	Commerce	0	0	0	0	0	0	0	0	0	0	0
09	Community Affairs	109	59	144	104	49	56	49	53	37	22	682
10	Health and Rehabilitative Services	8	0	0	0	0	0	0	0	0	0	8
11	Law Enforcement	0	232	64	73	105	10	77	45	49	1	656
12	Revenue	163	110	53	158	95	131	35	34	61	62	902
13	General Services	17	0	0	0	0	0	0	0	0	0	17
14	Transportation	88	42	38	72	89	61	80	56	43	50	619
15	Highway Safety and Motor Vehicles	45	0	1	0	1	14	15	0	16	0	92
16	Natural Resources	0	0	0	0	0	0	24	0	0	0	24
17	Environmental Regulation	0	0	14	0	0	0	0	0	0	0	14

# PROPOSED RULES 1998 THROUGH 2007

CHPT #	AGENCY	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	TOTAL
18	Board of Trustees of the Internal Improvement Trust Fund	11	1	0	17	13	21	11	0	0	26	100
19	State Board of Administration	21	23	47	31	40	16	28	28	20	37	291
20	Citrus	43	24	25	37	16	33	5	16	9	3	211
21	Professional Regulation	0	0	0	0	1	0	0	0	0	0	1
22	Administration	0	0	0	0	0	0	0	0	0	0	0
23	Florida Parole Commission	29	2	0	0	6	0	1	0	36	0	74
24	Pardon Board	0	0	0	0	0	0	0	0	0	0	0
25	Florida Public Service Commission	79	76	18	7	11	36	24	42	32	20	345
26	Assessment Administration Review Commission	0	0	0	0	0	0	0	0	0	0	0
27	Executive Office of the Governor	0	0	7	15	0	0	0	0	1	0	23
28	Administration Commission	125	41	38	3	0	0	3	2	45	8	265
29	Regional Planning Councils	35	134	1	0	17	18	11	1	19	0	236
30	Regional Transportation Authorities	0	0	15	0	0	0	0	0	0	0	15
31	Loxahatchee River Environmental Control District	11	2	0	0	0	0	0	0	0	0	13
32	Florida State Fair Authority	0	0	0	0	0	0	0	0	0	0	0

# PROPOSED RULES 1998 THROUGH 2007

CHPT #	AGENCY	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	TOTAL
33	Corrections	66	38	166	50	73	93	84	68	45	45	728
34	Florida Commission on Ethics	176	2	41	17	1	1	9	1	21	0	269
35	Metropolitan Planning Organizations	0	0	0	17	0	1	0	0	0	0	18
36	Englewood Water District	0	0	0	0	0	0	0	0	0	0	0
37	Legislative Committee on Intergovernmental Relations	0	0	0	0	0	0	0	0	0	0	0
38	Labor and Employment Security	67	8	14	29	9	0	0	0	0	0	127
39	Game and Fresh Water Fish Commission	75	41	0	0	0	0	0	0	0	0	116
40	Water Management Districts	546	71	144	210	175	131	161	94	130	125	1,787
41	Commission for the Transportation Disadvantaged	0	0	3	3	1	3	1	0	0	0	11
42	Florida Land and Water Adjudicatory Commission	39	15	4	6	17	17	31	16	23	18	186
43	Fiscal Accounting Information Board	0	0	0	0	0	0	0	0	0	0	0
44	Information Resource Commission	0	0	0	0	0	0	0	0	0	0	0
45	Expressway Authorities	0	0	0	0	0	0	0	0	0	0	0
46	Marine Fisheries Commission	46	17	0	0	0	0	0	0	0	0	63



# PROPOSED RULES 1998 THROUGH 2007

CHPT #	AGENCY	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	TOTAL
47	Florida High Speed Rail Transportation Commission	0	0	0	0	0	0	0	0	0	0	0
48	Florida Keys Aqueduct Authority	0	0	0	0	0	0	0	0	0	0	0
49	Regional Utilities Authorities	56	0	0	3	0	0	2	0	0	8	69
50	Alligator Point Water Resources District	0	0	0	0	0	0	0	0	0	0	0
51	The Consolidated Taxicab Commission	0	0	0	0	0	0	0	0	0	0	0
52	Port of Palm Beach District	0	0	0	0	0	0	0	0	0	0	0
53	Lottery	1	19	2	6	24	3	4	30	0	0	89
54	Interlocal Agencies	1	0	0	1	0	1	0	0	1	0	4
55	Veterans' Affairs	32	4	8	0	0	0	2	0	0	0	46
56	Clean Florida Commission	0	0	0	0	0	0	0	0	0	0	0
57	Space Florida	0	0	23	0	0	0	0	0	0	0	23
58	Elder Affairs	34	34	26	16	7	21	0	17	31	35	221
59	Agency for Health Care Administration	103	83	127	109	70	135	45	104	168	51	995
60	Management Services	318	105	64	146	67	192	153	38	98	52	1,233
61	Business and Professional Regulation	262	223	264	189	144	217	290	238	279	174	2,280
62	Environmental Protection	294	263	120	235	168	149	231	155	136	213	1,964
63	Juvenile Justice	3	0	0	14	0	0	3	0	92	123	235

# PROPOSED RULES 1998 THROUGH 2007

CHPT #	AGENCY	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	TOTAL
64	Health	435	360	412	425	507	280	387	405	376	389	3,976
65	Children and Family Services	220	95	98	46	51	81	46	152	167	45	1,001
66	Navigation Districts	31	7	17	19	7	8	0	19	10	10	128
67	Florida Housing Finance Corporation	127	143	142	101	114	133	180	57	38	86	1,121
68	Florida Fish and Wildlife Conservation Commission	1	58	79	116	77	77	151	91	40	77	767
69	Financial Services	0	0	0	9	0	74	161	211	235	235	925
70	Military Affairs	0	0	0	0	0	0	0	0	0	0	0
		4,598	2,915	2,877	2,955	2,774	2,459	2,654	2,209	2,428	2,138	70,957

# **Emergency Rules**

## **(1998 - 2007)**

# EMERGENCY RULES 1998 THROUGH 2007

CHPT #	AGENCY	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	TOTAL
01	State	0	0	0	1	2	0	1	1	1	2	8
02	Legal Affairs	1	0	1	1	1	0	0	0	0	0	4
03	Banking and Finance	0	0	0	0	0	0	0	0	0	0	0
04	Insurance	1	0	5	42	10	0	0	0	0	0	58
05	Agriculture and Consumer Services	0	1	4	2	1	0	3	1	0	0	12
06	Education	1	0	0	0	95	102	9	6	0	1	214
07	Business Regulation	0	0	0	0	0	0	0	0	0	0	0
08	Commerce	0	0	0	0	0	0	0	0	0	0	0
09	Community Affairs	1	2	11	0	1	0	1	2	1	1	20
10	Health and Rehabilitative Services	0	0	0	0	0	0	0	0	0	0	0
11	Law Enforcement	0	0	0	0	0	0	0	0	0	0	0
12	Revenue	1	1	2	30	8	10	11	13	9	14	99
13	General Services	0	0	0	0	0	0	0	0	0	0	0
14	Transportation	1	1	0	0	0	0	0	0	0	0	2
15	Highway Safety and Motor Vehicles	0	0	0	0	0	0	0	0	0	0	0
16	Natural Resources	0	0	0	0	0	0	0	0	0	0	0
17	Environmental Regulation	0	0	0	0	0	0	0	0	0	0	0

# EMERGENCY RULES 1998 THROUGH 2007

CHPT #	AGENCY	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	TOTAL
18	Board of Trustees of the Internal Improvement Trust Fund	0	0	0	0	0	0	0	0	0	0	0
19	State Board of Administration	0	0	0	0	2	0	2	1	4	1	10
20	Citrus	0	0	0	1	8	4	1	13	0	0	27
21	Professional Regulation	0	0	0	0	0	0	0	0	0	0	0
22	Administration	0	0	0	0	0	0	0	0	0	0	0
23	Florida Parole Commission	0	0	0	0	0	0	0	0	0	0	0
24	Pardon Board	0	0	0	0	0	0	0	0	0	0	0
25	Florida Public Service Commission	0	0	0	0	0	0	0	0	0	0	0
26	Assessment Administration Review Commission	0	0	0	0	0	0	0	0	0	0	0
27	Executive Office of the Governor	0	0	0	0	0	0	0	0	0	0	0
28	Administration Commission	0	0	0	0	0	0	0	0	0	0	0
29	Regional Planning Councils	0	0	0	0	0	0	0	0	0	0	0
30	Regional Transportation Authorities	0	0	0	0	0	0	0	0	0	0	0

# EMERGENCY RULES 1998 THROUGH 2007

CHPT #	AGENCY	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	TOTAL
31	Loxahatchee River Environmental Control District	0	0	0	0	0	0	0	0	0	0	0
32	Florida State Fair Authority	0	0	0	0	0	0	0	0	0	0	0
33	Corrections	0	0	0	0	0	14	0	0	0	0	14
34	Florida Commission on Ethics	0	0	0	0	0	0	0	0	8	0	8
35	Metropolitan Planning Organizations	0	0	0	0	0	0	0	0	0	0	0
36	Englewood Water Management District	0	0	0	0	0	0	0	0	0	0	0
37	Legislative Committee on Intergovernmental Relations	0	0	0	0	0	0	0	0	0	0	0
38	Labor and Employment Security	0	0	0	0	0	0	0	0	0	0	0
39	Game and Fresh Water Fish Commission	1	0	0	0	0	0	0	0	0	0	1
40	Water Management Districts	0	0	0	1	0	0	0	0	0	0	1
41	Commission for the Transportation Disadvantaged	0	0	0	0	0	0	0	0	0	0	0
42	Florida Land and Water Adjudicatory Commission	0	0	0	0	0	0	0	0	0	0	0
43	Fiscal Accounting Information Board	0	0	0	0	0	0	0	0	0	0	0

# EMERGENCY RULES 1998 THROUGH 2007

CHPT #	AGENCY	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	TOTAL
44	Information Resource Commission	0	0	0	0	0	0	0	0	0	0	0
45	Expressway Authorities	0	0	0	0	0	0	0	0	0	0	0
46	Marine Fisheries Commission	0	2	0	0	0	0	0	0	0	0	2
47	Florida High Speed Rail Transportation Commission	0	0	0	0	0	0	0	0	0	0	0
48	Florida Keys Aqueduct Authority	0	0	0	0	0	0	0	0	0	0	0
49	Regional Utilities Authorities	0	0	0	0	0	0	0	0	0	0	0
50	Alligator Point Water Resources District	0	0	0	0	0	0	0	0	0	0	0
51	The Consolidated Taxicab Commission	0	0	0	0	0	0	0	0	0	0	0
52	Port of Palm Beach District	0	0	0	0	0	0	0	0	0	0	0
53	Lottery	62	64	59	84	68	70	88	97	61	76	729
54	Interlocal Agencies	0	0	0	0	0	0	0	0	0	0	0
55	Veterans' Affairs	0	0	0	0	0	0	0	0	0	0	0
56	Clean Florida Commission	0	0	0	0	0	0	0	0	0	0	0
57	Space Florida	0	0	0	0	0	0	0	0	0	0	0
58	Elder Affairs	0	0	0	0	0	0	0	0	0	0	0

# EMERGENCY RULES 1998 THROUGH 2007

CHPT #	AGENCY	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	TOTAL
59	Agency for Health Care Administration	1	0	0	0	5	0	0	1	0	3	10
60	Management Services	0	0	0	0	0	0	0	4	0	0	4
61	Business and Professional Regulation	3	8	1	0	3	5	2	1	1	0	24
62	Environmental Protection	0	0	0	0	0	1	0	0	0	0	1
63	Juvenile Justice	0	0	0	0	0	0	0	0	54	0	54
64	Health	3	1	4	3	2	3	4	4	0	0	24
65	Children and Family Services	1	0	0	0	0	0	1	3	0	1	6
66	Navigation Districts	0	0	0	0	0	0	0	0	0	0	0
67	Florida Housing Finance Corporation	0	0	0	0	0	0	24	32	57	10	123
68	Florida Fish and Wildlife Conservation Commission	0	2	0	1	7	2	3	2	1	1	19
69	Financial Services	0	0	0	0	0	0	20	12	3	3	38
70	Military Affairs	0	0	0	0	0	0	0	0	0	0	0
		77	82	87	166	213	211	170	193	200	113	1,512



# **Legislative Report:**

## **2007 Session**

### **Changes in**

### **Chapter 120, F.S.**

## **2007 SUMMARY OF AMENDMENTS TO CHAPTER 120**

**Chapter 2007-6**, Laws of Florida, a reviser's bill, confirmed the repeal of section 120.551, F.S., which relates to Internet publication of specified agency notices in the Florida Administrative Weekly. Pursuant to its own terms, the statute was repealed effective July 1, 2006, unless reenacted by the Legislature before that date.

**Chapter 2007-196**, Laws of Florida, amended subsection 120.52(1), F.S., to exclude from the definition of "agency" a transportation authority created under chapter 349, F.S. Effective date: July 1, 2007.

**Chapter 2007-217**, Laws of Florida, amended subsection 120.52(1), F.S., to include in the definition of "agency" the Board of Governors of the State University System and a state university board of trustees when acting pursuant to statutory authority derived from the Legislature. Subsection 120.52(6), F.S., is amended to include in the definition of "educational unit" a state university when the university is acting pursuant to statutory authority derived from the Legislature. Subsection 120.65(11), F.S., is amended to provide that the Board of Governors of the State University System shall reimburse the Division of Administrative Hearings for administrative law judge services and travel expenses. Effective date: July 1, 2007.



# **Committee Review of Existing Rules and Statutes**

## **COMMITTEE REVIEW OF EXISTING RULES AND STATUTES**

In 2007, the committee continued its focused review of existing agency rules. The purpose of this review is to identify existing rules that are obsolete, unnecessary or no longer in compliance with current statutory authority. An accompanying examination of relevant statutes helps identify possible problems in the delegated legislative authority to adopt rules. Agencies are advised of the committee's findings and are requested to take appropriate action to amend or repeal specific rules. Recommendations to address problems or concerns related to an agency's statutory authority to adopt rules will be provided to the appropriate standing committees of the Senate and the House of Representatives.

In addition to the review of existing rules and implemented statutes, the committee continued its ongoing review of proposed rules to reveal problems or concerns with the delegated legislative authority to adopt rules in specific circumstances. Identifying statutory problems in the course of normal rule review is an efficient use of committee resources. When such problems are identified, the standing committees with subject area jurisdiction are contacted with regard to the advisability of considering changes to an agency's authority to adopt rules.

The following areas of concern were been brought to the attention of standing committees in 2007:

<b>Chapter 6, F.A.C.</b>	Clarification is needed regarding the rulemaking responsibilities of the Board of Governors and state universities. Specifically, what are their responsibilities under Chapter 120, F.S., when implementing delegated legislative authority, and what are their responsibilities when acting under their constitutional authority? Chapter 2007-217, Laws of Florida, clarified the responsibilities.
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<b>§212.08(7)(ccc)</b>	It was recommended that the Legislature consider whether the Department of Environmental Protection should be delegated legislative authority to adopt rules governing the certification procedure to receive certain sales tax exemptions.
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**§282.102**

The State Technology Office (STO) existed statutorily in §20.22(2)(b), F.S. During the 2005 Legislative Session, Senate Bill 1494 would have abolished the STO but Governor Jeb Bush vetoed the bill. The Legislature ceased to fund the STO. The provisions of §282.102, F.S., created the State Technology Office and listed its powers and duties, including rulemaking authority. Because the STO was not funded it had no personnel and was unable to engage in rulemaking, and no other entity can adopt, amend, or repeal its rules located in rule chapter 60DD of the Florida Administrative Code. The STO has since been removed from §20.22, F.S., and the Agency for Enterprise Information Technology and Department of Management Services were substituted for the STO in several statutory provisions in Chapter 282, F.S. Ch. 2007-105 (SB 1974).

**§370.025**

Amendments to §370.025(4), F.S., were considered to state what statutory authority the Florida Fish and Wildlife Conservation Commission (FWC) does not have rather than what they do have in regards to constitutional and statutory authority to adopt rules. Staff met with House and Senate standing committees in March 2007 to discuss possible bill language to amend §370.025. During the 2007 session, §370.025(4), F.S., was repealed and §20.331(8), F.S., was adopted to state that the constitutional power of the FWC does not include any authority over marine life retained by the legislature or in any agency other than the Marine Fisheries Commission (MFC) on March 1, 1998, nor does it include authority over marine aquaculture retained by the legislature or vested in any other agency as of July 1, 1999.

**§381.006**

The Department of Health published a notice of proposed repeal of rules 64E-26.014 and 64E-26.015 in the February 2, 2007, Florida Administrative Weekly, stating that the Department does not believe it has authority for these rules. On February 8, 2007, the Joint Administrative Procedures Committee received a petition from an inmate in the Broward Correctional Institution, raising concerns about inadequate ventilation and sanitation in the facility, and specifically inquiring about the Department of Health rules

regulating environmental health in detention facilities. There is no grant of mandatory rulemaking authority in §381.006, F.S., although the Department is authorized to adopt rules to implement this section. The responsibility for setting standards, conducting inspections, and enforcing standards for environmental health in institutions is unclear.

**§411.232(4)**

It is unclear whether pursuant to Chapter 2006-227, L.O.F. and §411.232(4), F.S., whether the Department of Health or the Agency for Persons with Disabilities is responsible for adopting rules to implement the Children's Early Investment Program.

**§456.50(2)**

There does not appear to be an applicable grant of rulemaking authority for the Board of Medicine and the Board of Osteopathic Medicine in Chapters 456, 458, or 459, F.S. granting rulemaking authority to implement the provisions of §456.50(2), F.S.

**§464.018(1)(n)**

Board of Nursing proposed rules 64B9-17.001 - .003 required that registered nurses obtain specified education and training prior to administering medications to achieve conscious sedation during certain surgical procedures. These proposed rules were essentially relying upon paragraph 464.018(1)(n), F.S., but this and other statutes do not appear to contain any authority for the Board to require completion of specific education or training requirements beyond those required for licensure if a nurse is otherwise qualified by experience to administer such medications for these purposes. The rules were withdrawn in the February 23, 2007 edition of the Florida Administrative Weekly.

**§849.086**

The current status of card room rules regarding poker tournaments calls into question the delegated legislative authority to adopt rules for poker tournaments by the Division of Pari-mutuel Wagering. The absence of specific statutory rulemaking authority for conducting poker tournaments leaves the existing provisions of §849.086, F.S., open to divergent interpretations regarding entry fees and bet limitations. Statutory clarification would provide more specific direction from the Legislature.

**Chapters 690-170  
and 690-175.003,  
F.A.C.**

The Department of Financial Services was created by Chapter 2002-404, Laws of Florida. The Financial Services Commission was created within the Department. Commission members consist of the Governor, the Attorney General, the Chief Financial Officer and the Commissioner of Agriculture. These Commission members serve as the agency head of the Financial Services Commission. Subsection 20.121(3), F.S.

Pursuant to subsection 120.54(3)(a)1., F.S., “[p]rior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency, upon approval of the agency head, shall give notice of its intended action, setting forth a short, plain explanation of the purpose and effect of the proposed action ....”

After the passage of Chapter 2002-404, the Financial Services Commission, i.e., the “agency head” delegated back to the agency the authority to approve rules prior to noticing them. Subsequently, in 2004 the Department noticed rules 690-175 and 690-170. These rules were challenged. Subsequently, the agency again noticed the rules after authorization from the Commission.

Following an extensive range of hearings, the first set of rules was declared invalid while the second were upheld. However, it is clear that a number of other rules went through the same procedure as those expressly declared invalid. Those rules have not been challenged or ruled upon by the courts. Pursuant to the holding of the first case, each of those rules is invalid.

Therefore, it is suggested that the Legislature consider whether legislation should be enacted to preclude legal challenge of these rules on the procedural ground that the agency head failed to approve the notice.

# **Exemptions Granted to Chapter 120, F.S.**



## EXEMPTIONS GRANTED TO CHAPTER 120

The drafters of the Administrative Procedure Act were aware that the future might bring some unforeseen circumstances which would make some portion of the Act detrimental to the best interests of the people. For this reason, provisions were made for the Administration Commission, composed of the Governor and the Cabinet, to grant exemptions from one or more of the Act's provisions. At the time an exemption is granted, alternative procedures which are compatible with the Act must be prescribed. If an exemption is granted while the Legislature is in session, the exemption expires with the adjournment sine die of the Legislature. When the Legislature is not in session, exemptions expire at the adjournment of the next regular legislative session. (§120.63, F.S.)



Since the Administrative Procedure Act has been in effect, the following agencies have been granted partial exemptions from the Act:

- Department of Business Regulation
- Marion and Lee County School Boards
- Public Employees Relations Commission
- School Boards and Community Colleges
- Department of Banking and Finance
- Department of Offender Rehabilitation
- Department of Business Regulation, Division of Pari-Mutuel Wagering
- Department of Health and Rehabilitative Services
- Parole and Probation Commission
- Florida State Board of Community Colleges

*All of the exemptions listed above have expired.*



There were no exemptions in 1998 – 2007.\*

*\*This information provided by the Administration Commission.*



# **2007 Rule Objections**

## 2007 OBJECTION REPORTS

**AGENCY:** STATE BOARD OF EDUCATION  
**RULE NUMBER:** 6A-6.040  
**TITLE:** VOLUNTARY PREKINDERGARTEN (VPK) DIRECTOR  
ENDORSEMENT FOR PRIVATE PROVIDERS

### OBJECTIONABLE PROVISIONS:

#### **6A-6.040 Voluntary Prekindergarten (VPK) Director Endorsement for Private Providers.**

(1) . . . [A] private prekindergarten program delivering the Voluntary Prekindergarten (VPK) Education Program must have a director who has a VPK Director Endorsement, issued by the Department of Children and Families (DCF), that meets the requirements of subsection (2) of this rule.

(2) Training Requirements. To be eligible for the Voluntary Prekindergarten (VPK) Director Endorsement, issued by the Department of Children and Families, applicants must successfully complete: . . . .

### CITED AGENCY AUTHORITY:

(a) Rulemaking

s. 1002.79(1), F.S.

(b) Law Implemented

s. 1002.55(3)(f), F.S.

s. 1002.57, F.S.

### SPECIFIC OBJECTIONS:

Rule 6A-6.040 is an invalid exercise of delegated legislative authority because it delegates to another agency, the Department of Children and Family Services (DCF), the responsibility to issue a credential that DCF does not have the authority to issue.

Section 120.52(8), F.S., defines an invalid exercise of delegated legislative authority as “action which goes beyond the powers, functions, and duties delegated by the Legislature.” An agency rule that “enlarges, modifies, or contravenes the specific provisions of law implemented” is an invalid exercise of delegated legislative authority. Section 120.52(8)(c), F.S. (2006).

The State’s Voluntary Pre-kindergarten (VPK) program was established in 2004 and can be found in Chapter 1002, Part V, F.S. The statutory framework divides tasks primarily between the department and the Agency for Workforce Innovation. However, it is clear that the task of setting standards and approving credentials for VPK directors was assigned solely to the department.

Section 1002.57, F.S., requires the department to “adopt minimum standards for a credential for prekindergarten directors of private prekindergarten providers” that participate in the state’s voluntary pre-kindergarten (VPK) program. Section 1002.73(2)(a), F.S., provides that the department is required to adopt procedures for “the department’s,” not another agency’s, “[a]pproval of prekindergarten director credentials under ss. 1002.55 and 1002.57.” Section 1002.55(3)(f), F.S., specifically provides that a private VPK provider “must have a prekindergarten director who has a prekindergarten director credential that is approved by the department as meeting or exceeding the minimum standards adopted under s. 1002.57.” (emphasis added). Further, section 1002.57(4), F.S., instructs the department, not DCF, to “award credit” to a person who has already completed child care facility director credential requirements that are duplicative of the VPK director credential requirements.

Sections 1002.55(3)(f), 1002.57, and 1002.73(2)(a), F.S., make it clear that the department is not required simply to set the standards for a VPK director credential, but is also required to approve or disapprove of applications for the credential. Even if its sole duty was to establish the minimum requirements for the credential, it has no authority to assign the power to award credentials to DCF. If DCF does, in fact, issue VPK director credentials, it is doing so without any statutory authority.

In short, this rule impermissibly shifts the responsibility for determining whether a person meets the requirements for a private VPK provider director credential to another agency and is, therefore, objectionable because it “enlarges, modifies, or contravenes the specific provisions of law implemented” and “goes beyond the powers, functions, and duties delegated by the Legislature.” Section 120.52(8), F.S. (2006).

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**AGENCY:** DEPARTMENT OF MANAGEMENT SERVICES  
**RULE NUMBER:** 60H-1.001(13)  
**TITLE:** DEFINITIONS

**OBJECTIONABLE PROVISIONS:**

**60H-1.001(13) Definitions.**

(13) Competitive Solicitation – Means an invitation to bid, a request for proposals, or an invitation to negotiate.

**CITED AGENCY AUTHORITY:**

(a) Rulemaking

s. 255.249, F.S.  
s. 255.25, F.S.  
s. 255.503(11), F.S.

(b) Law Implemented

s. 255.25(2), F.S.  
s. 255.503, F.S.

## **SPECIFIC OBJECTIONS:**

Pursuant to the “map-tack” provision of s. 120.536, F.S., an agency may only adopt rules that implement or interpret the specific powers or duties granted by enabling statutes. There is no specific power vested in the Department of Management Services to expand the competitive bid process for leasing office space in privately owned buildings to include an invitation to negotiate.

The department’s authority to regulate the leasing of space in privately owned buildings is addressed in ss. 255.249(4)(b) and 255.25(3)(a), F.S. Section 255.249(4)(b), F.S., authorizes the department to adopt rules establishing “procedures for soliciting and accepting competitive proposals for leased space of 5,000 square feet or more in privately owned buildings....”

Section 255.25(3)(a), F.S., specifically provides:

Except as provided in subsection (10), no state agency shall enter into a lease as lessee for the use of 5,000 square feet or more of space in a privately owned building except upon advertisement for and receipt of competitive bids and award to the lowest and best bidder. The Department of Management Services shall have the authority to approve a lease for 5,000 square feet or more of space that covers more than 1 fiscal year, subject to the provisions of ss. 216.311, 255.2501, 255.2502, and 255.2503, if such lease is, in the judgment of the department, in the best interests of the state. This paragraph does not apply to buildings or facilities of any size leased for the purpose of providing care and living space for persons. (e.s.)

The more specific language in s. 255.25(3)(a), F.S., which limits the real property leasing process to competitive bids and award to the lowest and best bidder, controls over the general reference to “procedures for soliciting and accepting competitive proposals” in s. 255.249(4)(b), F.S. Rules of statutory construction provide that the specific statutory provision prevails over the general statutory provision. See *Cone v. State of Florida, Department of Health*, 886 So.2d 1007, 1012 (Fla. 1<sup>st</sup> DCA 2004).

If the Department of Management Services believes that invitation to negotiate is a proper method to use when leasing office space, it must first seek legislative authority. In fact, during the 2004 legislative session, legislation was introduced in the Senate and House that would have specifically authorized the department to use invitation to negotiate in the leasing of space in privately owned buildings. (See SB 2722 and HB 1891.) The proposed legislation would have added to s. 255.249, F.S., the authority to solicit, evaluate, and accept competitive bids, proposals, or replies, and deleted from s. 255.25(3)(a), F.S., the reference to

“advertisement for and receipt of competitive bids and award to the lowest and best bidder.” The legislation failed to pass in the 2004 session. Therefore, the requisite legislative authority to use invitation to negotiate for leasing office space in privately owned buildings does not exist.

The legislature has authorized invitation to negotiate for the procurement of personal property and services in Chapter 287. Section 287.012(7), F.S., defines the term “competitive solicitation” to include an invitation to bid, a request for proposals, or an invitation to negotiate. Therefore, when the Department of Management Services exercises its jurisdiction in the procurement of personal property and services within the provisions of Chapter 287, it is authorized to use invitation to negotiate. The department does not have statutory authority to transfer the invitation to negotiate authorization from Chapter 287 (Procurement of Personal Property and Services) to Chapter 255 (Public Property and Publicly Owned Buildings). Before the Department of Management Services may use invitation to negotiate for leasing space in privately owned buildings under the provisions of Chapter 255, it must first obtain legislative authority.

Rule 60H-1.001(13) is an invalid exercise of delegated legislative authority because it enlarges the specific provisions of s. 255.25(3)(a), F.S. “It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute. A rule which purports to do so constitutes an invalid exercise of delegated legislative authority.” *State, Department of Business Regulation v. Salvation Limited, Inc.*, 452 So.2d 65 (Fla. 1<sup>st</sup> DCA 1984).

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<b>AGENCY:</b>	DEPARTMENT OF MANAGEMENT SERVICES
<b>RULE NUMBER:</b>	60H-1.003(3)(a)1.
<b>TITLE:</b>	STANDARD LEASE AGREEMENT FORM

#### **OBJECTIONABLE PROVISIONS:**

##### **60H-1.003(3)(a)1. Standard Lease Agreement Form.**

(3) Certificate of Compliance. Within 30 days after executing a lease of less than 5,000 square feet of space within a privately or publicly owned building, the agency head shall file with the Bureau on a form provided by the Bureau (FM 4113, effective May 1996, as revised January, 2003 and January, 2004, incorporated by reference in this rule) a certificate stating that the lease is in compliance with all leasing criteria provided by Chapter 255, Florida Statutes. The certificate shall further state that the agency has determined that the lease is in the best interest of the State. As used in this section the phrase “the best interest of the state” shall mean:

(a) The agency has filed a Request for Prior Approval of Space Need pursuant to Rule 60H-1.022, Florida Administrative Code, and either:

1. The Division has approved the Request or has not responded to the agency's request within 10 working days of receipt of the request; or

**CITED AGENCY AUTHORITY:**

(a) Rulemaking

s. 255.249(5), F.S.  
s. 255.25(2), F.S.

(b) Law Implemented

s. 255.249(2)(j), (k), (3), F.S.  
s. 255.25(2)(a), (b), F.S.

**SPECIFIC OBJECTIONS:**

Pursuant to the “map-tack” provision of s. 120.536, F.S., an agency may only adopt rules that implement or interpret the specific powers and duties granted by the enabling statute. There is no specific power vested in the Department of Management Services to authorize an agency to proceed without the department’s prior approval based on the passage of time.

Section 255.25(2)(a), F.S., provides, in pertinent part, that:

. . . no state agency may lease a building or any part thereof unless prior approval of the lease conditions and of the need therefor is first obtained from the Department of Management Services. . . .

The Department of Management Services is required to approve or disapprove the lease conditions, and may not create a default approval process by rule.

An example of the requisite legislative authority for the passage of time to equate with approval is found in s. 287.057(5)(c)2., F.S., which addresses the approval of a contract for commodities or contractual services available from a single source. The statute provides that “[T]he failure of the department to approve or disapprove the agency’s request for approval within 21 days after receiving such request shall constitute prior approval of the department. . . .” In that situation, the statute specifically provides that the contract is approved if the Department of Management Services does not act within 21 days. Similar statutory authority does not exist for rule 60H-1.003(3)(a)1.

The requisite statutory authority to equate the passage of 10 days to being deemed approved does not exist in s. 255.25(2)(a), F.S.

Rule 60H-1.003(3)(a)1., F.A.C., is an invalid exercise of delegated legislative authority pursuant to s. 120.52(8)(c), F.S., because it enlarges, modifies, or contravenes the specific provisions of s. 255.25(2)(a), F.S.

**AGENCY:** DEPARTMENT OF MANAGEMENT SERVICES  
**RULE NUMBER:** 60H-1.015(1)(b)5.  
**TITLE:** LEASES OF 5,000 SQUARE FEET OR MORE

**OBJECTIONABLE PROVISIONS:**

**60H-1.015(1)(b)5. Leases of 5,000 Square Feet or More.**

(1)(b) Exceptions:

5. The Division may approve extensions of an existing lease of 5,000 square feet or more space if such extensions are determined to fit the needs of the agency, but in no case shall the total of such extensions exceed 11 months. If at the end of the period granted by the extension(s), the time of such extension(s) equal(s) 11 months, and the agency still needs space, the agency shall solicit competitive responses in accordance with this chapter. All agency requests for an extension under this clause shall be submitted in writing to the Bureau within a reasonable period of time before a lease is to end. The agency shall furnish a statement of justification for the extension. The Division Director shall review the request and issue a written decision.

**CITED AGENCY AUTHORITY:**

(a) Rulemaking

s. 255.249(4), F.S.

(b) Law Implemented

s. 255.21, F.S.

s. 255.249(2)(b),(4), F.S.

s. 255.25(3),(5), F.S.

s. 255.254, F.S.

**SPECIFIC OBJECTIONS:**

Rule 60H-1.015(1)(b)5. is objectionable because it modifies s. 255.25(3)(b), F.S., which provides that extensions of a lease may be granted if determined to be in the best interest of the state. The rule, however, states that extensions may be granted if they are determined to “fit the needs of the agency.” An extension of a lease may fit the needs of the agency without being in the best interest of the state. Therefore, the rule modifies the standard expressed in the statute. A rule provision that enlarges, modifies, or contravenes the specific provisions of law implemented constitutes an invalid exercise of delegated legislative authority. Paragraph 120.52(8)(c), F.S.

The rule is further objectionable because it vests unbridled discretion in the Department to approve extensions, since it provides that the Department may, or may not, approve an extension when the criteria set forth in the rule are met. A rule that vests unbridled discretion in an agency is an invalid exercise of delegated legislative authority. Paragraph 120.52(8)(d), F.S.



**AGENCY:** DEPARTMENT OF MANAGEMENT SERVICES  
**RULE NUMBER:** 60H-1.017(1), (2)(a)2.a.  
**TITLE:** TURNKEY (LEASE) CONSTRUCTION PROGRAM

**OBJECTIONABLE PROVISIONS:**

**60H-1.017(1), (2)(a)2.a. Turnkey (Lease) Construction Program.**

(1) In carrying out the public solicitation, all parties should be clearly informed that the User Agency, in conjunction with its designated representative, may conduct extensive negotiations with each Developer submitting a response within a competitive range, prior to the selection of Approved Developer.

(2) Criteria. The State User Agency in conjunction with its designated representative will perform the program in accordance with the Department of Management Services' guidelines, as presented herein.

User Agency Responsibilities:

(a) 2. Agency shall certify that it has filed a Request for Prior Approval of Space Need pursuant to Rule 60H-1.022, Florida Administrative Code, and either;

a. The Division has approved the request or has not responded to the agency's request within 10 working days of receipt of the request; or

b. If state owned space is available in the same geographic region the agency has enunciated reasons such space does not satisfy the need.

**CITED AGENCY AUTHORITY:**

(a) Rulemaking

s. 255.249(4), F.S.

(b) Law Implemented

s. 255.21, F.S.

s. 255.249(2)(b),(4), F.S.

s. 255.25(3),(5), F.S.

s. 255.254, F.S.

**SPECIFIC OBJECTIONS:**

Rule 60H-1.017(1) is objectionable because it contravenes the statute by authorizing an award of a lease agreement to someone other than the lowest and best bidder. Paragraph 255.25(3)(a), F.S., restricts agencies to leases entered into as a result of advertisement for and receipt of competitive bids and award to the lowest and best bidder. The rule, however, provides that agencies will enter into negotiations with developers who submit responses within a competitive range. There is no requirement in the rule that the award be made to the lowest and best bidder. Therefore, the rule contravenes the statute and constitutes an

invalid exercise of delegated legislative authority within the meaning of s. 120.52(8)(c), F.S.

Rule 60H-1.017(2)(a)2.a. is objectionable because it contravenes the statute by authorizing an agency to enter into a turnkey lease agreement without first obtaining the Department's authorization. Section 255.25(2)(a), F.S., provides:

[N]o state agency may lease a building or any part thereof unless prior approval of the lease conditions and of the need therefor is first obtained from the Department of Management Services.

Therefore, the statute requires that an agency obtain approval of the lease conditions and of the agency's determination of need for the space prior to execution of a lease agreement. The rule, however, would allow an agency to enter into such an agreement if the agency has not received a response from the Department within 10 days. Therefore, the rule contravenes the requirements of the statute and constitutes an invalid exercise of delegated legislative authority pursuant to s. 120.52(8)(c), F.S.

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**AGENCY:** DEPARTMENT OF MANAGEMENT SERVICES  
**RULE NUMBER:** 60H-1.022(2)  
**TITLE:** PRIOR APPROVAL OF SPACE NEED

**OBJECTIONABLE PROVISIONS:**

**60H-1.022(2) Prior Approval of Space Need.**

The Division shall not authorize any agency to enter into a lease agreement in a privately owned building when suitable space is available in a state owned or other publicly owned building located in the same geographic region, unless the agency files with the Bureau a statement explaining why the public space does not fit the needs of the agency. If the Division director approves the request, or does not respond to the agency's request within 10 working days of receipt of the request, the agency may then proceed to:

(2) Negotiate a lease for private sector space of less than 5,000 square feet.

**CITED AGENCY AUTHORITY:**

(a) Rulemaking

s. 255.249(4), F.S.  
s. 255.25, F.S.

(b) Law Implemented

s. 255.25(2)(b),(3),(4), F.S.

## **SPECIFIC OBJECTIONS:**

Rule 60H-1.022 is objectionable because it contravenes the statute by authorizing an agency to negotiate a lease agreement for space in a privately owned building without obtaining the Department's prior approval.

Section 255.25(2)(b), F.S., provides:

(b) The approval of the Department of Management Services, except for technical sufficiency, need not be obtained for the lease of less than 5,000 square feet of space within a privately owned building, provided the agency head or the agency head's designated representative has certified compliance with applicable leasing criteria as may be provided pursuant to s. 255.249(4)(k) and has determined such lease to be in the best interest of the state.

Section 255.25(4)(a), F.S., further states:

The Department of Management Services shall not authorize any state agency to enter into a lease agreement for space in a privately owned building when suitable space is available in a state-owned building located in the same geographic region, except upon presentation to the department of sufficient written justification, acceptable to the department, that a separate space is required in order to fulfill the statutory duties of the agency making such request. The term "state-owned building" as used in this subsection means any state-owned facility regardless of use or control.

Therefore, s. 255.25(2)(b), F.S., requires that an agency obtain approval of the technical sufficiency of a lease of less than 5,000 square feet in a privately owned building prior to execution of the lease agreement. The rule, however, by requiring either the Department's approval or the Department's failure to respond within 10 days, would allow an agency to enter into such an agreement without the Department's review and approval.

Furthermore, when publicly-owned space is available in the same geographic area, s. 255.25(4)(a), F.S., requires an agency to submit written justification that a separate space is required in order to fulfill the statutory duties of the agency, and it requires that the Department find the justification “acceptable.”

Therefore, by authorizing an agency to enter into a lease agreement without the Department’s prior approval, the rule contravenes the statute and constitutes an invalid exercise of delegated legislative authority pursuant to s. 120.52(8)(c), F.S.

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**AGENCY:** DEPARTMENT OF HEALTH  
**RULE NUMBER:** RULE 64E-2.001  
**TITLE:** DEFINITIONS

**OBJECTIONABLE PROVISIONS:**

**64E-2.001 Definitions.** In addition to the definitions provided in Sections 395.401, 395.4001, 401.107, and 401.23, F.S., the following definitions apply to these rules:

- (16) “Operate” For purposes of s. 401.25(2)(d), F.S., means performing services requiring licensure under s. 401.25(1), F.S., but does not include:
- (a) Advertising the availability of services requiring licensure under s. 401.25(1), F.S., for a county in which the advertiser is a licensee;
  - (b) Proposing to engage in services requiring licensure under s. 401.25(1), F.S.;
  - (c) Interfacility transfer between two counties by a licensee possessing a Certificate of Public Convenience and Necessity from only one of the counties if the other county does not prohibit such transfer or transport;
  - (d) Transfer or transport by a licensee through, but not to or from, one or more counties;
  - (e) Transfer or transport by a licensee as part of a coordinated response to a disaster or a mass casualty incident;
  - (f) Transfer or transport by a licensee, after pickup of the patient not otherwise prohibited under s. 401.25(2)(d), F.S. and this rule, to an appropriate facility; or
  - (g) Transfer or transport by a licensee under an agreement sanctioned by the governing bodies of the affected counties.
- (20) “Transfer or transport” – Air, land or water vehicle transportation, by vehicles not exempted under s. 401.33, of sick or injured persons requiring or likely to require medical attention during such transportation.

## CITED AGENCY AUTHORITY:

### (a) Rulemaking

s. 381.0011(13) , F.S.  
s. 395.401, F.S.  
s. 395.4025(13) , F.S.  
s. 395.405, F.S.  
s. 401.121, F.S.  
s. 401.35, F.S.

### (b) Law Implemented

s. 381.0011, F.S.  
s. 395.4001, F.S.  
s. 395.401, F.S.  
s. 395.4015, F.S.  
s. 395.402, F.S.  
s. 395.4025, F.S.  
s. 395.403, F.S.  
s. 395.404, F.S.  
s. 395.4045, F.S.  
s. 395.405, F.S.  
s. 401.121, F.S.  
s. 401.211, F.S.  
s. 401.23, F.S.  
s. 401.25, F.S.  
s. 401.35, F.S.  
s. 401.435, F.S.

## SPECIFIC OBJECTIONS:

This rule is objectionable because through its definition of the term “operate,” the rule provides exceptions to the statutory requirement for a Certificate of Public Convenience and Necessity (COPCN) which are not authorized by statute.

Law implemented, s. 401.25(2)(d), F.S., requires each applicant for a license to operate a basic or advanced life support service to have obtained a COPCN from each county in which the applicant will operate:

401.25 Licensure as a basic life support or an advanced life support service.—

(2) The department shall issue a license for operation to any applicant who complies with the following requirements:

(d) The applicant has obtained a certificate of public convenience and necessity [COPCN] from *each* county in which the applicant will *operate*.  
(e.s.)

Paragraphs (16)(c) through (g) of the proposed rule create exceptions to the statutory requirement for a COPCN from each county in which the ambulance service operates. Thus, the rule contravenes the statute.

Paragraph 120.52(8)(c), F.S., in part defines “invalid exercise of delegated rulemaking authority,” as, “The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.” The courts have stated, “It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute.” *State, Department of Bus. Reg. v. Salvation Limited, Inc.*, 452 So.2d 65, 66 (Fla. 1 DCA, 1984); *DeMario v. Franklin Mortgage & Investment Co., Inc.*, 648 So.2d 210 (Fla. 4 DCA, 1995.)

By allowing an ambulance service to be licensed without the issuance of a COPCN in each county in which the service operates, the department has authorized licensure in circumstances which are specifically prohibited by the Legislature. The department has thereby contravened the law implemented in violation of ss.120.52(8)(b) and 120.545(1)(a), F.S., rendering this rule objectionable.

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**AGENCY:** DEPARTMENT OF CHILDREN AND FAMILY SERVICES  
**RULE NUMBER:** 65C-20.009(3)(a)1.a. and b.  
**TITLE:** STAFFING REQUIREMENTS

**OBJECTIONABLE PROVISIONS:**

**65C-20.009(3)(a)1.a. and b. Staffing Requirements.**

(3) Staff Training.

(a) Prior to licensure and prior to caring for children, all family day care home operators and substitutes who work 40 hours or more per month on average during a 12 month period must:

1. Successfully complete the Department of Children and Family Services’ 30 clock-hour Family Child Care Home training, as evidenced by successful completion of a competency based examination(s) offered by the Department of Children and Family Services or its designated representative with a weighted score of 70 or better.

a. Child care personnel have one (1) opportunity, if they choose, to exempt from one (1) or more of the department’s Introductory Child Care Training courses prior to attending training by successful completion of corresponding competency examinations with a weighted score of 70 or better.

b. Beginning July 1, 2006 the Department of Children and Family Services or its designated representative shall exempt individuals from the Health, Safety, and Nutrition; Child Growth and Development; and Behavioral Observation and Screening courses who meet one (1) of the following educational qualifications:

(I) Associate's degree or higher with six (6) college credit hours in early childhood education/child growth and development or degree in elementary education with certification to teach any age birth through 6<sup>th</sup> grade; or

(II) An active National Early Childhood Credential (NECC) or an active Birth Through Five Florida Child Care Professional Credential (FCCPC).

**CITED AGENCY AUTHORITY:**

(a) Rulemaking

s. 402.313, F.S.

(b) Law Implemented

s. 402.313, F.S.

**SPECIFIC OBJECTIONS:**

This rule is objectionable because it creates exemptions from training requirements for family day care workers that are not authorized by law.

The law implemented by this rule, s. 402.313, F.S., requires operators of family day care homes to complete a 30 clock-hour introductory course and does not authorize any exemptions to this requirement:

(4) Operators of family day care homes must successfully complete an approved 30-clock-hour introductory course in child care, as evidenced by passage of a competency examination, before caring for children.

The Department has established five courses that comprise the statutorily required 30 clock-hours of training. Sub-subparagraph (3)(a)1.a. of the rule exempts from one or more of the required courses individuals who have successfully completed the corresponding examination.

In addition, sub-subparagraph (3)(a)1.b. of the rule states that the Department will exempt from three of the required courses those individuals who meet certain educational requirements.

If the Legislature had intended to allow the Department to exempt family day care operators from the requirement that they successfully complete 30 clock-hours of coursework, they would have authorized exemptions in the statute. In fact, the Legislature specifically authorized exemptions for personnel in child care facilities based upon either education or passage of competency examinations. Section 402.305(2)(d)1., F.S., provides in part:

Exemption from all or a portion of the required training shall be granted to child care personnel based upon educational credentials or passage of competency examinations. Child care personnel possessing a 2-year degree or higher that includes 6 college credit hours in early childhood development or child growth and development, or a child development associate credential or an equivalent state-approved child development associate credential, or a child development associate waiver certificate shall be automatically exempted from the training requirements in sub-subparagraphs b., d., and e.

Because the rule creates exemptions from training mandated by statute for family day care operators, and the statute provides no exemptions, the rule contravenes the specific provisions of law implemented. "It is axiomatic that an administrative rule cannot enlarge, modify or contravene the provisions of a statute." *Dept. of Business Regulation, Division of Alcoholic Beverages & Tobacco v. Salvation Limited, Inc.*, 452 So. 2d 65, 66 (Fla. 1<sup>st</sup> DCA 1984). A rule that contravenes the law implemented is an invalid exercise of delegated legislative authority. Section 120.52(8)(c), F.S. Therefore, Rule 65C-20.009(3)(a)1.a. and (3)(a)1.b. is objectionable.

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**AGENCY:** DEPARTMENT OF CHILDREN AND FAMILY SERVICES  
**RULE NUMBER:** 65C-20.013(5)(b)1.c. II, III, and IV  
**TITLE:** LARGE FAMILY CHILD CARE HOMES (LFCCH)

**OBJECTIONABLE PROVISIONS:**

**65C-20.013(5)(b)1.c. II, III, and IV Large Family Child Care Homes (LFCCH).**

(5) LFCCH Staff Training.:

Form CF-FSP 5273

**Birth Through Five Florida Child Care Professional Credential (FCCP)  
Renewal Application**

To maintain a Birth Through Five FCCPC, every five (5) years a candidate must complete the renewal application and submit to the department documentation of the following:

7. Processing fee of \$25.00 in the form of a business check, cashier's check, or a money order payable to the State of Florida or the Department of Children and Families....



Form CF-FSP 5307

**School-Age Florida Child Care Professional Credential (FCCPC) Renewal Application**

To maintain a School-Age FCCP, every five (5) years a candidate must complete the renewal application and submit to the department documentation of the following:

7. Processing fee of \$25.00 in the form of a business check, cashier's check, or a money order payable to the State of Florida or the Department of Children and Families.

Form CF-FSP 5308

**Florida Department of Education School-Age Professional Certificate Renewal Application**

To maintain a Florida Department of Education School-Age Professional Certificate, every five (5) years a candidate must complete the renewal application and submit to the department documentation of the following:

7. Processing fee of \$25.00 in the form of a business check, cashier's check, or a money order payable to the State of Florida or the Department of Children and Families.

Form CF-FSP 5309

**Florida Department of Education Early Childhood Professional Certificate (ECPC) & Child Care Apprenticeship Certificate (CCAC) Renewal Application**

To maintain a Florida Department of Education Early Childhood Professional Certificate, every five (5) years a candidate must complete the renewal application and submit to the department documentation of the following:

7. Processing fee of \$25.00 in the form of a business check, cashier's check, or a money order payable to the State of Florida or the Department of Children and Families.

**CITED AGENCY AUTHORITY:**

(a) Rulemaking

s. 402.313, F.S.

(b) Law Implemented

s. 402.313, F.S.

**SPECIFIC OBJECTIONS:**

This rule is objectionable because it imposes a fee that is not authorized by statute. The rule incorporates by reference four forms for the renewal of certificates or credentials for large family child care home operators, each of

which requires remittance of a \$25.00 processing fee. There is no authority in the statutes for this requirement.

No agency may impose a fee without specific statutory authority. *Bradford v. Stoutamire*, 38 So. 2d 684 (Fla. 1948); *see also*, *Department of Business Regulation v. Vandervoort*, 273 So. 2d 66 (Fla. 1972), *reh. den.* (1973); *Manasota-88, Inc., v. Department of Environmental Regulation*, Case No. 90-4066RX, 1990 WL 749248 (September 11, 1990). A rule that exceeds the agency's grant of rulemaking authority is an invalid exercise of delegated legislative authority. Section 120.52(8)(b), Florida Statutes. Therefore, this rule is objectionable.

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**AGENCY:** DEPARTMENT OF CHILDREN AND FAMILY SERVICES  
**RULE NUMBER:** 65C-22.003(7)(d)3., 4., 5.  
**TITLE:** TRAINING

**OBJECTIONABLE PROVISIONS:**

**65C-22.003(7)(d)3., 4., 5. Training.**

(7) Staff Credentials.

(d) Staff Credential Renewal

Form CF-FSP 5273

**Birth Through Five Florida Child Care Professional Credential (FCCP)  
Renewal Application**

To maintain a Birth Through Five FCCPC, every five (5) years a candidate must complete the renewal application and submit to the department documentation of the following:

7. Processing fee of \$25.00 in the form of a business check, cashier's check, or a money order payable to the State of Florida or the Department of Children and Families....

Form CF-FSP 5306

**Florida Director Credential Renewal Application**

To maintain a Florida Director Credential, every five (5) years a candidate must complete the renewal application and provide documentation of the following up to one (1) year prior to the end of the active period of the current credential:

4. Processing charge of \$25.00 in the form of a business check, cashier's check, or a money order payable to the State of Florida or the Department of Children and Families....

Form CF-FSP 5307

**School-Age Florida Child Care Professional Credential (FCCPC) Renewal Application**

To maintain a School-Age FCCP, every five (5) years a candidate must complete the renewal application and submit to the department documentation of the following:

7. Processing fee of \$25.00 in the form of a business check, cashier's check, or a money order payable to the State of Florida or the Department of Children and Families.

Form CF-FSP 5308

**Florida Department of Education School-Age Professional Certificate Renewal Application**

To maintain a Florida Department of Education School-Age Professional Certificate, every five (5) years a candidate must complete the renewal application and submit to the department documentation of the following:

7. Processing fee of \$25.00 in the form of a business check, cashier's check, or a money order payable to the State of Florida or the Department of Children and Families.

Form CF-FSP 5309

**Florida Department of Education Early Childhood Professional Certificate (ECPC) & Child Care Apprenticeship Certificate (CCAC) Renewal Application**

To maintain a Florida Department of Education Early Childhood Professional Certificate, every five (5) years a candidate must complete the renewal application and submit to the department documentation of the following:

7. Processing fee of \$25.00 in the form of a business check, cashier's check, or a money order payable to the State of Florida or the Department of Children and Families.

**CITED AGENCY AUTHORITY:**

(a) Rulemaking

s. 402.281, F.S.

s. 402.305, F.S.

(b) Law Implemented

s. 402.281, F.S.

s. 402.305, F.S.

s. 402.3055, F.S.

s. 402.308, F.S.

**SPECIFIC OBJECTIONS:**

This rule is objectionable because it imposes a fee that is not authorized by statute. The rule incorporates by reference five forms for the renewal of

certificates or credentials for operators of child care facilities, each of which requires remittance of a \$25.00 processing fee. There is no authority in the statutes for the department to impose a processing fee.

No agency may impose a fee without specific statutory authority. *Bradford v. Stoutamire*, 38 So. 2d 684 (Fla. 1948); see also, *Department of Business Regulation v. Vandervoort*, 273 So. 2d 66 (Fla. 1972), *reh. den.* (1973); *Manasota-88, Inc., v. Department of Environmental Regulation*, Case No. 90-4066RX, 1990 WL 749248 (September 11, 1990). By imposing a fee for which the department has no statutory authority, the department has exceeded its grant of rulemaking authority. A rule that exceeds the agency's grant of rulemaking authority is an invalid exercise of delegated legislative authority pursuant to Section 120.52(8)(b), Florida Statutes. Therefore, this rule is objectionable.

# **Administrative Determinations and Petitions for Judicial Review**

## 2007 ADMINISTRATIVE DETERMINATIONS AND PETITIONS FOR JUDICIAL REVIEW FILED ON THE INVALIDITY OF PROPOSED AND EXISTING RULES\*

### **NUMBER OF CASES FILED AT DOAH:**

	CLOSED CASES	ACTIVE CASES
<i>PROPOSED RULES</i>	16	9
<i>EXISTING RULES</i>	11	8

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### **JUDICIAL REVIEW CASES:**

**CASE NUMBER:** 07-1857RX

**STYLE:** Florida Fine Wine and Spirits, LLC d/b/a Total Wine and More vs. Department of Business and Professional Regulation

**RULE:** 61A-1.010

**STATUTE:** Chapter 561, F.S.

**DOAH FINAL ORDER DATE:** 7-20-07

**CASE SUMMARY:** Petitioner was barred from challenging the 1997 repeal of Florida Administrative Code Rule 61A-4.058 because its challenge was untimely. Petitioner did not prove that Rule 61A-1.010 was an invalid exercise of delegated legislative authority.

**DCA CASE:** 1D07-4289 filed 8-16-07

**CASE NUMBER:** 07-0689RX

**STYLE:** Miguel Mora Rodriquez, by and through his best friend and guardian Maria Melendez vs. Department of Health

**RULE:** 64I-1.001(1)(c)

**STATUTE:** §381.76, F.S.

**DOAH FINAL ORDER DATE:** 5-24-07

**CASE SUMMARY:** Respondent modified and enlarged s. 381.76(1)(b) in R. 64I-1.001(1)(c) in its definition of "legal resident of the state" to include "lawful and permanent residence in the United States of America," and is an invalid exercise of delegated legislative authority.

**DCA CASE:** 1D07-3323 filed 6-25-07

**CASE NUMBER:** 07-0603RX

**STYLE:** JM Auto, Inc. d/b/a JM Lexus vs. Department of Highway Safety and Motor Vehicles

**RULE:** 15C-7.005

**STATUTE:** Chapter 320, F.S

**DOAH FINAL ORDER DATE:** 4-20-07

**CASE SUMMARY:** Petitioner has demonstrated that Florida Administrative Code Rule 15C-7.005 is an invalid exercise of legislative delegated authority in violation of Section 120.52(8)(b) and (c), Florida Statutes.

**DCA CASE:** 1D07-2662 filed 5-18-07

**CASE NUMBER:** 06-4816RX

**STYLE:** Sydney T. Bacchus vs. Department of Business and Professional Regulation

**RULE:** 61G16-9.001

**STATUTE:** Chs. 455 and 492, F.S.

**DOAH FINAL ORDER DATE:** 1-30-07

**CASE SUMMARY:** Petitioner failed to allege or demonstrate standing to challenge Florida Administrative Code Rule 61G16-9.001 because the Rule is a Disciplinary Guideline for violations committed by licensees and Petitioner is unlicensed.

**DCA CASE:** 1D07-1084 filed 2-28-07

**CASE NUMBER:** 06-2871RP

**STYLE:** Florida Power and Light vs. Department of Environmental Protection

**RULE:** 62-296.470

**STATUTE:** Chapter 403, F.S.

**DOAH FINAL ORDER DATE:** 3-1-07

**CASE SUMMARY:** The proposed rule is not an invalid exercise of delegated legislative authority; the Statement of Estimated Regulatory Cost was prepared in a correct manner.

**DCA CASE:** 3D07-840 filed 3-30-07; affirmed 11-7-07.

**CASE NUMBER:** 05-2803RP (consolidated with 05-1012RP)

**STYLE:** The Florida Insurance Council, Inc.; The American Insurance Association; Property Casualty Insurers Association of America; and National Association of Mutual Insurance Companies vs. Department of Financial Services, Office of Insurance Regulation, and the Financial Services Commission

**RULE:** 69O-125.005

**STATUTE:** §§626.9741, 627.062 and 627.0651

**DOAH FINAL ORDER DATE:** 12/29/06

**CASE SUMMARY:** The proposed rule regulating the insurance companies' use of credit scoring to establish rates was impermissibly vague.

**DCA CASE:** 1D07-478 filed 1/26/07; dismissed 4-26-07

*\*Note: As of February 5, 2008. Data obtained from the Division of Administrative Hearings (DOAH).*

**Section 11.60,  
Florida Statutes:  
  
Administrative  
  
Procedures  
  
Committee**



**11.60 Administrative Procedures Committee; creation; membership; powers; duties.—**

(1) There is created a joint standing committee of the Legislature designated as the "Administrative Procedures Committee," composed of six members appointed as follows: three members of the House of Representatives appointed by the Speaker of the House of Representatives, one of whom shall be a member of the minority party; and three members of the Senate appointed by the President of the Senate, one of whom shall be a member of the minority party. The president shall appoint the chair in even years and the vice chair in odd years, and the speaker shall appoint the chair in odd years and the vice chair in even years, from among the committee membership. Vacancies shall be filled in the same manner as the original appointment. Members shall serve without additional compensation, but shall be reimbursed for expenses.

(2) The committee shall:

(a) Maintain a continuous review of the statutory authority on which each administrative rule is based and, whenever such authority is eliminated or significantly changed by repeal, amendment, holding by a court of last resort, or other factor, advise the agency concerned of the fact.

(b) Maintain a continuous review of administrative rules and identify and request an agency to repeal any rule or any provision of any rule which reiterates or paraphrases any statute or for which the statutory authority has been repealed.

(c) Review administrative rules and advise the agencies concerned of its findings.

(d) Have the duties prescribed by chapter 120 concerning the adoption and promulgation of rules.

(e) Generally review agency action pursuant to the operation of the Administrative Procedure Act.

(f) Report to the Legislature at least annually, no later than the first week of the regular session, and recommend needed legislation or other appropriate action. Such report shall include the number of objections voted by the committee, the number of suspensions recommended by the committee, the number of administrative determinations filed on the invalidity of a proposed or existing rule, the number of petitions for judicial review filed on the invalidity of a proposed or existing rule, and the outcomes of such actions.

(g) Consult regularly with legislative standing committees which have jurisdiction over the subject areas addressed in agency proposed rules regarding legislative authority for the

proposed rules and other matters relating to legislative authority for agency action.

(h) Adopt rules and regulations necessary for its own organization and operation and for that of its staff, consistent with general law and the rules of each house.

(i) Appoint an executive director and general counsel, by majority vote of the members of the committee, and fill any vacancy in that office in the same manner.

(j) Have general administrative responsibility for the operations of its staff.

(k) Have standing to seek judicial review, on behalf of the Legislature or the citizens of this state, of the validity or invalidity of any administrative rule to which the committee has voted an objection and which has not been withdrawn, modified, repealed, or amended to meet the objection. Judicial review under this paragraph shall not be initiated until the Governor and the agency head of the agency making the rule to which the committee has objected have been notified of the committee's proposed action and have been given a reasonable opportunity, not to exceed 60 days, for consultation with the committee. The committee is authorized to expend public funds from its appropriation for the purpose of seeking judicial review.

(l) Maintain a continuous review of the administrative rulemaking process, including a review of agency procedure and of complaints based on such agency procedure.

(m) Establish measurement criteria to evaluate whether agencies are complying with the delegation of legislative authority in adopting and implementing rules.

(3) Expenses required for the work of the committee shall be included in and paid from the appropriation for legislative expense.

(4) The committee shall maintain a continuous review of statutes that authorize agencies to adopt rules and shall make recommendations to the appropriate standing committees of the Senate and the House of Representatives as to the advisability of considering changes to the delegated legislative authority to adopt rules in specific circumstances. The annual report submitted pursuant to paragraph (2)(f) shall include any recommendations provided to the standing committees during the preceding year.

**History.**—s. 2, ch. 74-310; s. 1, ch. 77-453; s. 2, ch. 79-400; s. 4, ch. 80-391; s. 3, ch. 91-429; s. 6, ch. 92-166; s. 24, ch. 95-147; s. 2, ch. 96-159; s. 1, ch. 2006-82.

# **Chapter 120, Florida Statutes: Administrative Procedure Act**

## CHAPTER 120

## ADMINISTRATIVE PROCEDURE ACT

- 120.50 Exception to application of chapter.
- 120.51 Short title.
- 120.52 Definitions.
- 120.525 Meetings, hearings, and workshops.
- 120.53 Maintenance of orders; indexing; listing; organizational information.
- 120.533 Coordination of indexing by Department of State.
- 120.536 Rulemaking authority; repeal; challenge.
- 120.54 Rulemaking.
- 120.541 Statement of estimated regulatory costs.
- 120.542 Variances and waivers.
- 120.545 Committee review of agency rules.
- 120.55 Publication.
- 120.56 Challenges to rules.
- 120.565 Declaratory statement by agencies.
- 120.569 Decisions which affect substantial interests.
- 120.57 Additional procedures for particular cases.
- 120.573 Mediation of disputes.
- 120.574 Summary hearing.
- 120.595 Attorney's fees.
- 120.60 Licensing.
- 120.62 Agency investigations.
- 120.63 Exemption from act.
- 120.65 Administrative law judges.
- 120.651 Designation of two administrative law judges to preside over actions involving department or boards.
- 120.655 Withholding funds to pay for administrative law judge services to school boards.
- 120.66 Ex parte communications.
- 120.665 Disqualification of agency personnel.
- 120.68 Judicial review.
- 120.69 Enforcement of agency action.
- 120.695 Notice of noncompliance.
- 120.72 Legislative intent; references to chapter 120 or portions thereof.
- 120.73 Circuit court proceedings; declaratory judgments.
- 120.74 Agency review, revision, and report.
- 120.80 Exceptions and special requirements; agencies.
- 120.81 Exceptions and special requirements; general areas.

**120.50 Exception to application of chapter.**—This chapter shall not apply to:

- (1) The Legislature.
- (2) The courts.

**History.**—s. 1, ch. 74-310; s. 3, ch. 77-468; s. 1, ch. 78-162.

**120.51 Short title.**—This chapter may be known and cited as the "Administrative Procedure Act."

**History.**—s. 1, ch. 74-310.

**120.52 Definitions.**—As used in this act:

- (1) "Agency" means:

(a) The Governor in the exercise of all executive powers other than those derived from the constitution.

- (b) Each:

1. State officer and state department, and each departmental unit described in s. 20.04.

2. Authority, including a regional water supply authority.

3. Board, including the Board of Governors of the State University System and a state university board of trustees when acting pursuant to statutory authority derived from the Legislature.

4. Commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.

5. Regional planning agency.

6. Multicounty special district with a majority of its governing board comprised of nonelected persons.

7. Educational units.

8. Entity described in chapters 163, 373, 380, and 582 and s. 186.504.

(c) Each other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

This definition does not include any legal entity or agency created in whole or in part pursuant to chapter 361, part II, any metropolitan planning organization created pursuant to s. 339.175, any separate legal or administrative entity created pursuant to s. 339.175 of which a metropolitan planning organization is a member, an expressway authority pursuant to chapter 348 or transportation authority under chapter 349, any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection, or any multicounty special district with a majority of its governing board comprised of elected persons; however, this definition shall include a regional water supply authority.

(2) "Agency action" means the whole or part of a rule or order, or the equivalent, or the denial of a petition to adopt a rule or issue an order. The term also includes any denial of a request made under s. 120.54(7).

(3) "Agency head" means the person or collegial body in a department or other governmental unit statutorily responsible for final agency action.

(4) "Committee" means the Administrative Procedures Committee.

(5) "Division" means the Division of Administrative Hearings.

(6) "Educational unit" means a local school district, a community college district, the Florida School for the Deaf and the Blind, or a state university when the university is acting pursuant to statutory authority derived from the Legislature.

(7) "Final order" means a written final decision which results from a proceeding under s. 120.56, s. 120.565, s. 120.569, s. 120.57, s. 120.573, or s.

120.574 which is not a rule, and which is not excepted from the definition of a rule, and which has been filed with the agency clerk, and includes final agency actions which are affirmative, negative, injunctive, or declaratory in form. A final order includes all materials explicitly adopted in it. The clerk shall indicate the date of filing on the order.

(8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

(a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;

(b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;

(c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

(e) The rule is arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational; or

(f) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

(9) "License" means a franchise, permit, certification, registration, charter, or similar form of authorization required by law, but it does not include a license required primarily for revenue purposes when issuance of the license is merely a ministerial act.

(10) "Licensing" means the agency process respecting the issuance, denial, renewal, revocation, suspension, annulment, withdrawal, or amendment of a license or imposition of terms for the exercise of a license.

(11) "Official reporter" means the publication in which an agency publishes final orders, the index to final orders, and the list of final orders which are listed rather than published.

(12) "Party" means:

(a) Specifically named persons whose substantial interests are being determined in the proceeding.

(b) Any other person who, as a matter of constitutional right, provision of statute, or provision of agency regulation, is entitled to participate in whole or in part in the proceeding, or whose substantial interests will be affected by proposed agency action, and who makes an appearance as a party.

(c) Any other person, including an agency staff member, allowed by the agency to intervene or participate in the proceeding as a party. An agency may by rule authorize limited forms of participation in agency proceedings for persons who are not eligible to become parties.

(d) Any county representative, agency, department, or unit funded and authorized by state statute or county ordinance to represent the interests of the consumers of a county, when the proceeding involves the substantial interests of a significant number of residents of the county and the board of county commissioners has, by resolution, authorized the representative, agency, department, or unit to represent the class of interested persons. The authorizing resolution shall apply to a specific proceeding and to appeals and ancillary proceedings thereto, and it shall not be required to state the names of the persons whose interests are to be represented.

The term "party" does not include a member government of a regional water supply authority or a governmental or quasi-judicial board or commission established by local ordinance or special or general law where the governing membership of such board or commission is shared with, in whole or in part, or appointed by a member government of a regional water supply authority in proceedings under s. 120.569, s. 120.57, or s. 120.68, to the extent that an interlocal agreement under ss. 163.01 and 373.1962 exists in which the member government has agreed that its substantial interests are not affected by the proceedings or that it is to be bound by alternative dispute resolution in lieu of participating in the proceedings. This exclusion applies only to those particular types of disputes or controversies, if any, identified in an interlocal agreement.

(13) "Person" means any person described in s. 1.01, any unit of government in or outside the state, and any agency described in subsection (1).

(14) "Recommended order" means the official recommendation of an administrative law judge assigned by the division or of any other duly authorized presiding officer, other than an agency head or member of an agency head, for the final disposition of a proceeding under ss. 120.569 and 120.57.

(15) "Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

(b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

(c) The preparation or modification of:

1. Agency budgets.

2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.

3. Contractual provisions reached as a result of collective bargaining.

4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

(16) "Small city" means any municipality that has an unincarcerated population of 10,000 or less according to the most recent decennial census.

(17) "Small county" means any county that has an unincarcerated population of 75,000 or less according to the most recent decennial census.

(18) "Variance" means a decision by an agency to grant a modification to all or part of the literal requirements of an agency rule to a person who is subject to the rule. Any variance shall conform to the standards for variances outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

(19) "Waiver" means a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Any waiver shall conform to the standards for waivers outlined in this chapter and in the uniform rules adopted pursuant to s. 120.54(5).

**History.**—s. 1, ch. 74-310; s. 1, ch. 75-191; s. 1, ch. 76-131; s. 1, ch. 77-174; s. 12, ch. 77-290; s. 2, ch. 77-453; s. 1, ch. 78-28; s. 1, ch. 78-425; s. 1, ch. 79-20; s. 55, ch. 79-40; s. 1, ch. 79-299; s. 2, ch. 81-119; s. 1, ch. 81-180; s. 7, ch. 82-180; s. 1, ch. 83-78; s. 2, ch. 83-273; s. 10, ch. 84-170; s. 15, ch. 85-80; s. 1, ch. 85-168; s. 2, ch. 87-385; s. 1, ch. 88-367; s. 1, ch. 89-147; s. 1, ch. 91-46; s. 9, ch. 92-166; s. 50, ch. 92-279; s. 55, ch. 92-326; s. 3, ch. 96-159; s. 1, ch. 97-176; s. 2, ch. 97-286; s. 1, ch. 98-402; s. 64, ch. 99-245; s. 2, ch. 99-379; s. 895, ch. 2002-387; s. 1, ch. 2003-94; s. 138, ch. 2003-261; s. 7, ch. 2003-286; s. 3, ch. 2007-196; s. 13, ch. 2007-217.

#### **120.525 Meetings, hearings, and workshops.—**

(1) Except in the case of emergency meetings, each agency shall give notice of public meetings, hearings, and workshops by publication in the Florida Administrative Weekly not less than 7 days before the event. The notice shall include a statement of the general subject matter to be considered.

(2) An agenda shall be prepared by the agency in time to ensure that a copy of the agenda may be received at least 7 days before the event by any person in the state who requests a copy and who pays the reasonable cost of the copy. The agenda shall contain the items to be considered in order of presentation. After the agenda has been made available, a change shall be made only for good cause, as determined by the person designated to preside, and stated in the record. Notification of such change shall be at the earliest practicable time.

(3) If an agency finds that an immediate danger to the public health, safety, or welfare requires immediate action, the agency may hold an emergency public meeting and give notice of such meeting by any procedure that is fair under the circumstances and necessary to protect the public interest, if:

(a) The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.

(b) The agency takes only that action necessary to protect the public interest under the emergency procedure.

(c) The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The agency findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

**History.**—s. 4, ch. 96-159.

#### **120.53 Maintenance of orders; indexing; listing; organizational information.—**

(1)(a) Each agency shall maintain:

1. All agency final orders.

2.a. A current hierarchical subject-matter index, identifying for the public any rule or order as specified in this subparagraph.

b. In lieu of the requirement for making available for public inspection and copying a hierarchical subject-matter index of its orders, an agency may maintain and make available for public use an electronic database of its orders that allows users to research and retrieve the full texts of agency orders by devising an ad hoc indexing system employing any logical search terms in common usage which are composed by the user and which are contained in the orders of the agency or by descriptive information about the order which may not be specifically contained in the order.

c. The agency orders that must be indexed, unless excluded under paragraph (c) or paragraph (d), include:

(I) Each final agency order resulting from a proceeding under s. 120.57 or s. 120.573.

(II) Each final agency order rendered pursuant to s. 120.57(4) which contains a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value.

(III) Each declaratory statement issued by an agency.

(IV) Each final order resulting from a proceeding under s. 120.56 or s. 120.574.

3. A list of all final orders rendered pursuant to s. 120.57(4) which have been excluded from the indexing requirement of this section, with the approval of the Department of State, because they do not contain statements of agency policy or statements of precedential value. The list must include the name of the parties to the proceeding and the number assigned to the final order.

4. All final orders listed pursuant to subparagraph 3.

(b) An agency final order that must be indexed or listed pursuant to paragraph (a) must be indexed or listed within 120 days after the order is rendered. Each final order that must be indexed or listed pursuant to paragraph (a) must have attached a copy of the complete text of any materials incorporated by reference; however, if the quantity of the materials incorporated makes attachment of the complete text of the materials impractical, the order may contain a statement of the location of such materials and the manner in which the public may inspect or obtain copies of the materials incorporated by reference. The Department of State shall establish by rule procedures for indexing final orders, and procedures of agencies for indexing orders must be approved by the department.

(c) Each agency must receive approval in writing from the Department of State for:

1. The specific types and categories of agency final orders that may be excluded from the indexing and public inspection requirements, as determined by the department pursuant to paragraph (d).

2. The method for maintaining indexes, lists, and final orders that must be indexed or listed and made available to the public.

3. The method by which the public may inspect or obtain copies of indexes, lists, and final orders.

4. A sequential numbering system which numbers all final orders required to be indexed or listed pursuant to paragraph (a), in the order rendered.

5. Proposed rules for implementing the requirements of this section for indexing and making final orders available for public inspection.

(d) In determining which final orders may be excluded from the indexing and public inspection requirements, the Department of State may consider all factors specified by an agency, including precedential value, legal significance, and purpose. Only agency final orders that are of limited or no precedential value, that are of limited or no legal significance, or that are ministerial in nature may be excluded.

(e) Each agency shall specify the specific types or categories of agency final orders that are excluded from the indexing and public inspection requirements.

(f) Each agency shall specify the location or locations where agency indexes, lists, and final orders that are required to be indexed or listed are maintained and shall specify the method or procedure by which the public may inspect or obtain copies of indexes, lists, and final orders.

(g) Each agency shall specify all systems in use by the agency to search and locate agency final orders that are required to be indexed or listed, including, but not limited to, any automated system. An agency shall make the search capabilities employed by the agency available to the public subject to reasonable terms and conditions, including a reasonable charge, as provided by s. 119.07. The agency shall specify how assistance and information pertaining to final orders may be obtained.

(h) Each agency shall specify the numbering system used to identify agency final orders.

(2)(a) An agency may comply with subparagraphs (1)(a)1. and 2. by designating an official reporter to

publish and index by subject matter each agency order that must be indexed and made available to the public. An agency is in compliance with subparagraph (1)(a)3. if it publishes in its designated reporter a list of each agency final order that must be listed and preserves each listed order and makes it available for public inspection and copying.

(b) An agency may publish its official reporter or may contract with a publishing firm to publish its official reporter; however, if an agency contracts with a publishing firm to publish its reporter, the agency is responsible for the quality, timeliness, and usefulness of the reporter. The Department of State may publish an official reporter for an agency or may contract with a publishing firm to publish the reporter for the agency; however, if the department contracts for publication of the reporter, the department is responsible for the quality, timeliness, and usefulness of the reporter. A reporter that is designated by an agency as its official reporter and approved by the Department of State constitutes the official compilation of the administrative final orders for that agency.

(c) A reporter that is published by the Department of State may be made available by annual subscription, and each agency that designates an official reporter published by the department may be charged a space rate payable to the department. The subscription rate and the space rate must be equitably apportioned to cover the costs of publishing the reporter.

(d) An agency that designates an official reporter need not publish the full text of an agency final order that is rendered pursuant to s. 120.57(4) and that must be indexed pursuant to paragraph (1)(a), if the final order is preserved by the agency and made available for public inspection and copying and the official reporter indexes the final order and includes a synopsis of the order. A synopsis must include the names of the parties to the order; any rule, statute, or constitutional provision pertinent to the order; a summary of the facts, if included in the order, which are pertinent to the final disposition; and a summary of the final disposition.

(3) Agency orders that must be indexed or listed are documents of continuing legal value and must be permanently preserved and made available to the public. Each agency to which this chapter applies shall provide, under the direction of the Department of State, for the preservation of orders as required by this chapter and for maintaining an index to those orders.

(4) Each agency must provide any person who makes a request with a written description of its organization and the general course of its operations.

**History.**—s. 1, ch. 74-310; s. 2, ch. 75-191; s. 2, ch. 76-131; s. 2, ch. 79-299; s. 1, ch. 81-296; s. 2, ch. 81-309; s. 8, ch. 83-92; s. 34, ch. 83-217; s. 3, ch. 83-273; s. 1, ch. 84-203; s. 77, ch. 85-180; s. 2, ch. 87-100; s. 2, ch. 88-384; s. 44, ch. 90-136; s. 35, ch. 90-302; s. 2, ch. 91-30; s. 79, ch. 91-45; s. 1, ch. 91-191; s. 1, ch. 92-166; s. 143, ch. 92-279; s. 55, ch. 92-326; s. 757, ch. 95-147; s. 5, ch. 96-159; s. 2, ch. 96-423; s. 2, ch. 97-176.

#### **120.533 Coordination of indexing by Department of State.**—The Department of State shall:

(1) Administer the coordination of the indexing, management, preservation, and availability of agency orders that must be indexed or listed pursuant to s. 120.53(1).

(2) Provide, by rule, guidelines for the indexing of agency orders. More than one system for indexing may be approved by the Department of State, including systems or methods in use, or proposed for use, by an agency. More than one system may be approved for use by a single agency as best serves the needs of that agency and the public.

(3) Provide, by rule, for storage and retrieval systems to be maintained by agencies for indexing, and making available, agency orders by subject matter. The Department of State may approve more than one system, including systems in use, or proposed for use, by an agency. Storage and retrieval systems that may be used by an agency include, without limitation, a designated reporter or reporters, a microfilming system, an automated system, or any other system considered appropriate by the Department of State.

(4) Determine which final orders must be indexed for each agency.

(5) Require each agency to report to the department concerning which types or categories of agency orders establish precedent for each agency.

**History.**—s. 9, ch. 91-30; s. 1, ch. 91-191; s. 7, ch. 96-159.

#### **120.536 Rulemaking authority; repeal; challenge.**

(1) A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or interpret the specific powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific powers and duties conferred by the same statute.

(2) The Administrative Procedures Committee or any substantially affected person may petition an agency to repeal any rule, or portion thereof, because it exceeds the rulemaking authority permitted by this section. Not later than 30 days after the date of filing the petition if the agency is headed by an individual, or not later than 45 days if the agency is headed by a collegial body, the agency shall initiate rulemaking proceedings to repeal the rule, or portion thereof, or deny the petition, giving a written statement of its reasons for the denial.

(3) Nothing in this section shall be construed to change the legal status of a rule that has otherwise been judicially or administratively determined to be invalid.

**History.**—s. 9, ch. 96-159; s. 3, ch. 99-379; s. 15, ch. 2000-151; s. 15, ch. 2005-2.

#### **120.54 Rulemaking.—**

(1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.—

(a) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule by s. 120.52 shall be adopted by the rulemaking procedure provided by this section as soon as feasible and practicable.

1. Rulemaking shall be presumed feasible unless the agency proves that:

a. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking;

b. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or

c. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

2. Rulemaking shall be presumed practicable to the extent necessary to provide fair notice to affected persons of relevant agency procedures and applicable principles, criteria, or standards for agency decisions unless the agency proves that:

a. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or

b. The particular questions addressed are of such a narrow scope that more specific resolution of the matter is impractical outside of an adjudication to determine the substantial interests of a party based on individual circumstances.

(b) Whenever an act of the Legislature is enacted which requires implementation of the act by rules of an agency within the executive branch of state government, such rules shall be drafted and formally proposed as provided in this section within 180 days after the effective date of the act, unless the act provides otherwise.

(c) No statutory provision shall be delayed in its implementation pending an agency's adoption of implementing rules unless there is an express statutory provision prohibiting its application until the adoption of implementing rules.

(d) In adopting rules, all agencies must, among the alternative approaches to any regulatory objective and to the extent allowed by law, choose the alternative that does not impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

(e) No agency has inherent rulemaking authority, nor has any agency authority to establish penalties for violation of a rule unless the Legislature, when establishing a penalty, specifically provides that the penalty applies to rules.

(f) An agency may adopt rules authorized by law and necessary to the proper implementation of a statute prior to the effective date of the statute, but the rules may not be effective until the statute upon which they are based is effective. An agency may not adopt retroactive rules, including retroactive rules intended to clarify existing law, unless that power is expressly authorized by statute.

(g) Each rule adopted shall contain only one subject.

(h) In rulemaking proceedings, the agency may recognize any material which may be judicially noticed, and it may provide that materials so recognized be incorporated into the record of the proceeding. Before the record of any proceeding is completed, all parties shall be provided a list of these materials and given a reasonable opportunity to examine them and offer written comments or written rebuttal.

(i)1. A rule may incorporate material by reference but only as the material exists on the date the rule is adopted. For purposes of the rule, changes in the material are not effective unless the rule is amended to incorporate the changes. A rule may not be amended by reference only. Amendments must set out the amended rule in full in the same manner as required by the State Constitution for laws. The Department of State may prescribe by rule requirements for incorporating materials by reference pursuant to this paragraph.

2. Notwithstanding any contrary provision in this section, when an adopted rule of the Department of Environmental Protection or a water management district is incorporated by reference in the other agency's rule to implement a provision of part IV of chapter 373, subsequent amendments to the rule are not effective as to the incorporating rule unless the agency incorporating by reference notifies the committee and the Department of State of its intent to adopt the subsequent amendment, publishes notice of such intent in the Florida Administrative Weekly, and files with the Department of State a copy of the amended rule incorporated by reference. Changes in the rule incorporated by reference are effective as to the other agency 20 days after the date of the published notice and filing with the Department of State. The Department of State shall amend the history note of the incorporating rule to show the effective date of such change. Any substantially affected person may, within 14 days after the date of publication of the notice of intent in the Florida Administrative Weekly, file an objection to rulemaking with the agency. The objection shall specify the portions of the rule incorporated by reference to which the person objects and the reasons for the objection. The agency shall not have the authority under this subparagraph to adopt those portions of the rule specified in such objection. The agency shall publish notice of the objection and of its action in response in the next available issue of the Florida Administrative Weekly.

(j) A rule published in the Florida Administrative Code must be indexed by the Department of State within 90 days after the rule is filed. The Department of State shall by rule establish procedures for indexing rules.

## **(2) RULE DEVELOPMENT; WORKSHOPS; NEGOTIATED RULEMAKING.—**

(a) Except when the intended action is the repeal of a rule, agencies shall provide notice of the development of proposed rules by publication of a notice of rule development in the Florida Administrative Weekly before providing notice of a proposed rule as required by paragraph (3)(a). The notice of rule development shall indicate the subject area to be addressed by rule development, provide a short, plain explanation of the

purpose and effect of the proposed rule, cite the specific legal authority for the proposed rule, and include the preliminary text of the proposed rules, if available, or a statement of how a person may promptly obtain, without cost, a copy of any preliminary draft, if available.

(b) All rules should be drafted in readable language. The language is readable if:

1. It avoids the use of obscure words and unnecessarily long or complicated constructions; and

2. It avoids the use of unnecessary technical or specialized language that is understood only by members of particular trades or professions.

(c) An agency may hold public workshops for purposes of rule development. An agency must hold public workshops, including workshops in various regions of the state or the agency's service area, for purposes of rule development if requested in writing by any affected person, unless the agency head explains in writing why a workshop is unnecessary. The explanation is not final agency action subject to review pursuant to ss. 120.569 and 120.57. The failure to provide the explanation when required may be a material error in procedure pursuant to s. 120.56(1)(c). When a workshop or public hearing is held, the agency must ensure that the persons responsible for preparing the proposed rule are available to explain the agency's proposal and to respond to questions or comments regarding the rule being developed. The workshop may be facilitated or mediated by a neutral third person, or the agency may employ other types of dispute resolution alternatives for the workshop that are appropriate for rule development. Notice of a rule development workshop shall be by publication in the Florida Administrative Weekly not less than 14 days prior to the date on which the workshop is scheduled to be held and shall indicate the subject area which will be addressed; the agency contact person; and the place, date, and time of the workshop.

(d)1. An agency may use negotiated rulemaking in developing and adopting rules. The agency should consider the use of negotiated rulemaking when complex rules are being drafted or strong opposition to the rules is anticipated. The agency should consider, but is not limited to considering, whether a balanced committee of interested persons who will negotiate in good faith can be assembled, whether the agency is willing to support the work of the negotiating committee, and whether the agency can use the group consensus as the basis for its proposed rule. Negotiated rulemaking uses a committee of designated representatives to draft a mutually acceptable proposed rule.

2. An agency that chooses to use the negotiated rulemaking process described in this paragraph shall publish in the Florida Administrative Weekly a notice of negotiated rulemaking that includes a listing of the representative groups that will be invited to participate in the negotiated rulemaking process. Any person who believes that his or her interest is not adequately represented may apply to participate within 30 days after publication of the notice. All meetings of the negotiating committee shall be noticed and open to the public pursuant to the provisions of this chapter. The negotiating committee shall be chaired by a neutral facilitator or mediator.



3. The agency's decision to use negotiated rulemaking, its selection of the representative groups, and approval or denial of an application to participate in the negotiated rulemaking process are not agency action. Nothing in this subparagraph is intended to affect the rights of an affected person to challenge a proposed rule developed under this paragraph in accordance with s. 120.56(2).

(3) ADOPTION PROCEDURES.—

(a) *Notices.*—

1. Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency, upon approval of the agency head, shall give notice of its intended action, setting forth a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the specific rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific. The notice shall include a summary of the agency's statement of the estimated regulatory costs, if one has been prepared, based on the factors set forth in s. 120.541(2), and a statement that any person who wishes to provide the agency with information regarding the statement of estimated regulatory costs, or to provide a proposal for a lower cost regulatory alternative as provided by s. 120.541(1), must do so in writing within 21 days after publication of the notice. The notice must state the procedure for requesting a public hearing on the proposed rule. Except when the intended action is the repeal of a rule, the notice shall include a reference both to the date on which and to the place where the notice of rule development that is required by subsection (2) appeared.

2. The notice shall be published in the Florida Administrative Weekly not less than 28 days prior to the intended action. The proposed rule shall be available for inspection and copying by the public at the time of the publication of notice.

3. The notice shall be mailed to all persons named in the proposed rule and to all persons who, at least 14 days prior to such mailing, have made requests of the agency for advance notice of its proceedings. The agency shall also give such notice as is prescribed by rule to those particular classes of persons to whom the intended action is directed.

4. The adopting agency shall file with the committee, at least 21 days prior to the proposed adoption date, a copy of each rule it proposes to adopt; a detailed written statement of the facts and circumstances justifying the proposed rule; a copy of any statement of estimated regulatory costs that has been prepared pursuant to s. 120.541; a statement of the extent to which the proposed rule relates to federal standards or rules on the same subject; and the notice required by subparagraph 1.

(b) *Special matters to be considered in rule adoption.*—

1. Statement of estimated regulatory costs.—Prior to the adoption, amendment, or repeal of any rule other than an emergency rule, an agency is encouraged to

prepare a statement of estimated regulatory costs of the proposed rule, as provided by s. 120.541.

2. Small businesses, small counties, and small cities.—

a. Each agency, before the adoption, amendment, or repeal of a rule, shall consider the impact of the rule on small businesses as defined by s. 288.703 and the impact of the rule on small counties or small cities as defined by s. 120.52. Whenever practicable, an agency shall tier its rules to reduce disproportionate impacts on small businesses, small counties, or small cities to avoid regulating small businesses, small counties, or small cities that do not contribute significantly to the problem the rule is designed to address. An agency may define "small business" to include businesses employing more than 100 persons, may define "small county" to include those with populations of more than 75,000, and may define "small city" to include those with populations of more than 10,000, if it finds that such a definition is necessary to adapt a rule to the needs and problems of small businesses, small counties, or small cities. The agency shall consider each of the following methods for reducing the impact of the proposed rule on small businesses, small counties, and small cities, or any combination of these entities:

(I) Establishing less stringent compliance or reporting requirements in the rule.

(II) Establishing less stringent schedules or deadlines in the rule for compliance or reporting requirements.

(III) Consolidating or simplifying the rule's compliance or reporting requirements.

(IV) Establishing performance standards or best-management practices to replace design or operational standards in the rule.

(V) Exempting small businesses, small counties, or small cities from any or all requirements of the rule.

b.(I) If the agency determines that the proposed action will affect small businesses as defined by the agency as provided in sub-subparagraph a., the agency shall send written notice of the rule to the small business ombudsman of the Office of Tourism, Trade, and Economic Development not less than 28 days prior to the intended action.

(II) Each agency shall adopt those regulatory alternatives offered by the small business ombudsman and provided to the agency no later than 21 days after the ombudsman's receipt of the written notice of the rule which it finds are feasible and consistent with the stated objectives of the proposed rule and which would reduce the impact on small businesses. When regulatory alternatives are offered by the small business ombudsman, the 90-day period for filing the rule in subparagraph (e)2. is extended for a period of 21 days.

(III) If an agency does not adopt all alternatives offered pursuant to this sub-subparagraph, it shall, prior to rule adoption or amendment and pursuant to subparagraph (d)1., file a detailed written statement with the committee explaining the reasons for failure to adopt such alternatives. Within 3 working days of the filing of such notice, the agency shall send a copy of such notice to the small business ombudsman.

(c) *Hearings.*—

1. If the intended action concerns any rule other than one relating exclusively to procedure or practice, the agency shall, on the request of any affected person received within 21 days after the date of publication of the notice of intended agency action, give affected persons an opportunity to present evidence and argument on all issues under consideration. The agency may schedule a public hearing on the rule and, if requested by any affected person, shall schedule a public hearing on the rule. Any material pertinent to the issues under consideration submitted to the agency within 21 days after the date of publication of the notice or submitted at a public hearing shall be considered by the agency and made a part of the record of the rulemaking proceeding.

2. Rulemaking proceedings shall be governed solely by the provisions of this section unless a person timely asserts that the person's substantial interests will be affected in the proceeding and affirmatively demonstrates to the agency that the proceeding does not provide adequate opportunity to protect those interests. If the agency determines that the rulemaking proceeding is not adequate to protect the person's interests, it shall suspend the rulemaking proceeding and convene a separate proceeding under the provisions of ss. 120.569 and 120.57. Similarly situated persons may be requested to join and participate in the separate proceeding. Upon conclusion of the separate proceeding, the rulemaking proceeding shall be resumed.

(d) *Modification or withdrawal of proposed rules.*—

1. After the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, if the rule has not been changed from the rule as previously filed with the committee, or contains only technical changes, the adopting agency shall file a notice to that effect with the committee at least 7 days prior to filing the rule for adoption. Any change, other than a technical change that does not affect the substance of the rule, must be supported by the record of public hearings held on the rule, must be in response to written material received on or before the date of the final public hearing, or must be in response to a proposed objection by the committee. In addition, when any change is made in a proposed rule, other than a technical change, the adopting agency shall provide a copy of a notice of change by certified mail or actual delivery to any person who requests it in writing no later than 21 days after the notice required in paragraph (a). The agency shall file the notice of change with the committee, along with the reasons for the change, and provide the notice of change to persons requesting it, at least 21 days prior to filing the rule for adoption. The notice of change shall be published in the Florida Administrative Weekly at least 21 days prior to filing the rule for adoption. This subparagraph does not apply to emergency rules adopted pursuant to subsection (4).

2. After the notice required by paragraph (a) and prior to adoption, the agency may withdraw the rule in whole or in part.

3. After adoption and before the effective date, a rule may be modified or withdrawn only in response to an objection by the committee or may be modified to

extend the effective date by not more than 60 days when the committee has notified the agency that an objection to the rule is being considered.

4. The agency shall give notice of its decision to withdraw or modify a rule in the first available issue of the publication in which the original notice of rulemaking was published, shall notify those persons described in subparagraph (a)3. in accordance with the requirements of that subparagraph, and shall notify the Department of State if the rule is required to be filed with the Department of State.

5. After a rule has become effective, it may be repealed or amended only through the rulemaking procedures specified in this chapter.

(e) *Filing for final adoption; effective date.*—

1. If the adopting agency is required to publish its rules in the Florida Administrative Code, it shall file with the Department of State three certified copies of the rule it proposes to adopt, a summary of the rule, a summary of any hearings held on the rule, and a detailed written statement of the facts and circumstances justifying the rule. Agencies not required to publish their rules in the Florida Administrative Code shall file one certified copy of the proposed rule, and the other material required by this subparagraph, in the office of the agency head, and such rules shall be open to the public.

2. A rule may not be filed for adoption less than 28 days or more than 90 days after the notice required by paragraph (a), until 21 days after the notice of change required by paragraph (d), until 14 days after the final public hearing, until 21 days after preparation of a statement of estimated regulatory costs required under s. 120.541, or until the administrative law judge has rendered a decision under s. 120.56(2), whichever applies. When a required notice of change is published prior to the expiration of the time to file the rule for adoption, the period during which a rule must be filed for adoption is extended to 45 days after the date of publication. If notice of a public hearing is published prior to the expiration of the time to file the rule for adoption, the period during which a rule must be filed for adoption is extended to 45 days after adjournment of the final hearing on the rule, 21 days after receipt of all material authorized to be submitted at the hearing, or 21 days after receipt of the transcript, if one is made, whichever is latest. The term "public hearing" includes any public meeting held by any agency at which the rule is considered. If a petition for an administrative determination under s. 120.56(2) is filed, the period during which a rule must be filed for adoption is extended to 60 days after the administrative law judge files the final order with the clerk or until 60 days after subsequent judicial review is complete.

3. At the time a rule is filed, the agency shall certify that the time limitations prescribed by this paragraph have been complied with, that all statutory rulemaking requirements have been met, and that there is no administrative determination pending on the rule.

4. At the time a rule is filed, the committee shall certify whether the agency has responded in writing to all material and timely written comments or written inquiries made on behalf of the committee. The depart-

ment shall reject any rule not filed within the prescribed time limits; that does not satisfy all statutory rulemaking requirements; upon which an agency has not responded in writing to all material and timely written inquiries or written comments; upon which an administrative determination is pending; or which does not include a statement of estimated regulatory costs, if required.

5. If a rule has not been adopted within the time limits imposed by this paragraph or has not been adopted in compliance with all statutory rulemaking requirements, the agency proposing the rule shall withdraw the rule and give notice of its action in the next available issue of the Florida Administrative Weekly.

6. The proposed rule shall be adopted on being filed with the Department of State and become effective 20 days after being filed, on a later date specified in the rule, or on a date required by statute. Rules not required to be filed with the Department of State shall become effective when adopted by the agency head or on a later date specified by rule or statute. If the committee notifies an agency that an objection to a rule is being considered, the agency may postpone the adoption of the rule to accommodate review of the rule by the committee. When an agency postpones adoption of a rule to accommodate review by the committee, the 90-day period for filing the rule is tolled until the committee notifies the agency that it has completed its review of the rule.

For the purposes of this paragraph, the term "administrative determination" does not include subsequent judicial review.

#### (4) EMERGENCY RULES.—

(a) If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action, the agency may adopt any rule necessitated by the immediate danger. The agency may adopt a rule by any procedure which is fair under the circumstances if:

1. The procedure provides at least the procedural protection given by other statutes, the State Constitution, or the United States Constitution.

2. The agency takes only that action necessary to protect the public interest under the emergency procedure.

3. The agency publishes in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. In any event, notice of emergency rules, other than those of educational units or units of government with jurisdiction in only one or a part of one county, including the full text of the rules, shall be published in the first available issue of the Florida Administrative Weekly and provided to the committee. The agency's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable.

(b) Rules pertaining to the public health, safety, or welfare shall include rules pertaining to perishable agricultural commodities or rules pertaining to the interpretation and implementation of the requirements of chapters 97-102 and chapter 105 of the Election Code.

(c) An emergency rule adopted under this subsection shall not be effective for a period longer than 90 days and shall not be renewable, except during the pendency of a challenge to proposed rules addressing the subject of the emergency rule. However, the agency may take identical action by the rulemaking procedures specified in this chapter.

(d) Subject to applicable constitutional and statutory provisions, an emergency rule becomes effective immediately on filing, or on a date less than 20 days thereafter if specified in the rule, if the adopting agency finds that such effective date is necessary because of immediate danger to the public health, safety, or welfare.

#### (5) UNIFORM RULES.—

(a)1. By July 1, 1997, the Administration Commission shall adopt one or more sets of uniform rules of procedure which shall be reviewed by the committee and filed with the Department of State. Agencies must comply with the uniform rules by July 1, 1998. The uniform rules shall establish procedures that comply with the requirements of this chapter. On filing with the department, the uniform rules shall be the rules of procedure for each agency subject to this chapter unless the Administration Commission grants an exception to the agency under this subsection.

2. An agency may seek exceptions to the uniform rules of procedure by filing a petition with the Administration Commission. The Administration Commission shall approve exceptions to the extent necessary to implement other statutes, to the extent necessary to conform to any requirement imposed as a condition precedent to receipt of federal funds or to permit persons in this state to receive tax benefits under federal law, or as required for the most efficient operation of the agency as determined by the Administration Commission. The reasons for the exceptions shall be published in the Florida Administrative Weekly.

3. Agency rules that provide exceptions to the uniform rules shall not be filed with the department unless the Administration Commission has approved the exceptions. Each agency that adopts rules that provide exceptions to the uniform rules shall publish a separate chapter in the Florida Administrative Code that delineates clearly the provisions of the agency's rules that provide exceptions to the uniform rules and specifies each alternative chosen from among those authorized by the uniform rules. Each chapter shall be organized in the same manner as the uniform rules.

(b) The uniform rules of procedure adopted by the commission pursuant to this subsection shall include, but are not limited to:

1. Uniform rules for the scheduling of public meetings, hearings, and workshops.

2. Uniform rules for use by each state agency that provide procedures for conducting public meetings, hearings, and workshops, and for taking evidence, testimony, and argument at such public meetings, hearings, and workshops, in person and by means of communications media technology. The rules shall provide that all evidence, testimony, and argument presented shall be afforded equal consideration, regardless of the method of communication. If a public meeting, hearing,

or workshop is to be conducted by means of communications media technology, or if attendance may be provided by such means, the notice shall so state. The notice for public meetings, hearings, and workshops utilizing communications media technology shall state how persons interested in attending may do so and shall name locations, if any, where communications media technology facilities will be available. Nothing in this paragraph shall be construed to diminish the right to inspect public records under chapter 119. Limiting points of access to public meetings, hearings, and workshops subject to the provisions of s. 286.011 to places not normally open to the public shall be presumed to violate the right of access of the public, and any official action taken under such circumstances is void and of no effect. Other laws relating to public meetings, hearings, and workshops, including penal and remedial provisions, shall apply to public meetings, hearings, and workshops conducted by means of communications media technology, and shall be liberally construed in their application to such public meetings, hearings, and workshops. As used in this subparagraph, "communications media technology" means the electronic transmission of printed matter, audio, full-motion video, freeze-frame video, compressed video, and digital video by any method available.

3. Uniform rules of procedure for the filing of notice of protests and formal written protests. The Administration Commission may prescribe the form and substantive provisions of a required bond.

4. Uniform rules of procedure for the filing of petitions for administrative hearings pursuant to s. 120.569 or s. 120.57. Such rules shall require the petition to include:

- a. The identification of the petitioner.
- b. A statement of when and how the petitioner received notice of the agency's action or proposed action.
- c. An explanation of how the petitioner's substantial interests are or will be affected by the action or proposed action.
- d. A statement of all material facts disputed by the petitioner or a statement that there are no disputed facts.
- e. A statement of the ultimate facts alleged, including a statement of the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action.
- f. A statement of the specific rules or statutes that the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes.
- g. A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the proposed action.

5. Uniform rules for the filing of request for administrative hearing by a respondent in agency enforcement and disciplinary actions. Such rules shall require a request to include:

- a. The name, address, and telephone number of the party making the request and the name, address,

and telephone number of the party's counsel or qualified representative upon whom service of pleadings and other papers shall be made;

- b. A statement that the respondent is requesting an administrative hearing and disputes the material facts alleged by the petitioner, in which case the respondent shall identify those material facts that are in dispute, or that the respondent is requesting an administrative hearing and does not dispute the material facts alleged by the petitioner; and

- c. A reference by file number to the administrative complaint that the party has received from the agency and the date on which the agency pleading was received.

The agency may provide an election-of-rights form for the respondent's use in requesting a hearing, so long as any form provided by the agency calls for the information in sub-subparagraphs a. through c. and does not impose any additional requirements on a respondent in order to request a hearing, unless such requirements are specifically authorized by law.

6. Uniform rules of procedure for the filing and prompt disposition of petitions for declaratory statements. The rules shall also describe the contents of the notices that must be published in the Florida Administrative Weekly under s. 120.565, including any applicable time limit for the filing of petitions to intervene or petitions for administrative hearing by persons whose substantial interests may be affected.

7. Provision of a method by which each agency head shall provide a description of the agency's organization and general course of its operations.

8. Uniform rules establishing procedures for granting or denying petitions for variances and waivers pursuant to s. 120.542.

(6) ADOPTION OF FEDERAL STANDARDS.—Notwithstanding any contrary provision of this section, in the pursuance of state implementation, operation, or enforcement of federal programs, an agency is empowered to adopt rules substantively identical to regulations adopted pursuant to federal law, in accordance with the following procedures:

- (a) The agency shall publish notice of intent to adopt a rule pursuant to this subsection in the Florida Administrative Weekly at least 21 days prior to filing the rule with the Department of State. The agency shall provide a copy of the notice of intent to adopt a rule to the committee at least 21 days prior to the date of filing with the Department of State. Prior to filing the rule with the Department of State, the agency shall consider any written comments received within 14 days after the date of publication of the notice of intent to adopt a rule. The rule shall be adopted upon filing with the Department of State. Substantive changes from the rules as noticed shall require republishing of notice as required in this subsection.

- (b) Any rule adopted pursuant to this subsection shall become effective upon the date designated in the rule by the agency; however, no such rule shall become effective earlier than the effective date of the substantively identical federal regulation.

(c) Any substantially affected person may, within 14 days after the date of publication of the notice of intent to adopt a rule, file an objection to rulemaking with the agency. The objection shall specify the portions of the proposed rule to which the person objects and the specific reasons for the objection. The agency shall not proceed pursuant to this subsection to adopt those portions of the proposed rule specified in an objection, unless the agency deems the objection to be frivolous, but may proceed pursuant to subsection (3). An objection to a proposed rule, which rule in no material respect differs from the requirements of the federal regulation upon which it is based, is deemed to be frivolous.

(d) Whenever any federal regulation adopted as an agency rule pursuant to this subsection is declared invalid or is withdrawn, revoked, repealed, remanded, or suspended, the agency shall, within 60 days thereafter, publish a notice of repeal of the substantively identical agency rule in the Florida Administrative Weekly. Such repeal is effective upon publication of the notice. Whenever any federal regulation adopted as an agency rule pursuant to this subsection is substantially amended, the agency may adopt the amended regulation as a rule. If the amended regulation is not adopted as a rule within 180 days after the effective date of the amended regulation, the original rule is deemed repealed and the agency shall publish a notice of repeal of the original agency rule in the next available Florida Administrative Weekly.

(e) Whenever all or part of any rule proposed for adoption by the agency is substantively identical to a regulation adopted pursuant to federal law, such rule shall be written in a manner so that the rule specifically references the regulation whenever possible.

(7) PETITION TO INITIATE RULEMAKING.—

(a) Any person regulated by an agency or having substantial interest in an agency rule may petition an agency to adopt, amend, or repeal a rule or to provide the minimum public information required by this chapter. The petition shall specify the proposed rule and action requested. Not later than 30 calendar days following the date of filing a petition, the agency shall initiate rulemaking proceedings under this chapter, otherwise comply with the requested action, or deny the petition with a written statement of its reasons for the denial.

(b) If the petition filed under this subsection is directed to an existing rule which the agency has not adopted by the rulemaking procedures or requirements set forth in this chapter, the agency shall, not later than 30 days following the date of filing a petition, initiate rulemaking, or provide notice in the Florida Administrative Weekly that the agency will hold a public hearing on the petition within 30 days after publication of the notice. The purpose of the public hearing is to consider the comments of the public directed to the agency rule which has not been adopted by the rulemaking procedures or requirements of this chapter, its scope and application, and to consider whether the public interest is served adequately by the application of the rule on a case-by-case basis, as contrasted with its adoption by the rulemaking procedures or requirements set forth in this chapter.

(c) Within 30 days following the public hearing provided for by paragraph (b), if the agency does not initiate rulemaking or otherwise comply with the requested action, the agency shall publish in the Florida Administrative Weekly a statement of its reasons for not initiating rulemaking or otherwise complying with the requested action, and of any changes it will make in the scope or application of the unadopted rule. The agency shall file the statement with the committee. The committee shall forward a copy of the statement to the substantive committee with primary oversight jurisdiction of the agency in each house of the Legislature. The committee or the committee with primary oversight jurisdiction may hold a hearing directed to the statement of the agency. The committee holding the hearing may recommend to the Legislature the introduction of legislation making the rule a statutory standard or limiting or otherwise modifying the authority of the agency.

(8) RULEMAKING RECORD.—In all rulemaking proceedings the agency shall compile a rulemaking record. The record shall include, if applicable, copies of:

- (a) All notices given for the proposed rule.
- (b) Any statement of estimated regulatory costs for the rule.
- (c) A written summary of hearings on the proposed rule.
- (d) The written comments and responses to written comments as required by this section and s. 120.541.
- (e) All notices and findings made under subsection (4).
- (f) All materials filed by the agency with the committee under subsection (3).
- (g) All materials filed with the Department of State under subsection (3).
- (h) All written inquiries from standing committees of the Legislature concerning the rule.

Each state agency shall retain the record of rulemaking as long as the rule is in effect. When a rule is no longer in effect, the record may be destroyed pursuant to the records-retention schedule developed under s. 257.36(6).

**History.**—s. 1, ch. 74-310; s. 3, ch. 75-191; s. 3, ch. 76-131; ss. 1, 2, ch. 76-276; s. 1, ch. 77-174; s. 13, ch. 77-290; s. 3, ch. 77-453; s. 2, ch. 78-28; s. 2, ch. 78-425; s. 7, ch. 79-3; s. 3, ch. 79-299; s. 69, ch. 79-400; s. 5, ch. 80-391; s. 1, ch. 81-309; s. 2, ch. 83-351; s. 1, ch. 84-173; s. 2, ch. 84-203; s. 7, ch. 85-104; s. 1, ch. 86-30; s. 3, ch. 87-385; s. 36, ch. 90-302; ss. 2, 4, 7, ch. 92-166; s. 63, ch. 93-187; s. 758, ch. 95-147; s. 6, ch. 95-295; s. 10, ch. 96-159; s. 6, ch. 96-320; s. 9, ch. 96-370; s. 3, ch. 97-176; s. 3, ch. 98-200; s. 4, ch. 99-379; s. 9, ch. 2001-75; s. 2, ch. 2003-94; s. 50, ch. 2005-278; s. 3, ch. 2006-82.

**120.541 Statement of estimated regulatory costs.**

(1)(a) A substantially affected person, within 21 days after publication of the notice provided under s. 120.54(3)(a), may submit to an agency a good faith written proposal for a lower cost regulatory alternative to a proposed rule which substantially accomplishes the objectives of the law being implemented. The proposal may include the alternative of not adopting any rule, so long as the proposal explains how the lower costs and objectives of the law will be achieved by not adopting any rule. If such a proposal is submitted, the 90-day period for filing the rule is extended 21 days.

(b) Upon the submission of the lower cost regulatory alternative, the agency shall prepare a statement

of estimated regulatory costs as provided in subsection (2), or shall revise its prior statement of estimated regulatory costs, and either adopt the alternative or give a statement of the reasons for rejecting the alternative in favor of the proposed rule. The failure of the agency to prepare or revise the statement of estimated regulatory costs as provided in this paragraph is a material failure to follow the applicable rulemaking procedures or requirements set forth in this chapter. An agency required to prepare or revise a statement of estimated regulatory costs as provided in this paragraph shall make it available to the person who submits the lower cost regulatory alternative and to the public prior to filing the rule for adoption.

(c) No rule shall be declared invalid because it imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives, and no rule shall be declared invalid based upon a challenge to the agency's statement of estimated regulatory costs, unless:

1. The issue is raised in an administrative proceeding within 1 year after the effective date of the rule; and

2. The substantial interests of the person challenging the agency's rejection of, or failure to consider, the lower cost regulatory alternative are materially affected by the rejection; and

3.a. The agency has failed to prepare or revise the statement of estimated regulatory costs as required by paragraph (b); or

b. The challenge is to the agency's rejection under paragraph (b) of a lower cost regulatory alternative submitted under paragraph (a).

(2) A statement of estimated regulatory costs shall include:

(a) A good faith estimate of the number of individuals and entities likely to be required to comply with the rule, together with a general description of the types of individuals likely to be affected by the rule.

(b) A good faith estimate of the cost to the agency, and to any other state and local government entities, of implementing and enforcing the proposed rule, and any anticipated effect on state or local revenues.

(c) A good faith estimate of the transactional costs likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the rule. As used in this paragraph, "transactional costs" are direct costs that are readily ascertainable based upon standard business practices, and include filing fees, the cost of obtaining a license, the cost of equipment required to be installed or used or procedures required to be employed in complying with the rule, additional operating costs incurred, and the cost of monitoring and reporting.

(d) An analysis of the impact on small businesses as defined by s. 288.703, and an analysis of the impact on small counties and small cities as defined by s. 120.52.

(e) Any additional information that the agency determines may be useful.

(f) In the statement or revised statement, whichever applies, a description of any good faith written pro-

posal submitted under paragraph (1)(a) and either a statement adopting the alternative or a statement of the reasons for rejecting the alternative in favor of the proposed rule.

*History.*—s. 11, ch. 96-159; s. 4, ch. 97-176.

#### **120.542 Variances and waivers.—**

(1) Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation. A public employee is not a person subject to regulation under this section for the purpose of petitioning for a variance or waiver to a rule that affects that public employee in his or her capacity as a public employee. Agencies are authorized to grant variances and waivers to requirements of their rules consistent with this section and with rules adopted under the authority of this section. An agency may limit the duration of any grant of a variance or waiver or otherwise impose conditions on the grant only to the extent necessary for the purpose of the underlying statute to be achieved. This section does not authorize agencies to grant variances or waivers to statutes or to rules required by the Federal Government for the agency's implementation or retention of any federally approved or delegated program, except as allowed by the program or when the variance or waiver is also approved by the appropriate agency of the Federal Government. This section is supplemental to, and does not abrogate, the variance and waiver provisions in any other statute.

(2) Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule.

(3) The Governor and Cabinet, sitting as the Administration Commission, shall adopt uniform rules of procedure pursuant to the requirements of s. 120.54(5) establishing procedures for granting or denying petitions for variances and waivers. The uniform rules shall include procedures for the granting, denying, or revoking of emergency and temporary variances and waivers. Such provisions may provide for expedited timeframes, waiver of or limited public notice, and limitations on comments on the petition in the case of such temporary or emergency variances and waivers.

(4) Agencies shall advise persons of the remedies available through this section and shall provide copies of this section, the uniform rules on variances and waivers, and, if requested, the underlying statute, to persons who inquire about the possibility of relief from rule requirements.

(5) A person who is subject to regulation by an agency rule may file a petition with that agency, with a copy to the committee, requesting a variance or waiver from the agency's rule. In addition to any requirements mandated by the uniform rules, each petition shall specify:

(a) The rule from which a variance or waiver is requested.

(b) The type of action requested.

(c) The specific facts that would justify a waiver or variance for the petitioner.

(d) The reason why the variance or the waiver requested would serve the purposes of the underlying statute.

(6) Within 15 days after receipt of a petition for variance or waiver, an agency shall provide notice of the petition to the Department of State, which shall publish notice of the petition in the first available issue of the Florida Administrative Weekly. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which variance or waiver is sought, and an explanation of how a copy of the petition can be obtained. The uniform rules shall provide a means for interested persons to provide comments on the petition.

(7) Except for requests for emergency variances or waivers, within 30 days after receipt of a petition for a variance or waiver, an agency shall review the petition and request submittal of all additional information that the agency is permitted by this section to require. Within 30 days after receipt of such additional information, the agency shall review it and may request only that information needed to clarify the additional information or to answer new questions raised by or directly related to the additional information. If the petitioner asserts that any request for additional information is not authorized by law or by rule of the affected agency, the agency shall proceed, at the petitioner's written request, to process the petition.

(8) An agency shall grant or deny a petition for variance or waiver within 90 days after receipt of the original petition, the last item of timely requested additional material, or the petitioner's written request to finish processing the petition. A petition not granted or denied within 90 days after receipt of a completed petition is deemed approved. A copy of the order granting or denying the petition shall be filed with the committee and shall contain a statement of the relevant facts and reasons supporting the agency's action. The agency shall provide notice of the disposition of the petition to the Department of State, which shall publish the notice in the next available issue of the Florida Administrative Weekly. The notice shall contain the name of the petitioner, the date the petition was filed, the rule number and nature of the rule from which the waiver or variance is sought, a reference to the place and date of publication of the notice of the petition, the date of the order denying or approving the variance or waiver, the general basis for the agency decision, and an explanation of how a copy of the order can be obtained. The agency's decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57. Any proceeding pursu-

ant to ss. 120.569 and 120.57 in regard to a variance or waiver shall be limited to the agency action on the request for the variance or waiver, except that a proceeding in regard to a variance or waiver may be consolidated with any other proceeding authorized by this chapter.

(9) Each agency shall maintain a record of the type and disposition of each petition, including temporary or emergency variances and waivers, filed pursuant to this section. On October 1 of each year, each agency shall file a report with the Governor, the President of the Senate, and the Speaker of the House of Representatives listing the number of petitions filed requesting variances to each agency rule, the number of petitions filed requesting waivers to each agency rule, and the disposition of all petitions. Temporary or emergency variances and waivers, and the reasons for granting or denying temporary or emergency variances and waivers, shall be identified separately from other waivers and variances.

**History.**—s. 12, ch. 96-159; s. 5, ch. 97-176.

#### **120.545 Committee review of agency rules.—**

(1) As a legislative check on legislatively created authority, the committee shall examine each proposed rule, except for those proposed rules exempted by s. 120.81(1)(e) and (2), and its accompanying material, and each emergency rule, and may examine any existing rule, for the purpose of determining whether:

(a) The rule is an invalid exercise of delegated legislative authority.

(b) The statutory authority for the rule has been repealed.

(c) The rule reiterates or paraphrases statutory material.

(d) The rule is in proper form.

(e) The notice given prior to its adoption was sufficient to give adequate notice of the purpose and effect of the rule.

(f) The rule is consistent with expressed legislative intent pertaining to the specific provisions of law which the rule implements.

(g) The rule is necessary to accomplish the apparent or expressed objectives of the specific provision of law which the rule implements.

(h) The rule is a reasonable implementation of the law as it affects the convenience of the general public or persons particularly affected by the rule.

(i) The rule could be made less complex or more easily comprehensible to the general public.

(j) The rule does not impose regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

(k) The rule will require additional appropriations.

(l) If the rule is an emergency rule, there exists an emergency justifying the promulgation of such rule, the agency has exceeded the scope of its statutory authority, and the rule was promulgated in compliance with the requirements and limitations of s. 120.54(4).

(2) The committee may request from an agency such information as is reasonably necessary for examination of a rule as required by subsection (1). The com-

committee shall consult with legislative standing committees with jurisdiction over the subject areas. If the committee objects to an emergency rule or a proposed or existing rule, it shall, within 5 days of the objection, certify that fact to the agency whose rule has been examined and include with the certification a statement detailing its objections with particularity. The committee shall notify the Speaker of the House of Representatives and the President of the Senate of any objection to an agency rule concurrent with certification of that fact to the agency. Such notice shall include a copy of the rule and the statement detailing the committee's objections to the rule.

(3) Within 30 days of receipt of the objection, if the agency is headed by an individual, or within 45 days of receipt of the objection, if the agency is headed by a collegial body, the agency shall:

(a) If the rule is a proposed rule:

1. Modify the rule to meet the committee's objection;

2. Withdraw the rule in its entirety; or

3. Refuse to modify or withdraw the rule.

(b) If the rule is an existing rule:

1. Notify the committee that it has elected to amend the rule to meet the committee's objection and initiate the amendment procedure;

2. Notify the committee that it has elected to repeal the rule and initiate the repeal procedure; or

3. Notify the committee that it refuses to amend or repeal the rule.

(c) If the rule is either an existing or a proposed rule and the objection is to the statement of estimated regulatory costs:

1. Prepare a corrected statement of estimated regulatory costs, give notice of the availability of the corrected statement in the first available issue of the Florida Administrative Weekly, and file a copy of the corrected statement with the committee; or

2. Notify the committee that it refuses to prepare a corrected statement of estimated regulatory costs.

(4) If the agency elects to modify a proposed rule to meet the committee's objection, it shall make only such modifications as are necessary to meet the objection and shall resubmit the rule to the committee. The agency shall give notice of its election to modify a proposed rule to meet the committee's objection by publishing a notice of change in the first available issue of the Florida Administrative Weekly, but shall not be required to conduct a public hearing. If the agency elects to amend an existing rule to meet the committee's objection, it shall notify the committee in writing and shall initiate the amendment procedure by giving notice in the next available issue of the Florida Administrative Weekly. The committee shall give priority to rules so modified or amended when setting its agenda.

(5) If the agency elects to withdraw a proposed rule as a result of a committee objection, it shall notify the committee, in writing, of its election and shall give notice of the withdrawal in the next available issue of the Florida Administrative Weekly. The rule shall be withdrawn without a public hearing, effective upon publication of the notice in the Florida Administrative Weekly. If the agency elects to repeal an existing rule

as a result of a committee objection, it shall notify the committee, in writing, of its election and shall initiate rulemaking procedures for that purpose by giving notice in the next available issue of the Florida Administrative Weekly.

(6) If an agency elects to amend or repeal an existing rule as a result of a committee objection, it shall complete the process within 90 days after giving notice in the Florida Administrative Weekly.

(7) Failure of the agency to respond to a committee objection to a proposed rule within the time prescribed in subsection (3) shall constitute withdrawal of the rule in its entirety. In this event, the committee shall notify the Department of State that the agency, by its failure to respond to a committee objection, has elected to withdraw the proposed rule. Upon receipt of the committee's notice, the Department of State shall publish a notice to that effect in the next available issue of the Florida Administrative Weekly. Upon publication of the notice, the proposed rule shall be stricken from the files of the Department of State and the files of the agency.

(8) Failure of the agency to respond to a committee objection to an existing rule within the time prescribed in subsection (3) shall constitute a refusal to repeal the rule.

(9) If the committee objects to a proposed or existing rule and the agency refuses to modify, amend, withdraw, or repeal the rule, the committee shall file with the Department of State a notice of the objection, detailing with particularity its objection to the rule. The Department of State shall publish this notice in the Florida Administrative Weekly and shall publish, as a history note to the rule in the Florida Administrative Code, a reference to the committee's objection and to the issue of the Florida Administrative Weekly in which the full text thereof appears.

(10)(a) If the committee objects to a proposed or existing rule, or portion thereof, and the agency fails to initiate administrative action to modify, amend, withdraw, or repeal the rule consistent with the objection within 60 days after the objection, or thereafter fails to proceed in good faith to complete such action, the committee may submit to the President of the Senate and the Speaker of the House of Representatives a recommendation that legislation be introduced to modify or suspend the adoption of the proposed rule, or amend or repeal the rule, or portion thereof.

(b)1. If the committee votes to recommend the introduction of legislation to modify or suspend the adoption of a proposed rule, or amend or repeal a rule, the committee shall, within 5 days after this determination, certify that fact to the agency whose rule or proposed rule has been examined. The committee may request that the agency temporarily suspend the rule or suspend the adoption of the proposed rule, pending consideration of proposed legislation during the next regular session of the Legislature.

2. Within 30 days after receipt of the certification, if the agency is headed by an individual, or within 45 days after receipt of the certification, if the agency is headed by a collegial body, the agency shall either:

a. Temporarily suspend the rule or suspend the adoption of the proposed rule; or



b. Notify the committee in writing that it refuses to temporarily suspend the rule or suspend the adoption of the proposed rule.

3. If the agency elects to temporarily suspend the rule or suspend the adoption of the proposed rule, it shall give notice of the suspension in the Florida Administrative Weekly. The rule or the rule adoption process shall be suspended upon publication of the notice. An agency shall not base any agency action on a suspended rule or suspended proposed rule, or portion thereof, prior to expiration of the suspension. A suspended rule or suspended proposed rule, or portion thereof, continues to be subject to administrative determination and judicial review as provided by law.

4. Failure of an agency to respond to committee certification within the time prescribed by subparagraph 2. constitutes a refusal to suspend the rule or to suspend the adoption of the proposed rule.

(c) The committee shall prepare bills to modify or suspend the adoption of the proposed rule or amend or repeal the rule, or portion thereof, in accordance with the rules of the Senate and the House of Representatives for prefiling and introduction in the next regular session of the Legislature. The proposed bill shall be presented to the President of the Senate and the Speaker of the House of Representatives with the committee recommendation.

(d) If a bill to suspend the adoption of a proposed rule is enacted into law, the proposed rule is suspended until specific delegated legislative authority for the proposed rule has been enacted. If a bill to suspend the adoption of a proposed rule fails to become law, any temporary agency suspension of the rule shall expire. If a bill to modify a proposed rule or amend a rule is enacted into law, the suspension shall expire upon publication of notice of modification or amendment in the Florida Administrative Weekly. If a bill to repeal a rule is enacted into law, the suspension shall remain in effect until notification of repeal of the rule is published in the Florida Administrative Weekly.

(e) The Department of State shall publish in the next available issue of the Florida Administrative Weekly the final legislative action taken. If a bill to modify or suspend the adoption of the proposed rule or amend or repeal the rule, or portion thereof, is enacted into law, the Department of State shall conform the rule or portion of the rule to the provisions of the law in the Florida Administrative Code and publish a reference to the law as a history note to the rule.

**History.**—s. 4, ch. 76-131; s. 1, ch. 77-174; s. 6, ch. 80-391; s. 3, ch. 81-309; s. 4, ch. 87-385; s. 8, ch. 92-166; s. 20, ch. 95-280; s. 14, ch. 96-159; s. 16, ch. 2000-151.

**Note.**—The words “Florida Administrative” were inserted by the editors to conform to the full title of the Florida Administrative Weekly.

#### **120.55 Publication.—**

(1) The Department of State shall:

(a)1. Through a continuous revision system, compile and publish the “Florida Administrative Code.” The Florida Administrative Code shall contain all rules adopted by each agency, citing the specific rulemaking authority pursuant to which each rule was adopted, all history notes as authorized in s. 120.545(9), and complete indexes to all rules contained in the code. Supple-

mentation shall be made as often as practicable, but at least monthly. The department may contract with a publishing firm for the publication, in a timely and useful form, of the Florida Administrative Code; however, the department shall retain responsibility for the code as provided in this section. This publication shall be the official compilation of the administrative rules of this state. The Department of State shall retain the copyright over the Florida Administrative Code.

2. Rules general in form but applicable to only one school district, community college district, or county, or a part thereof, or state university rules relating to internal personnel or business and finance shall not be published in the Florida Administrative Code. Exclusion from publication in the Florida Administrative Code shall not affect the validity or effectiveness of such rules.

3. At the beginning of the section of the code dealing with an agency that files copies of its rules with the department, the department shall publish the address and telephone number of the executive offices of each agency, the manner by which the agency indexes its rules, a listing of all rules of that agency excluded from publication in the code, and a statement as to where those rules may be inspected.

4. Forms shall not be published in the Florida Administrative Code; but any form which an agency uses in its dealings with the public, along with any accompanying instructions, shall be filed with the committee before it is used. Any form or instruction which meets the definition of “rule” provided in s. 120.52 shall be incorporated by reference into the appropriate rule. The reference shall specifically state that the form is being incorporated by reference and shall include the number, title, and effective date of the form and an explanation of how the form may be obtained. Each form created by an agency which is incorporated by reference in a rule notice of which is given under s. 120.54(3)(a) after December 31, 2007, must clearly display the number, title, and effective date of the form and the number of the rule in which the form is incorporated.

(b) Electronically publish on an Internet website managed by the department a weekly publication entitled the “Florida Administrative Weekly,” which shall serve as the official Internet website for such publication and must contain:

1. Notice of adoption of, and an index to, all rules filed during the preceding week.

2. All notices required by s. 120.54(3)(a), showing the text of all rules proposed for consideration.

3. All notices of public meetings, hearings, and workshops conducted in accordance with the provisions of s. 120.525, including a statement of the manner in which a copy of the agenda may be obtained.

4. A notice of each request for authorization to amend or repeal an existing uniform rule or for the adoption of new uniform rules.

5. Notice of petitions for declaratory statements or administrative determinations.

6. A summary of each objection to any rule filed by the Administrative Procedures Committee during the preceding week.

7. A cumulative list of all rules that have been proposed but not filed for adoption.

8. Any other material required or authorized by law or deemed useful by the department.

The department shall publish a printed version of the Florida Administrative Weekly and make copies available on an annual subscription basis. The department may contract with a publishing firm for printed publication of the Florida Administrative Weekly.

(c) Review notices for compliance with format and numbering requirements before publishing them on the Florida Administrative Weekly Internet website.

(d) Prescribe by rule the style and form required for rules submitted for filing and establish the form for their certification.

(e) Correct grammatical, typographical, and like errors not affecting the construction or meaning of the rules, after having obtained the advice and consent of the appropriate agency, and insert history notes.

(f) Charge each agency using the Florida Administrative Weekly a space rate to cover the costs related to the Florida Administrative Weekly and the Florida Administrative Code.

(g) Maintain a permanent record of all notices published in the Florida Administrative Weekly.

(2) The Florida Administrative Weekly Internet website must allow users to:

(a) Search for notices by type, publication date, rule number, word, subject, and agency;

(b) Search a database that makes available all notices published on the website for a period of at least 5 years;

(c) Subscribe to an automated e-mail notification of selected notices;

(d) View agency forms incorporated by reference in proposed rules; and

(e) Comment on proposed rules.

(3) Publication of material required by paragraph (1)(b) on the Florida Administrative Weekly Internet website does not preclude publication of such material on an agency's website or by other means.

(4) Each agency shall provide copies of its rules upon request, with citations to the grant of rulemaking authority and the specific law implemented for each rule.

(5) Any publication of a proposed rule promulgated by an agency, whether published in the Florida Administrative Code or elsewhere, shall include, along with the rule, the name of the person or persons originating such rule, the name of the supervisor or person who approved the rule, and the date upon which the rule was approved.

(6) Access to the Florida Administrative Weekly Internet website and its contents, including the e-mail notification service, shall be free for the public.

(7)(a) Each year the Department of State shall furnish the Florida Administrative Weekly, without charge and upon request, as follows:

1. One subscription to each federal and state court having jurisdiction over the residents of the state; the Legislative Library; each state university library; the State Library; each depository library designated pur-

suant to s. 257.05; and each standing committee of the Senate and House of Representatives and each state legislator.

2. Two subscriptions to each state department.

3. Three subscriptions to the library of the Supreme Court of Florida, the library of each state district court of appeal, the division, the library of the Attorney General, each law school library in Florida, the Secretary of the Senate, and the Clerk of the House of Representatives.

4. Ten subscriptions to the committee.

(b) The Department of State shall furnish one copy of the Florida Administrative Weekly, at no cost, to each clerk of the circuit court and each state department, for posting for public inspection.

(8)(a) All fees and moneys collected by the Department of State under this chapter shall be deposited in the Records Management Trust Fund for the purpose of paying for costs incurred by the department in carrying out this chapter.

(b) The unencumbered balance in the Records Management Trust Fund for fees collected pursuant to this chapter may not exceed \$300,000 at the beginning of each fiscal year, and any excess shall be transferred to the General Revenue Fund.

**History.**—s. 1, ch. 74-310; s. 1, ch. 75-107; s. 4, ch. 75-191; s. 5, ch. 76-131; s. 1, ch. 77-174; s. 4, ch. 77-453; s. 3, ch. 78-425; s. 4, ch. 79-299; s. 7, ch. 80-391; s. 4, ch. 81-309; s. 1, ch. 82-19; s. 1, ch. 82-47; s. 3, ch. 83-351; s. 3, ch. 84-203; s. 17, ch. 87-224; s. 1, ch. 87-322; s. 20, ch. 91-45; s. 15, ch. 96-159; s. 896, ch. 2002-387; s. 5, ch. 2004-235; s. 14, ch. 2004-335; s. 4, ch. 2006-82.

#### **120.56 Challenges to rules.—**

(1) GENERAL PROCEDURES FOR CHALLENGING THE VALIDITY OF A RULE OR A PROPOSED RULE.—

(a) Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.

(b) The petition seeking an administrative determination must state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.

(c) The petition shall be filed with the division which shall, immediately upon filing, forward copies to the agency whose rule is challenged, the Department of State, and the committee. Within 10 days after receiving the petition, the division director shall, if the petition complies with the requirements of paragraph (b), assign an administrative law judge who shall conduct a hearing within 30 days thereafter, unless the petition is withdrawn or a continuance is granted by agreement of the parties or for good cause shown. Evidence of good cause includes, but is not limited to, written notice of an agency's decision to modify or withdraw the proposed rule or a written notice from the chair of the committee stating that the committee will consider an objection to the rule at its next scheduled meeting. The failure of an agency to follow the applicable rulemaking procedures or requirements set forth in this chapter shall be pre-

sumed to be material; however, the agency may rebut this presumption by showing that the substantial interests of the petitioner and the fairness of the proceedings have not been impaired.

(d) Within 30 days after the hearing, the administrative law judge shall render a decision and state the reasons therefor in writing. The division shall forthwith transmit copies of the administrative law judge's decision to the agency, the Department of State, and the committee.

(e) Hearings held under this section shall be de novo in nature. The standard of proof shall be the preponderance of the evidence. Hearings shall be conducted in the same manner as provided by ss. 120.569 and 120.57, except that the administrative law judge's order shall be final agency action. The petitioner and the agency whose rule is challenged shall be adverse parties. Other substantially affected persons may join the proceedings as intervenors on appropriate terms which shall not unduly delay the proceedings. Failure to proceed under this section shall not constitute failure to exhaust administrative remedies.

**(2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.—**

(a) Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule by filing a petition seeking such a determination with the division within 21 days after the date of publication of the notice required by s. 120.54(3)(a), within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(c), within 20 days after the preparation of a statement of estimated regulatory costs required pursuant to s. 120.541, if applicable, or within 20 days after the date of publication of the notice required by s. 120.54(3)(d). The petition shall state with particularity the objections to the proposed rule and the reasons that the proposed rule is an invalid exercise of delegated legislative authority. The petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. Any person who is substantially affected by a change in the proposed rule may seek a determination of the validity of such change. Any person not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the rule and is not limited to challenging the change to the proposed rule.

(b) The administrative law judge may declare the proposed rule wholly or partly invalid. Unless the decision of the administrative law judge is reversed on appeal, the proposed rule or provision of a proposed rule declared invalid shall not be adopted. However, the agency may proceed with all other steps in the rulemaking process, including the holding of a factfinding hearing. In the event part of a proposed rule is declared invalid, the adopting agency may, in its sole discretion, withdraw the proposed rule in its entirety. The agency whose proposed rule has been declared invalid in whole or part shall give notice of the decision in the first available issue of the Florida Administrative Weekly.

(c) When any substantially affected person seeks determination of the invalidity of a proposed rule pursuant to this section, the proposed rule is not presumed to be valid or invalid.

**(3) CHALLENGING EXISTING RULES; SPECIAL PROVISIONS.—**

(a) A substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time during the existence of the rule. The petitioner has a burden of proving by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.

(b) The administrative law judge may declare all or part of a rule invalid. The rule or part thereof declared invalid shall become void when the time for filing an appeal expires. The agency whose rule has been declared invalid in whole or part shall give notice of the decision in the Florida Administrative Weekly in the first available issue after the rule has become void.

**(4) CHALLENGING AGENCY STATEMENTS DEFINED AS RULES; SPECIAL PROVISIONS.—**

(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

(b) The administrative law judge may extend the hearing date beyond 30 days after assignment of the case for good cause. If a hearing is held and the petitioner proves the allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible and practicable under s. 120.54(1)(a).

(c) The administrative law judge may determine whether all or part of a statement violates s. 120.54(1)(a). The decision of the administrative law judge shall constitute a final order. The division shall transmit a copy of the final order to the Department of State and the committee. The Department of State shall publish notice of the final order in the first available issue of the Florida Administrative Weekly.

(d) When an administrative law judge enters a final order that all or part of an agency statement violates s. 120.54(1)(a), the agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

(e)1. If, prior to a final hearing to determine whether all or part of any agency statement violates s. 120.54(1)(a), an agency publishes, pursuant to s. 120.54(3)(a), proposed rules that address the statement, then for purposes of this section, a presumption is created that the agency is acting expeditiously and in good faith to adopt rules that address the statement, and the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e).

2. If, prior to the final hearing to determine whether all or part of an agency statement violates s.

120.54(1)(a), an agency publishes a notice of rule development which addresses the statement pursuant to s. 120.54(2), or certifies that such a notice has been transmitted to the Florida Administrative Weekly for publication, then such publication shall constitute good cause for the granting of a stay of the proceedings and a continuance of the final hearing for 30 days. If the agency publishes proposed rules within this 30-day period or any extension of that period granted by an administrative law judge upon showing of good cause, then the administrative law judge shall place the case in abeyance pending the outcome of rulemaking and any proceedings involving challenges to proposed rules pursuant to subsection (2).

3. If, following the commencement of the final hearing and prior to entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), an agency publishes, pursuant to s. 120.54(3)(a), proposed rules that address the statement and proceeds expeditiously and in good faith to adopt rules that address the statement, the agency shall be permitted to rely upon the statement or a substantially similar statement as a basis for agency action if the statement meets the requirements of s. 120.57(1)(e).

4. If an agency fails to adopt rules that address the statement within 180 days after publishing proposed rules, for purposes of this subsection, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules. If the agency's proposed rules are challenged pursuant to subsection (2), the 180-day period for adoption of rules is tolled until a final order is entered in that proceeding.

5. If the proposed rules addressing the challenged statement are determined to be an invalid exercise of delegated legislative authority as defined in s. 120.52(8)(b)-(f), the agency must immediately discontinue reliance on the statement and any substantially similar statement until the rules addressing the subject are properly adopted.

(f) All proceedings to determine a violation of s. 120.54(1)(a) shall be brought pursuant to this subsection. A proceeding pursuant to this subsection may be consolidated with a proceeding under any other section of this chapter. Nothing in this paragraph shall be construed to prevent a party whose substantial interests have been determined by an agency action from bringing a proceeding pursuant to s. 120.57(1)(e).

(5) **CHALLENGING EMERGENCY RULES; SPECIAL PROVISIONS.**—Challenges to the validity of an emergency rule shall be subject to the following time schedules in lieu of those established by paragraphs (1)(c) and (d). Within 7 days after receiving the petition, the division director shall, if the petition complies with paragraph (1)(b), assign an administrative law judge, who shall conduct a hearing within 14 days, unless the petition is withdrawn. The administrative law judge shall render a decision within 14 days after the hearing.

**History.**—s. 1, ch. 74-310; s. 5, ch. 75-191; s. 6, ch. 76-131; s. 1, ch. 77-174; s. 4, ch. 78-425; s. 759, ch. 95-147; s. 16, ch. 96-159; s. 6, ch. 97-176; s. 5, ch. 99-379; s. 3, ch. 2003-94; s. 5, ch. 2006-82.

#### **120.565 Declaratory statement by agencies.—**

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion

as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule, or order that the petitioner believes may apply to the set of circumstances.

(3) The agency shall give notice of the filing of each petition in the next available issue of the Florida Administrative Weekly and transmit copies of each petition to the committee. The agency shall issue a declaratory statement or deny the petition within 90 days after the filing of the petition. The declaratory statement or denial of the petition shall be noticed in the next available issue of the Florida Administrative Weekly. Agency disposition of petitions shall be final agency action.

**History.**—s. 6, ch. 75-191; s. 7, ch. 76-131; s. 5, ch. 78-425; s. 5, ch. 79-299; s. 760, ch. 95-147; s. 17, ch. 96-159.

#### **120.569 Decisions which affect substantial interests.—**

(1) The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless the parties are proceeding under s. 120.573 or s. 120.574. Unless waived by all parties, s. 120.57(1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, s. 120.57(2) applies in all other cases. Parties shall be notified of any order, including a final order. Unless waived, a copy of the order shall be delivered or mailed to each party or the party's attorney of record at the address of record. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under this section, s. 120.57, or s. 120.68; shall indicate the procedure which must be followed to obtain the hearing or judicial review; and shall state the time limits which apply.

(2)(a) Except for any proceeding conducted as prescribed in s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency requests an administrative law judge from the division, it shall so notify the division within 15 days after receipt of the petition or request. A request for a hearing shall be granted or denied within 15 days after receipt. On the request of any agency, the division shall assign an administrative law judge with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to a proceeding under s. 120.57(1), except as a party litigant, as long as the division has jurisdiction over the proceeding under s. 120.57(1). Any party may request the disqualification of the administrative law judge by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity.

(b) All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days; however, the 14-day notice requirement may be waived with the consent of all parties. The notice shall include:

1. A statement of the time, place, and nature of the hearing.

2. A statement of the legal authority and jurisdiction under which the hearing is to be held.

(c) Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b)4. Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured. The agency shall promptly give written notice to all parties of the action taken on the petition, shall state with particularity its reasons if the petition is not granted, and shall state the deadline for filing an amended petition if applicable. This paragraph does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition.

(d) The agency may refer a petition to the division for the assignment of an administrative law judge only if the petition is in substantial compliance with the requirements of paragraph (c).

(e) All pleadings, motions, or other papers filed in the proceeding must be signed by the party, the party's attorney, or the party's qualified representative. The signature constitutes a certificate that the person has read the pleading, motion, or other paper and that, based upon reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay, or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the presiding officer shall impose upon the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(f) The presiding officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas, 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, including the imposition of sanctions, except contempt. However, no presiding officer has the authority to issue any subpoena or order directing discovery to any member or employee of the Legislature when the subpoena or order commands the production of documents or materials or compels testimony relating to the legislative duties of the member or employee. Any subpoena or order directing discovery directed to a member or an employee of the Legislature shall show on its face that the testimony sought does not relate to legislative duties.

(g) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, but all other evidence of a type commonly relied upon by reasonably prudent per-

sons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida. Any part of the evidence may be received in written form, and all testimony of parties and witnesses shall be made under oath.

(h) Documentary evidence may be received in the form of a copy or excerpt. Upon request, parties shall be given an opportunity to compare the copy with the original, if available.

(i) When official recognition is requested, the parties shall be notified and given an opportunity to examine and contest the material.

(j) A party shall be permitted to conduct cross-examination when testimony is taken or documents are made a part of the record.

(k)1. Any person subject to a subpoena may, before compliance and on timely petition, request the presiding officer having jurisdiction of the dispute to invalidate the subpoena on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material.

2. A party may seek enforcement of a subpoena, order directing discovery, or order imposing sanctions issued under the authority of this chapter by filing a petition for enforcement in the circuit court of the judicial circuit in which the person failing to comply with the subpoena or order resides. A failure to comply with an order of the court shall result in a finding of contempt of court. However, no person shall be in contempt while a subpoena is being challenged under subparagraph 1. The court may award to the prevailing party all or part of the costs and attorney's fees incurred in obtaining the court order whenever the court determines that such an award should be granted under the Florida Rules of Civil Procedure.

3. Any public employee subpoenaed to appear at an agency proceeding shall be entitled to per diem and travel expenses at the same rate as that provided for state employees under s. 112.061 if travel away from such public employee's headquarters is required. All other witnesses appearing pursuant to a subpoena shall be paid such fees and mileage for their attendance as is provided in civil actions in circuit courts of this state. In the case of a public employee, such expenses shall be processed and paid in the manner provided for agency employee travel expense reimbursement, and in the case of a witness who is not a public employee, payment of such fees and expenses shall accompany the subpoena.

(l) Unless the time period is waived or extended with the consent of all parties, the final order in a proceeding which affects substantial interests must be in writing and include findings of fact, if any, and conclusions of law separately stated, and it must be rendered within 90 days:

1. After the hearing is concluded, if conducted by the agency;

2. After a recommended order is submitted to the agency and mailed to all parties, if the hearing is conducted by an administrative law judge; or

3. After the agency has received the written and oral material it has authorized to be submitted, if there has been no hearing.

(m) Findings of fact, if set forth in a manner which is no more than mere tracking of the statutory language, must be accompanied by a concise and explicit statement of the underlying facts of record which support the findings.

(n) If an agency head finds that an immediate danger to the public health, safety, or welfare requires an immediate final order, it shall recite with particularity the facts underlying such finding in the final order, which shall be appealable or enjoined from the date rendered.

(o) On the request of any party, the administrative law judge shall enter an initial scheduling order to facilitate the just, speedy, and inexpensive determination of the proceeding. The initial scheduling order shall establish a discovery period, including a deadline by which all discovery shall be completed, and the date by which the parties shall identify expert witnesses and their opinions. The initial scheduling order also may require the parties to meet and file a joint report by a date certain.

**History.**—s. 18, ch. 96-159; s. 7, ch. 97-176; s. 4, ch. 98-200; s. 4, ch. 2003-94; s. 6, ch. 2006-82.

#### **120.57 Additional procedures for particular cases.**

##### **(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.—**

(a) Except as provided in ss. 120.80 and 120.81, an administrative law judge assigned by the division shall conduct all hearings under this subsection, except for hearings before agency heads or a member thereof. If the administrative law judge assigned to a hearing becomes unavailable, the division shall assign another administrative law judge who shall use any existing record and receive any additional evidence or argument, if any, which the new administrative law judge finds necessary.

(b) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to the presiding officer's recommended order, and to be represented by counsel or other qualified representative. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut the material.

(c) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions.

(d) Notwithstanding s. 120.569(2)(g), similar fact evidence of other violations, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity. When the state in an administrative proceeding intends to offer evidence of other acts or offenses under this

paragraph, the state shall furnish to the party whose substantial interests are being determined and whose other acts or offenses will be the subject of such evidence, no fewer than 10 days before commencement of the proceeding, a written statement of the acts or offenses it intends to offer, describing them and the evidence the state intends to offer with particularity. Notice is not required for evidence of acts or offenses which is used for impeachment or on rebuttal.

(e)1. Any agency action that determines the substantial interests of a party and that is based on an unadopted rule is subject to de novo review by an administrative law judge.

2. The agency action shall not be presumed valid or invalid. The agency must demonstrate that the unadopted rule:

a. Is within the powers, functions, and duties delegated by the Legislature or, if the agency is operating pursuant to authority derived from the State Constitution, is within that authority;

b. Does not enlarge, modify, or contravene the specific provisions of law implemented;

c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency;

d. Is not arbitrary or capricious. A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational;

e. Is not being applied to the substantially affected party without due notice; and

f. Does not impose excessive regulatory costs on the regulated person, county, or city.

3. The recommended and final orders in any proceeding shall be governed by the provisions of paragraphs (k) and (l), except that the administrative law judge's determination regarding the unadopted rule shall not be rejected by the agency unless the agency first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law. In any proceeding for review under s. 120.68, if the court finds that the agency's rejection of the determination regarding the unadopted rule does not comport with the provisions of this subparagraph, the agency action shall be set aside and the court shall award to the prevailing party the reasonable costs and a reasonable attorney's fee for the initial proceeding and the proceeding for review.

(f) The record in a case governed by this subsection shall consist only of:

1. All notices, pleadings, motions, and intermediate rulings.

2. Evidence admitted.

3. Those matters officially recognized.

4. Proffers of proof and objections and rulings thereon.

5. Proposed findings and exceptions.

6. Any decision, opinion, order, or report by the presiding officer.

7. All staff memoranda or data submitted to the presiding officer during the hearing or prior to its disposition, after notice of the submission to all parties,

except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records.

8. All matters placed on the record after an ex parte communication.

9. The official transcript.

(g) The agency shall accurately and completely preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost.

(h) Any party to a proceeding in which an administrative law judge of the Division of Administrative Hearings has final order authority may move for a summary final order when there is no genuine issue as to any material fact. A summary final order shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. A summary final order shall consist of findings of fact, if any, conclusions of law, a disposition or penalty, if applicable, and any other information required by law to be contained in the final order.

(i) When, in any proceeding conducted pursuant to this subsection, a dispute of material fact no longer exists, any party may move the administrative law judge to relinquish jurisdiction to the agency. An order relinquishing jurisdiction shall be rendered if the administrative law judge determines from the pleadings, depositions, answers to interrogatories, and admissions on file, together with supporting and opposing affidavits, if any, that no genuine issue as to any material fact exists. If the administrative law judge enters an order relinquishing jurisdiction, the agency may promptly conduct a proceeding pursuant to subsection (2), if appropriate, but the parties may not raise any issues of disputed fact that could have been raised before the administrative law judge. An order entered by an administrative law judge relinquishing jurisdiction to the agency based upon a determination that no genuine dispute of material fact exists, need not contain findings of fact, conclusions of law, or a recommended disposition or penalty.

(j) Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.

(k) The presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order. All proceedings conducted under this subsection shall be de novo. The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that

does not include appropriate and specific citations to the record.

(l) 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 over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

(m) If a recommended order is submitted to an agency, the agency shall provide a copy of its final order and any exceptions to the division within 15 days after the order is filed with the agency clerk.

(n) Notwithstanding any law to the contrary, when statutes or rules impose conflicting time requirements for the scheduling of expedited hearings or issuance of recommended or final orders, the director of the division shall have the authority to set the proceedings for the orderly operation of this chapter.

(2) **ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS NOT INVOLVING DISPUTED ISSUES OF MATERIAL FACT.**—In any case to which subsection (1) does not apply:

(a) The agency shall:

1. Give reasonable notice to affected persons of the action of the agency, whether proposed or already taken, or of its decision to refuse action, together with a summary of the factual, legal, and policy grounds therefor.

2. Give parties or their counsel the option, at a convenient time and place, to present to the agency or hearing officer written or oral evidence in opposition to the action of the agency or to its refusal to act, or a written statement challenging the grounds upon which the agency has chosen to justify its action or inaction.

3. If the objections of the parties are overruled, provide a written explanation within 7 days.

(b) The record shall only consist of:

1. The notice and summary of grounds.

2. Evidence received.

3. All written statements submitted.

4. Any decision overruling objections.

5. All matters placed on the record after an ex parte communication.

6. The official transcript.

7. Any decision, opinion, order, or report by the presiding officer.

(3) **ADDITIONAL PROCEDURES APPLICABLE TO PROTESTS TO CONTRACT SOLICITATION OR AWARD.**—Agencies subject to this chapter shall use the uniform rules of procedure, which provide procedures for the resolution of protests arising from the contract solicitation or award process. Such rules shall at least provide that:

(a) The agency shall provide notice of a decision or intended decision concerning a solicitation, contract award, or exceptional purchase by electronic posting. This notice shall contain the following statement: "Failure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under chapter 120, Florida Statutes."

(b) Any person who is adversely affected by the agency decision or intended decision shall file with the agency a notice of protest in writing within 72 hours after the posting of the notice of decision or intended decision. With respect to a protest of the terms, conditions, and specifications contained in a solicitation, including any provisions governing the methods for ranking bids, proposals, or replies, awarding contracts, reserving rights of further negotiation, or modifying or amending any contract, the notice of protest shall be filed in writing within 72 hours after the posting of the solicitation. The formal written protest shall be filed within 10 days after the date the notice of protest is filed. Failure to file a notice of protest or failure to file a formal written protest shall constitute a waiver of proceedings under this chapter. The formal written protest shall state with particularity the facts and law upon which the protest is based. Saturdays, Sundays, and state holidays shall be excluded in the computation of the 72-hour time periods provided by this paragraph.

(c) Upon receipt of the formal written protest that has been timely filed, the agency shall stop the solicitation or contract award process until the subject of the protest is resolved by final agency action, unless the agency head sets forth in writing particular facts and circumstances which require the continuance of the solicitation or contract award process without delay in order to avoid an immediate and serious danger to the public health, safety, or welfare.

(d)1. The agency shall provide an opportunity to resolve the protest by mutual agreement between the parties within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of a formal written protest.

2. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays, Sundays, and state holidays, after receipt of the formal written protest, and if there is no disputed issue of material fact, an informal proceeding shall be conducted pursuant to subsection (2) and applicable agency rules before a person whose qualifications have been prescribed by rules of the agency.

3. If the subject of a protest is not resolved by mutual agreement within 7 days, excluding Saturdays,

Sundays, and state holidays, after receipt of the formal written protest, and if there is a disputed issue of material fact, the agency shall refer the protest to the division for proceedings under subsection (1).

(e) Upon receipt of a formal written protest referred pursuant to this subsection, the director of the division shall expedite the hearing and assign an administrative law judge who shall commence a hearing within 30 days after the receipt of the formal written protest by the division and enter a recommended order within 30 days after the hearing or within 30 days after receipt of the hearing transcript by the administrative law judge, whichever is later. Each party shall be allowed 10 days in which to submit written exceptions to the recommended order. A final order shall be entered by the agency within 30 days of the entry of a recommended order. The provisions of this paragraph may be waived upon stipulation by all parties.

(f) In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. In a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

(g) For purposes of this subsection, the definitions in s. 287.012 apply.

(4) **INFORMAL DISPOSITION.**—Unless precluded by law, informal disposition may be made of any proceeding by stipulation, agreed settlement, or consent order.

(5) **APPLICABILITY.**—This section does not apply to agency investigations preliminary to agency action.

**History.**—s. 1, ch. 74-310; s. 7, ch. 75-191; s. 8, ch. 76-131; s. 1, ch. 77-174; s. 5, ch. 77-453; ss. 6, 11, ch. 78-95; s. 6, ch. 78-425; s. 8, ch. 79-7; s. 7, ch. 80-95; s. 4, ch. 80-289; s. 57, ch. 81-259; s. 2, ch. 83-78; s. 9, ch. 83-216; s. 2, ch. 84-173; s. 4, ch. 84-203; ss. 1, 2, ch. 86-108; s. 44, ch. 87-6; ss. 1, 2, ch. 87-54; s. 5, ch. 87-385; s. 1, ch. 90-283; s. 4, ch. 91-30; s. 1, ch. 91-191; s. 22, ch. 92-315; s. 7, ch. 94-218; s. 1420, ch. 95-147; s. 1, ch. 95-328; s. 19, ch. 96-159; s. 1, ch. 96-423; s. 8, ch. 97-176; s. 5, ch. 98-200; s. 3, ch. 98-279; s. 47, ch. 99-2; s. 6, ch. 99-379; s. 2, ch. 2002-207; s. 5, ch. 2003-94; s. 7, ch. 2006-82.

**120.573 Mediation of disputes.**—Each announcement of an agency action that affects substantial interests shall advise whether mediation of the administrative dispute for the type of agency action announced is available and that choosing mediation does not affect the right to an administrative hearing. If the agency and



all parties to the administrative action agree to mediation, in writing, within 10 days after the time period stated in the announcement for election of an administrative remedy under ss. 120.569 and 120.57, the time limitations imposed by ss. 120.569 and 120.57 shall be tolled to allow the agency and parties to mediate the administrative dispute. The mediation shall be concluded within 60 days of such agreement unless otherwise agreed by the parties. The mediation agreement shall include provisions for mediator selection, the allocation of costs and fees associated with mediation, and the mediating parties' understanding regarding the confidentiality of discussions and documents introduced during mediation. If mediation results in settlement of the administrative dispute, the agency shall enter a final order incorporating the agreement of the parties. If mediation terminates without settlement of the dispute, the agency shall notify the parties in writing that the administrative hearing processes under ss. 120.569 and 120.57 are resumed.

**History.**—s. 20, ch. 96-159; s. 9, ch. 97-176.

#### **120.574 Summary hearing.—**

(1)(a) Within 5 business days following the division's receipt of a petition or request for hearing, the division shall issue and serve on all original parties an initial order that assigns the case to a specific administrative law judge and provides general information regarding practice and procedure before the division. The initial order shall also contain a statement advising the addressees that a summary hearing is available upon the agreement of all parties under subsection (2) and briefly describing the expedited time sequences, limited discovery, and final order provisions of the summary procedure.

(b) Within 15 days after service of the initial order, any party may file with the division a motion for summary hearing in accordance with subsection (2). If all original parties agree, in writing, to the summary proceeding, the proceeding shall be conducted within 30 days of the agreement, in accordance with the provisions of subsection (2).

(c) Intervenors in the proceeding shall be governed by the decision of the original parties regarding whether the case will proceed in accordance with the summary hearing process and shall not have standing to challenge that decision.

(d) If a motion for summary hearing is not filed within 15 days after service of the division's initial order, the matter shall proceed in accordance with ss. 120.569 and 120.57.

(2) In any case to which this subsection is applicable, the following procedures apply:

(a) Motions shall be limited to the following:

1. A motion in opposition to the petition.
2. A motion requesting discovery beyond the informal exchange of documents and witness lists described in paragraph (b). Upon a showing of necessity, additional discovery may be permitted in the discretion of the administrative law judge, but only if it can be completed not later than 5 days prior to the final hearing.

3. A motion for continuance of the final hearing date.

4. A motion requesting a prehearing conference, or the administrative law judge may require a prehearing conference, for the purpose of identifying: the legal and factual issues to be considered at the final hearing; the names and addresses of witnesses who may be called to testify at the final hearing; documentary evidence that will be offered at the final hearing; the range of penalties that may be imposed upon final hearing; and any other matter that the administrative law judge determines would expedite resolution of the proceeding. The prehearing conference may be held by telephone conference call.

5. During or after any preliminary hearing or conference, any party or the administrative law judge may suggest that the case is no longer appropriate for summary disposition. Following any argument requested by the parties, the administrative law judge may enter an order referring the case back to the formal adjudicatory process described in s. 120.57(1), in which event the parties shall proceed accordingly.

- (b) Not later than 5 days prior to the final hearing, the parties shall furnish to each other copies of documentary evidence and lists of witnesses who may testify at the final hearing.

- (c) All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, and to be represented by counsel or other qualified representative.

- (d) The record in a case governed by this subsection shall consist only of:

1. All notices, pleadings, motions, and intermediate rulings.

2. Evidence received.

3. A statement of matters officially recognized.

4. Proffers of proof and objections and rulings thereon.

5. Matters placed on the record after an ex parte communication.

6. The written decision of the administrative law judge presiding at the final hearing.

7. The official transcript of the final hearing.

- (e) The agency shall accurately and completely preserve all testimony in the proceeding and, upon request by any party, shall make a full or partial transcript available at no more than actual cost.

- (f) The decision of the administrative law judge shall be rendered within 30 days after the conclusion of the final hearing or the filing of the transcript thereof, whichever is later. The administrative law judge's decision, which shall be final agency action subject to judicial review under s. 120.68, shall include the following:

1. Findings of fact based exclusively on the evidence of record and matters officially recognized.

2. Conclusions of law.

3. Imposition of a fine or penalty, if applicable.

4. Any other information required by law or rule to be contained in a final order.

**History.**—s. 21, ch. 96-159; s. 10, ch. 97-176; s. 11, ch. 2000-158; s. 10, ch. 2000-336.

#### **120.595 Attorney's fees.—**

(1) CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.57(1).—

(a) The provisions of this subsection are supplemental to, and do not abrogate, other provisions allowing the award of fees or costs in administrative proceedings.

(b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge to have participated in the proceeding for an improper purpose.

(c) In proceedings pursuant to s. 120.57(1), and upon motion, the administrative law judge shall determine whether any party participated in the proceeding for an improper purpose as defined by this subsection. In making such determination, the administrative law judge shall consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. In such event, it shall be rebuttably presumed that the nonprevailing adverse party participated in the pending proceeding for an improper purpose.

(d) In any proceeding in which the administrative law judge determines that a party participated in the proceeding for an improper purpose, the recommended order shall so designate and shall determine the award of costs and attorney's fees.

(e) For the purpose of this subsection:

1. "Improper purpose" means participation in a proceeding pursuant to s. 120.57(1) primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity.

2. "Costs" has the same meaning as the costs allowed in civil actions in this state as provided in chapter 57.

3. "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding. In the event that a proceeding results in any substantial modification or condition intended to resolve the matters raised in a party's petition, it shall be determined that the party having raised the issue addressed is not a nonprevailing adverse party. The recommended order shall state whether the change is substantial for purposes of this subsection. In no event shall the term "nonprevailing party" or "prevailing party" be deemed to include any party that has intervened in a previously existing proceeding to support the position of an agency.

(2) **CHALLENGES TO PROPOSED AGENCY RULES PURSUANT TO SECTION 120.56(2).**—If the court or administrative law judge declares a proposed rule or portion of a proposed rule invalid pursuant to s. 120.56(2), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special cir-

cumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed \$15,000.

(3) **CHALLENGES TO EXISTING AGENCY RULES PURSUANT TO SECTION 120.56(3).**—If the court or administrative law judge declares a rule or portion of a rule invalid pursuant to s. 120.56(3), a judgment or order shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust. An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency. If the agency prevails in the proceedings, the court or administrative law judge shall award reasonable costs and reasonable attorney's fees against a party if the court or administrative law judge determines that a party participated in the proceedings for an improper purpose as defined by paragraph (1)(e). No award of attorney's fees as provided by this subsection shall exceed \$15,000.

(4) **CHALLENGES TO AGENCY ACTION PURSUANT TO SECTION 120.56(4).**—

(a) Upon entry of a final order that all or part of an agency statement violates s. 120.54(1)(a), the administrative law judge shall award reasonable costs and reasonable attorney's fees to the petitioner, unless the agency demonstrates that the statement is required by the Federal Government to implement or retain a delegated or approved program or to meet a condition to receipt of federal funds.

(b) Notwithstanding the provisions of chapter 284, an award shall be paid from the budget entity of the secretary, executive director, or equivalent administrative officer of the agency, and the agency shall not be entitled to payment of an award or reimbursement for payment of an award under any provision of law.

(5) **APPEALS.**—When there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney's fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding.

(6) **OTHER SECTIONS NOT AFFECTED.**—Other provisions, including ss. 57.105 and 57.111, authorize the award of attorney's fees and costs in administrative proceedings. Nothing in this section shall affect the

availability of attorney's fees and costs as provided in those sections.

**History.**—s. 25, ch. 96-159; s. 11, ch. 97-176; s. 48, ch. 99-2; s. 6, ch. 2003-94.

#### **120.60 Licensing.—**

(1) Upon receipt of an application for a license, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency shall not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period. An application shall be considered complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired. Every application for a license shall be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period shall be tolled by the initiation of a proceeding under ss. 120.569 and 120.57. Any application for a license that is not approved or denied within the 90-day or shorter time period, within 15 days after conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever action and timeframe is latest and applicable, is considered approved unless the recommended order recommends that the agency deny the license. Subject to the satisfactory completion of an examination if required as a prerequisite to licensure, any license that is considered approved shall be issued and may include such reasonable conditions as are authorized by law. Any applicant for licensure seeking to claim licensure by default under this subsection shall notify the agency clerk of the licensing agency, in writing, of the intent to rely upon the default license provision of this subsection, and shall not take any action based upon the default license until after receipt of such notice by the agency clerk.

(2) If an applicant seeks a license for an activity that is exempt from licensure, the agency shall notify the applicant and return any tendered application fee within 30 days after receipt of the original application.

(3) Each applicant shall be given written notice either personally or by mail that the agency intends to grant or deny, or has granted or denied, the application for license. The notice must state with particularity the grounds or basis for the issuance or denial of the license, except when issuance is a ministerial act. Unless waived, a copy of the notice shall be delivered or mailed to each party's attorney of record and to each person who has requested notice of agency action. Each notice shall inform the recipient of the basis for the agency decision, shall inform the recipient of any administrative hearing pursuant to ss. 120.569 and 120.57 or judicial review pursuant to s. 120.68 which may be available, shall indicate the procedure which must be followed, and shall state the applicable time limits. The issuing agency shall certify the date the notice was mailed or delivered, and the notice and the certification shall be filed with the agency clerk.

(4) When a licensee has made timely and sufficient application for the renewal of a license which does not automatically expire by statute, the existing license shall not expire until the application for renewal has been finally acted upon by the agency or, in case the application is denied or the terms of the license are limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court.

(5) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57. When personal service cannot be made and the certified mail notice is returned undelivered, the agency shall cause a short, plain notice to the licensee to be published once each week for 4 consecutive weeks in a newspaper published in the county of the licensee's last known address as it appears on the records of the agency. If no newspaper is published in that county, the notice may be published in a newspaper of general circulation in that county. If the address is in some state other than this state or in a foreign territory or country, the notice may be published in Leon County.

(6) If the agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license, the agency may take such action by any procedure that is fair under the circumstances if:

(a) The procedure provides at least the same procedural protection as is given by other statutes, the State Constitution, or the United States Constitution;

(b) The agency takes only that action necessary to protect the public interest under the emergency procedure; and

(c) The agency states in writing at the time of, or prior to, its action the specific facts and reasons for finding an immediate danger to the public health, safety, or welfare and its reasons for concluding that the procedure used is fair under the circumstances. The agency's findings of immediate danger, necessity, and procedural fairness are judicially reviewable. Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding pursuant to ss. 120.569 and 120.57 shall also be promptly instituted and acted upon.

(7) No agency shall include as a condition of approval of any license any provision that is based upon a statement, policy, or guideline of another agency unless the statement, policy, or guideline is within the jurisdiction of the other agency. The other agency shall identify for the licensing agency the specific legal authority for each such statement, policy, or guideline. The licensing agency must provide the licensee with an opportunity to challenge the condition as invalid. If the licensing agency bases a condition of approval or denial of the license upon the statement, policy, or guideline of the other agency, any party to an

administrative proceeding that arises from the approval with conditions or denial of the license may require the other agency to join as a party in determining the validity of the condition.

**History.**—s. 1, ch. 74-310; s. 10, ch. 76-131; s. 1, ch. 77-174; ss. 6, 9, ch. 77-453; s. 57, ch. 78-95; s. 8, ch. 78-425; s. 1, ch. 79-142; s. 6, ch. 79-299; s. 2, ch. 81-180; s. 6, ch. 84-203; s. 2, ch. 84-265; s. 1, ch. 85-82; s. 14, ch. 90-51; s. 762, ch. 95-147; s. 26, ch. 96-159; s. 326, ch. 96-410; s. 12, ch. 97-176; s. 7, ch. 2003-94.

#### **120.62 Agency investigations.—**

(1) Every person who responds to a request or demand by any agency or representative thereof for written data or an oral statement shall be entitled to a transcript or recording of his or her oral statement at no more than cost.

(2) Any person compelled to appear, or who appears voluntarily, before any presiding officer or agency in an investigation or in any agency proceeding has the right, at his or her own expense, to be accompanied, represented, and advised by counsel or by other qualified representatives.

**History.**—s. 1, ch. 74-310; s. 763, ch. 95-147; s. 28, ch. 96-159.

#### **120.63 Exemption from act.—**

(1) Upon application of any agency, the Administration Commission may exempt any process or proceeding governed by this act from one or more requirements of this act:

(a) When the agency head has certified that the requirement would conflict with any provision of federal law or rules with which the agency must comply;

(b) In order to permit persons in the state to receive tax benefits or federal funds under any federal law; or

(c) When the commission has found that conformity with the requirements of the part or parts of this act for which exemption is sought would be so inconvenient or impractical as to defeat the purpose of the agency proceeding involved or the purpose of this act and would not be in the public interest in light of the nature of the intended action and the enabling act or other laws affecting the agency.

(2) The commission may not exempt an agency from any requirement of this act pursuant to this section until it establishes alternative procedures to achieve the agency's purpose which shall be consistent, insofar as possible, with the intent and purpose of the act.

(a) Prior to the granting of any exemption authorized by this section, the commission shall hold a public hearing after notice given as provided in s. 120.525. Upon the conclusion of the hearing, the commission, through the Executive Office of the Governor, shall issue an order specifically granting or denying the exemption and specifying any processes or proceedings exempted and the extent of the exemption; transmit to the committee and to the Department of State a copy of the petition, a certified copy of the order granting or denying the petition, and a copy of any alternative procedures prescribed; and give notice of the petition and the commission's response in the Florida Administrative Weekly.

(b) An exemption and any alternative procedure prescribed shall terminate 90 days following adjournment sine die of the then-current or next regular legislative session after issuance of the exemption order, or

upon the effective date of any subsequent legislation incorporating the exemption or any partial exemption related thereto, whichever is earlier. The exemption granted by the commission shall be renewable upon the same or similar facts not more than once. Such renewal shall terminate as would an original exemption.

**History.**—s. 1, ch. 74-310; s. 11, ch. 76-131; s. 1, ch. 77-53; s. 8, ch. 77-453; s. 87, ch. 79-190; s. 7, ch. 79-299; s. 70, ch. 79-400; s. 58, ch. 81-259; s. 29, ch. 96-159.

#### **120.65 Administrative law judges.—**

(1) The Division of Administrative Hearings within the Department of Management Services shall be headed by a director who shall be appointed by the Administration Commission and confirmed by the Senate. The director, who shall also serve as the chief administrative law judge, and any deputy chief administrative law judge must possess the same minimum qualifications as the administrative law judges employed by the division. The Deputy Chief Judge of Compensation Claims must possess the minimum qualifications established in s. 440.45(2) and shall report to the director. The division shall be a separate budget entity, and the director shall be its agency head for all purposes. The Department of Management Services shall provide administrative support and service to the division to the extent requested by the director. The division shall not be subject to control, supervision, or direction by the Department of Management Services in any manner, including, but not limited to, personnel, purchasing, transactions involving real or personal property, and budgetary matters.

(2) The director has the right to appeal actions by the Executive Office of the Governor that affect amendments to the division's approved operating budget or any personnel actions pursuant to chapter 216 to the Administration Commission, which shall decide such issue by majority vote. The appropriations committees may advise the Administration Commission on the issue. If the President of the Senate and the Speaker of the House of Representatives object in writing to the effects of the appeal, the appeal may be affirmed by the affirmative vote of two-thirds of the commission members present.

(3) Each state agency as defined in chapter 216 and each political subdivision shall make its facilities available, at a time convenient to the provider, for use by the division in conducting proceedings pursuant to this chapter.

(4) The division shall employ administrative law judges to conduct hearings required by this chapter or other law. Any person employed by the division as an administrative law judge must have been a member of The Florida Bar in good standing for the preceding 5 years.

(5) If the division cannot furnish a division administrative law judge promptly in response to an agency request, the director shall designate in writing a qualified full-time employee of an agency other than the requesting agency to conduct the hearing. The director shall have the discretion to designate such a hearing officer who is located in that part of the state where the parties and witnesses reside.

(6) By rule, the division may establish:

(a) Further qualifications for administrative law judges and shall establish procedures by which candidates will be considered for employment or contract.

(b) The manner in which public notice will be given of vacancies in the staff of administrative law judges.

(c) Procedures for the assignment of administrative law judges.

(7) The division is authorized to provide administrative law judges on a contract basis to any governmental entity to conduct any hearing not covered by this section.

(8) The division shall have the authority to adopt reasonable rules to carry out the provisions of this act.

(9) Rules promulgated by the division may authorize any reasonable sanctions except contempt for violation of the rules of the division or failure to comply with a reasonable order issued by an administrative law judge, which is not under judicial review.

(10) Not later than February 1 of each year, the division shall issue a written report to the Administrative Procedures Committee and the Administration Commission, including at least the following information:

(a) A summary of the extent and effect of agencies' utilization of administrative law judges, court reporters, and other personnel in proceedings under this chapter.

(b) Recommendations for change or improvement in the Administrative Procedure Act or any agency's practice or policy with respect thereto.

(c) Recommendations as to those types of cases or disputes which should be conducted under the summary hearing process described in s. 120.574.

(d) A report regarding each agency's compliance with the filing requirement in s. 120.57(1)(m).

(11) The division shall be reimbursed for administrative law judge services and travel expenses by the following entities: water management districts, regional planning councils, school districts, community colleges, the Division of Community Colleges, state universities, the Board of Governors of the State University System, the State Board of Education, the Florida School for the Deaf and the Blind, and the Commission for Independent Education. These entities shall contract with the division to establish a contract rate for services and provisions for reimbursement of administrative law judge travel expenses and video conferencing expenses attributable to hearings conducted on behalf of these entities. The contract rate must be based on a total-cost-recovery methodology.

**History.**—s. 1, ch. 74-310; s. 9, ch. 75-191; s. 14, ch. 76-131; s. 9, ch. 78-425; s. 46, ch. 79-190; s. 1, ch. 86-297; s. 46, ch. 87-6; s. 25, ch. 87-101; s. 54, ch. 88-1; s. 30, ch. 88-277; s. 51, ch. 92-279; s. 23, ch. 92-315; s. 55, ch. 92-326; s. 764, ch. 95-147; s. 31, ch. 96-159; s. 13, ch. 97-176; s. 38, ch. 2000-371; s. 4, ch. 2001-91; s. 1, ch. 2004-247; s. 8, ch. 2006-82; s. 14, ch. 2007-217.

**120.651 Designation of two administrative law judges to preside over actions involving department or boards.**—The Division of Administrative Hearings shall designate at least two administrative law judges who shall specifically preside over actions involving the Department of Health or boards within the Department of Health. Each designated administrative law judge must be a member of The Florida Bar in good standing and must have legal, managerial, or clinical experience

in issues related to health care or have attained board certification in health care law from The Florida Bar.

**History.**—s. 32, ch. 2003-416.

**120.655 Withholding funds to pay for administrative law judge services to school boards.**—If a district school board fails to make a timely payment for the services provided by an administrative law judge of the Division of Administrative Hearings as provided annually in the General Appropriations Act, the Commissioner of Education shall withhold, from any general revenue funds the district is eligible to receive, an amount sufficient to pay for the administrative law judge's services. The commissioner shall transfer the amount withheld to the Division of Administrative Hearings in payment of such services.

**History.**—s. 1, ch. 92-121; s. 32, ch. 96-159.

#### **120.66 Ex parte communications.**—

(1) In any proceeding under ss. 120.569 and 120.57, no ex parte communication relative to the merits, threat, or offer of reward shall be made to the agency head, after the agency head has received a recommended order, or to the presiding officer by:

(a) An agency head or member of the agency or any other public employee or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter.

(b) A party to the proceeding, the party's authorized representative or counsel, or any person who, directly or indirectly, would have a substantial interest in the proposed agency action.

Nothing in this subsection shall apply to advisory staff members who do not testify on behalf of the agency in the proceeding or to any rulemaking proceedings under s. 120.54.

(2) A presiding officer, including an agency head or designee, who is involved in the decisional process and who receives an ex parte communication in violation of subsection (1) shall place on the record of the pending matter all written communications received, all written responses to such communications, and a memorandum stating the substance of all oral communications received and all oral responses made, and shall also advise all parties that such matters have been placed on the record. Any party desiring to rebut the ex parte communication shall be allowed to do so, if such party requests the opportunity for rebuttal within 10 days after notice of such communication. The presiding officer may, if necessary to eliminate the effect of an ex parte communication, withdraw from the proceeding, in which case the entity that appointed the presiding officer shall assign a successor.

(3) Any person who makes an ex parte communication prohibited by subsection (1), and any presiding officer, including an agency head or designee, who fails to place in the record any such communication, is in violation of this act and may be assessed a civil penalty not to exceed \$500 or be subjected to other disciplinary action.

**History.**—s. 1, ch. 74-310; s. 10, ch. 75-191; s. 12, ch. 76-131; s. 1, ch. 77-174; s. 10, ch. 78-425; s. 765, ch. 95-147; s. 33, ch. 96-159; s. 14, ch. 97-176.

**120.665 Disqualification of agency personnel.—**

(1) Notwithstanding the provisions of s. 112.3143, any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding. If the disqualified individual was appointed, the appointing power may appoint a substitute to serve in the matter from which the individual is disqualified. If the individual is an elected official, the Governor may appoint a substitute to serve in the matter from which the individual is disqualified. However, if a quorum remains after the individual is disqualified, it shall not be necessary to appoint a substitute.

(2) Any agency action taken by a duly appointed substitute for a disqualified individual shall be as conclusive and effective as if agency action had been taken by the agency as it was constituted prior to any substitution.

**History.**—s. 1, ch. 74-310; s. 12, ch. 78-425; s. 2, ch. 83-329; s. 767, ch. 95-147; s. 34, ch. 96-159.

**Note.**—Former s. 120.71.

**120.68 Judicial review.—**

(1) A party who is adversely affected by final agency action is entitled to judicial review. A preliminary, procedural, or intermediate order of the agency or of an administrative law judge of the Division of Administrative Hearings is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(2)(a) Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law. All proceedings shall be instituted by filing a notice of appeal or petition for review in accordance with the Florida Rules of Appellate Procedure within 30 days after the rendition of the order being appealed. If the appeal is of an order rendered in a proceeding initiated under s. 120.56, the agency whose rule is being challenged shall transmit a copy of the notice of appeal to the committee.

(b) When proceedings under this chapter are consolidated for final hearing and the parties to the consolidated proceeding seek review of final or interlocutory orders in more than one district court of appeal, the courts of appeal are authorized to transfer and consolidate the review proceedings. The court may transfer such appellate proceedings on its own motion, upon motion of a party to one of the appellate proceedings, or by stipulation of the parties to the appellate proceedings. In determining whether to transfer a proceeding, the court may consider such factors as the interrelationship of the parties and the proceedings, the desirability of avoiding inconsistent results in related matters, judicial economy, and the burden on the parties of reproducing the record for use in multiple appellate courts.

(3) The filing of the petition does not itself stay enforcement of the agency decision, but if the agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless

the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state. The agency also may grant a stay upon appropriate terms, but, whether or not the action has the effect of suspending or revoking a license, a petition to the agency for a stay is not a prerequisite to a petition to the court for supersedeas. In any event the court shall specify the conditions, if any, upon which the stay or supersedeas is granted.

(4) Judicial review of any agency action shall be confined to the record transmitted and any additions made thereto in accordance with paragraph (7)(a).

(5) The record for judicial review shall be compiled in accordance with the Florida Rules of Appellate Procedure.

(6)(a) The reviewing court's decision may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the original form of the petition. The court may:

1. Order agency action required by law; order agency exercise of discretion when required by law; set aside agency action; remand the case for further agency proceedings; or decide the rights, privileges, obligations, requirements, or procedures at issue between the parties; and

2. Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

(b) If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as the court finds necessary to preserve the interests of any party and the public pending further proceedings or agency action.

(7) The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:

- (a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;

- (b) The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact;

- (c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure;

- (d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or

- (e) The agency's exercise of discretion was:

1. Outside the range of discretion delegated to the agency by law;

2. Inconsistent with agency rule;

3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or

4. Otherwise in violation of a constitutional or statutory provision;

but the court shall not substitute its judgment for that of the agency on an issue of discretion.

(8) Unless the court finds a ground for setting aside, modifying, remanding, or ordering agency action or ancillary relief under a specified provision of this section, it shall affirm the agency's action.

(9) No petition challenging an agency rule as an invalid exercise of delegated legislative authority shall be instituted pursuant to this section, except to review an order entered pursuant to a proceeding under s. 120.56 or an agency's findings of immediate danger, necessity, and procedural fairness prerequisite to the adoption of an emergency rule pursuant to s. 120.54(4), unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact.

(10) If an administrative law judge's final order depends on any fact found by the administrative law judge, the court shall not substitute its judgment for that of the administrative law judge as to the weight of the evidence on any disputed finding of fact. The court shall, however, set aside the final order of the administrative law judge or remand the case to the administrative law judge, if it finds that the final order depends on any finding of fact that is not supported by competent substantial evidence in the record of the proceeding.

**History.**—s. 1, ch. 74-310; s. 13, ch. 76-131; s. 38, ch. 77-104; s. 1, ch. 77-174; s. 11, ch. 78-425; s. 4, ch. 84-173; s. 7, ch. 87-385; s. 36, ch. 90-302; s. 6, ch. 91-30; s. 1, ch. 91-191; s. 10, ch. 92-166; s. 35, ch. 96-159; s. 15, ch. 97-176; s. 8, ch. 2003-94.

#### **120.69 Enforcement of agency action.—**

(1) Except as otherwise provided by statute:

(a) Any agency may seek enforcement of an action by filing a petition for enforcement, as provided in this section, in the circuit court where the subject matter of the enforcement is located.

(b) A petition for enforcement of any agency action may be filed by any substantially interested person who is a resident of the state. However, no such action may be commenced:

1. Prior to 60 days after the petitioner has given notice of the violation of the agency action to the head of the agency concerned, the Attorney General, and any alleged violator of the agency action.

2. If an agency has filed, and is diligently prosecuting, a petition for enforcement.

(c) A petition for enforcement filed by a nongovernmental person shall be in the name of the State of Florida on the relation of the petitioner, and the doctrines of res judicata and collateral estoppel shall apply.

(d) In an action brought under paragraph (b), the agency whose action is sought to be enforced, if not a party, may intervene as a matter of right.

(2) A petition for enforcement may request declaratory relief; temporary or permanent equitable relief; any fine, forfeiture, penalty, or other remedy provided by statute; any combination of the foregoing; or, in the absence of any other specific statutory authority, a fine not to exceed \$1,000.

(3) After the court has rendered judgment on a petition for enforcement, no other petition shall be filed or adjudicated against the same agency action, on the basis of the same transaction or occurrence, unless

expressly authorized on remand. The doctrines of res judicata and collateral estoppel shall apply, and the court shall make such orders as are necessary to avoid multiplicity of actions.

(4) In all enforcement proceedings:

(a) If enforcement depends on any facts other than those appearing in the record, the court may ascertain such facts under procedures set forth in s. 120.68(7)(a).

(b) If one or more petitions for enforcement and a petition for review involving the same agency action are pending at the same time, the court considering the review petition may order all such actions transferred to and consolidated in one court. Each party shall be under an affirmative duty to notify the court when it becomes aware of multiple proceedings.

(c) Should any party willfully fail to comply with an order of the court, the court shall punish that party in accordance with the law applicable to contempt committed by a person in the trial of any other action.

(5) In any enforcement proceeding the respondent may assert as a defense the invalidity of any relevant statute, the inapplicability of the administrative determination to respondent, compliance by the respondent, the inappropriateness of the remedy sought by the agency, or any combination of the foregoing. In addition, if the petition for enforcement is filed during the time within which the respondent could petition for judicial review of the agency action, the respondent may assert the invalidity of the agency action.

(6) Notwithstanding any other provision of this section, upon receipt of evidence that an alleged violation of an agency's action presents an imminent and substantial threat to the public health, safety, or welfare, the agency may bring suit for immediate temporary relief in an appropriate circuit court, and the granting of such temporary relief shall not have res judicata or collateral estoppel effect as to further relief sought under a petition for enforcement relating to the same violation.

(7) In any final order on a petition for enforcement the court may award to the prevailing party all or part of the costs of litigation and reasonable attorney's fees and expert witness fees, whenever the court determines that such an award is appropriate.

**History.**—s. 1, ch. 74-310; s. 766, ch. 95-147; s. 36, ch. 96-159.

#### **120.695 Notice of noncompliance.—**

(1) It is the policy of the state that the purpose of regulation is to protect the public by attaining compliance with the policies established by the Legislature. Fines and other penalties may be provided in order to assure compliance; however, the collection of fines and the imposition of penalties are intended to be secondary to the primary goal of attaining compliance with an agency's rules. It is the intent of the Legislature that an agency charged with enforcing rules shall issue a notice of noncompliance as its first response to a minor violation of a rule in any instance in which it is reasonable to assume that the violator was unaware of the rule or unclear as to how to comply with it.

(2)(a) Each agency shall issue a notice of noncompliance as a first response to a minor violation of a rule.

A "notice of noncompliance" is a notification by the agency charged with enforcing the rule issued to the person or business subject to the rule. A notice of noncompliance may not be accompanied with a fine or other disciplinary penalty. It must identify the specific rule that is being violated, provide information on how to comply with the rule, and specify a reasonable time for the violator to comply with the rule. A rule is agency action that regulates a business, occupation, or profession, or regulates a person operating a business, occupation, or profession, and that, if not complied with, may result in a disciplinary penalty.

(b) Each agency shall review all of its rules and designate those for which a violation would be a minor violation and for which a notice of noncompliance must be the first enforcement action taken against a person or business subject to regulation. A violation of a rule is a minor violation if it does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm. If an agency under the direction of a cabinet officer mails to each licensee a notice of the designated rules at the time of licensure and at least annually thereafter, the provisions of paragraph (a) may be exercised at the discretion of the agency. Such notice shall include a subject-matter index of the rules and information on how the rules may be obtained.

(c) The agency's review and designation must be completed by December 1, 1995; each agency under the direction of the Governor shall make a report to the Governor, and each agency under the joint direction of the Governor and Cabinet shall report to the Governor and Cabinet by January 1, 1996, on which of its rules have been designated as rules the violation of which would be a minor violation.

(d) The Governor or the Governor and Cabinet, as appropriate pursuant to paragraph (c), may evaluate the review and designation effects of each agency and may apply a different designation than that applied by the agency.

(e) This section does not apply to the regulation of law enforcement personnel or teachers.

(f) Designation pursuant to this section is not subject to challenge under this chapter.

**History.**—s. 1, ch. 95-402.

**120.72 Legislative intent; references to chapter 120 or portions thereof.**—Unless expressly provided otherwise, a reference in any section of the Florida Statutes to chapter 120 or to any section or sections or portion of a section of chapter 120 includes, and shall be understood as including, all subsequent amendments to chapter 120 or to the referenced section or sections or portions of a section.

**History.**—s. 3, ch. 74-310; s. 1, ch. 76-207; s. 1, ch. 77-174; s. 57, ch. 78-95; s. 13, ch. 78-425; s. 38, ch. 96-159.

**120.73 Circuit court proceedings; declaratory judgments.**—Nothing in this chapter shall be construed to repeal any provision of the Florida Statutes which grants the right to a proceeding in the circuit court in lieu of an administrative hearing or to divest the circuit courts of jurisdiction to render declaratory judgments under the provisions of chapter 86.

**History.**—s. 11, ch. 75-191; s. 14, ch. 78-425.

#### **120.74 Agency review, revision, and report.**—

(1) Each agency shall review and revise its rules as often as necessary to ensure that its rules are correct and comply with statutory requirements. Additionally, each agency shall perform a formal review of its rules every 2 years. In the review, each agency must:

- (a) Identify and correct deficiencies in its rules;
- (b) Clarify and simplify its rules;
- (c) Delete obsolete or unnecessary rules;
- (d) Delete rules that are redundant of statutes;
- (e) Seek to improve efficiency, reduce paperwork, or decrease costs to government and the private sector; and

(f) Contact agencies that have concurrent or overlapping jurisdiction to determine whether their rules can be coordinated to promote efficiency, reduce paperwork, or decrease costs to government and the private sector.

(2) Beginning October 1, 1997, and by October 1 of every other year thereafter, the head of each agency shall file a report with the President of the Senate, the Speaker of the House of Representatives, and the committee, with a copy to each appropriate standing committee of the Legislature, which certifies that the agency has complied with the requirements of this subsection. The report must specify any changes made to its rules as a result of the review and, when appropriate, recommend statutory changes that will promote efficiency, reduce paperwork, or decrease costs to government and the private sector. The report must identify the types of cases or disputes in which the agency is involved which should be conducted under the summary hearing process described in s. 120.574.

**History.**—s. 46, ch. 96-399; s. 16, ch. 97-176; s. 9, ch. 2006-82.

#### **120.80 Exceptions and special requirements; agencies.**—

##### **(1) DIVISION OF ADMINISTRATIVE HEARINGS.**

(a) *Division as a party.*—Notwithstanding s. 120.57(1)(a), a hearing in which the division is a party may not be conducted by an administrative law judge assigned by the division. An attorney assigned by the Administration Commission shall be the hearing officer.

(b) *Workers' compensation.*—Notwithstanding s. 120.52(1), a judge of compensation claims, in adjudicating matters under chapter 440, is not an agency or part of an agency for purposes of this chapter.

##### **(2) DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES.**—

(a) Marketing orders under chapter 527, chapter 573, or chapter 601 are not rules.

(b) Notwithstanding s. 120.57(1)(a), hearings held by the Department of Agriculture and Consumer Services pursuant to chapter 601 need not be conducted by an administrative law judge assigned by the division.

##### **(3) OFFICE OF FINANCIAL REGULATION.**—

(a) Notwithstanding s. 120.60(1), in proceedings for the issuance, denial, renewal, or amendment of a license or approval of a merger pursuant to title XXXVIII:

1.a. The Office of Financial Regulation of the Financial Services Commission shall have published in the Florida Administrative Weekly notice of the application within 21 days after receipt.



b. Within 21 days after publication of notice, any person may request a hearing. Failure to request a hearing within 21 days after notice constitutes a waiver of any right to a hearing. The Office of Financial Regulation or an applicant may request a hearing at any time prior to the issuance of a final order. Hearings shall be conducted pursuant to ss. 120.569 and 120.57, except that the Financial Services Commission shall by rule provide for participation by the general public.

2. Should a hearing be requested as provided by sub-subparagraph 1.b., the applicant or licensee shall publish at its own cost a notice of the hearing in a newspaper of general circulation in the area affected by the application. The Financial Services Commission may by rule specify the format and size of the notice.

3. Notwithstanding s. 120.60(1), and except as provided in subparagraph 4., every application for license for a new bank, new trust company, new credit union, or new savings and loan association shall be approved or denied within 180 days after receipt of the original application or receipt of the timely requested additional information or correction of errors or omissions. Any application for such a license or for acquisition of such control which is not approved or denied within the 180-day period or within 30 days after conclusion of a public hearing on the application, whichever is later, shall be deemed approved subject to the satisfactory completion of conditions required by statute as a prerequisite to license and approval of insurance of accounts for a new bank, a new savings and loan association, or a new credit union by the appropriate insurer.

4. In the case of every application for license to establish a new bank, trust company, or capital stock savings association in which a foreign national proposes to own or control 10 percent or more of any class of voting securities, and in the case of every application by a foreign national for approval to acquire control of a bank, trust company, or capital stock savings association, the Office of Financial Regulation shall request that a public hearing be conducted pursuant to ss. 120.569 and 120.57. Notice of such hearing shall be published by the applicant as provided in subparagraph 2. The failure of any such foreign national to appear personally at the hearing shall be grounds for denial of the application. Notwithstanding the provisions of s. 120.60(1) and subparagraph 3., every application involving a foreign national shall be approved or denied within 1 year after receipt of the original application or any timely requested additional information or the correction of any errors or omissions, or within 30 days after the conclusion of the public hearing on the application, whichever is later.

(b) In any application for a license or merger pursuant to title XXXVIII which is referred by the agency to the division for hearing, the administrative law judge shall complete and submit to the agency and to all parties a written report consisting of findings of fact and rulings on evidentiary matters. The agency shall allow each party at least 10 days in which to submit written exceptions to the report.

(4) DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION.—

(a) *Business regulation.*—The Division of Pari-mutuel Wagering is exempt from the hearing and notice requirements of ss. 120.569 and 120.57(1)(a), but only for stewards, judges, and boards of judges when the hearing is to be held for the purpose of the imposition of fines or suspensions as provided by rules of the Division of Pari-mutuel Wagering, but not for revocations, and only upon violations of subparagraphs 1.-6. The Division of Pari-mutuel Wagering shall adopt rules establishing alternative procedures, including a hearing upon reasonable notice, for the following violations:

1. Horse riding, harness riding, greyhound interference, and jai alai game actions in violation of chapter 550.

2. Application and usage of drugs and medication to horses, greyhounds, and jai alai players in violation of chapter 550.

3. Maintaining or possessing any device which could be used for the injection or other infusion of a prohibited drug to horses, greyhounds, and jai alai players in violation of chapter 550.

4. Suspensions under reciprocity agreements between the Division of Pari-mutuel Wagering and regulatory agencies of other states.

5. Assault or other crimes of violence on premises licensed for pari-mutuel wagering.

6. Prearranging the outcome of any race or game.

(b) *Professional regulation.*—Notwithstanding s. 120.57(1)(a), formal hearings may not be conducted by the Secretary of Business and Professional Regulation or a board or member of a board within the Department of Business and Professional Regulation for matters relating to the regulation of professions, as defined by chapter 455.

(5) FLORIDA LAND AND WATER ADJUDICATORY COMMISSION.—Notwithstanding the provisions of s. 120.57(1)(a), when the Florida Land and Water Adjudicatory Commission receives a notice of appeal pursuant to s. 380.07, the commission shall notify the division within 60 days after receipt of the notice of appeal if the commission elects to request the assignment of an administrative law judge.

(6) DEPARTMENT OF LAW ENFORCEMENT.—Law enforcement policies and procedures of the Department of Law Enforcement which relate to the following are not rules as defined by this chapter:

(a) The collection, management, and dissemination of active criminal intelligence information and active criminal investigative information; management of criminal investigations; and management of undercover investigations and the selection, assignment, and fictitious identity of undercover personnel.

(b) The recruitment, management, identity, and remuneration of confidential informants or sources.

(c) Surveillance techniques, the selection of surveillance personnel, and electronic surveillance, including court-ordered and consensual interceptions of communication conducted pursuant to chapter 934.

(d) The safety and release of hostages.

(e) The provision of security and protection to public figures.

(f) The protection of witnesses.

(7) DEPARTMENT OF CHILDREN AND FAMILY SERVICES.—Notwithstanding s. 120.57(1)(a), hearings conducted within the Department of Children and Family Services in the execution of those social and economic programs administered by the former Division of Family Services of the former Department of Health and Rehabilitative Services prior to the reorganization effected by chapter 75-48, Laws of Florida, need not be conducted by an administrative law judge assigned by the division.

(8) DEPARTMENT OF HIGHWAY SAFETY AND MOTOR VEHICLES.—

(a) *Drivers' licenses.*—

1. Notwithstanding s. 120.57(1)(a), hearings regarding drivers' licensing pursuant to chapter 322 need not be conducted by an administrative law judge assigned by the division.

2. Notwithstanding s. 120.60(5), cancellation, suspension, or revocation of a driver's license shall be by personal delivery to the licensee or by first-class mail as provided in s. 322.251.

(b) *Wrecker operators.*—Notwithstanding s. 120.57(1)(a), hearings held by the Division of the Florida Highway Patrol of the Department of Highway Safety and Motor Vehicles to deny, suspend, or remove a wrecker operator from participating in the wrecker rotation system established by s. 321.051 need not be conducted by an administrative law judge assigned by the division. These hearings shall be held by a hearing officer appointed by the director of the Division of the Florida Highway Patrol.

(9) OFFICE OF INSURANCE REGULATION.—Notwithstanding s. 120.60(1), every application for a certificate of authority as required by s. 624.401 shall be approved or denied within 180 days after receipt of the original application. Any application for a certificate of authority which is not approved or denied within the 180-day period, or within 30 days after conclusion of a public hearing held on the application, shall be deemed approved, subject to the satisfactory completion of conditions required by statute as a prerequisite to licensure.

(10) AGENCY FOR WORKFORCE INNOVATION.

(a) Notwithstanding s. 120.54, the rulemaking provisions of this chapter do not apply to unemployment appeals referees.

(b) Notwithstanding s. 120.54(5), the uniform rules of procedure do not apply to appeal proceedings conducted under chapter 443 by the Unemployment Appeals Commission, special deputies, or unemployment appeals referees.

(c) Notwithstanding s. 120.57(1)(a), hearings under chapter 443 may not be conducted by an administrative law judge assigned by the division, but instead shall be conducted by the Unemployment Appeals Commission in unemployment compensation appeals, unemployment appeals referees, and the Agency for Workforce Innovation or its special deputies under s. 443.141.

(11) NATIONAL GUARD.—Notwithstanding s. 120.52(15), the enlistment, organization, administration, equipment, maintenance, training, and discipline of the militia, National Guard, organized militia, and

unorganized militia, as provided by s. 2, Art. X of the State Constitution, are not rules as defined by this chapter.

(12) PUBLIC EMPLOYEES RELATIONS COMMISSION.—

(a) Notwithstanding s. 120.57(1)(a), hearings within the jurisdiction of the Public Employees Relations Commission need not be conducted by an administrative law judge assigned by the division.

(b) Section 120.60 does not apply to certification of employee organizations pursuant to s. 447.307.

(13) FLORIDA PUBLIC SERVICE COMMISSION.—

(a) Agency statements that relate to cost-recovery clauses, factors, or mechanisms implemented pursuant to chapter 366, relating to public utilities, are exempt from the provisions of s. 120.54(1)(a).

(b) Notwithstanding ss. 120.569 and 120.57, a hearing on an objection to proposed action of the Florida Public Service Commission may only address the issues in dispute. Issues in the proposed action which are not in dispute are deemed stipulated.

(c) The Florida Public Service Commission is exempt from the time limitations in s. 120.60(1) when issuing a license.

(d) Notwithstanding the provisions of this chapter, in implementing the Telecommunications Act of 1996, Pub. L. No. 104-104, the Public Service Commission is authorized to employ procedures consistent with that act.

(e) Notwithstanding the provisions of this chapter, s. 350.128, or s. 364.381, appellate jurisdiction for Public Service Commission decisions that implement the Telecommunications Act of 1996, Pub. L. No. 104-104, shall be consistent with the provisions of that act.

(f) Notwithstanding any provision of this chapter, all public utilities and companies regulated by the Public Service Commission shall be entitled to proceed under the interim rate provisions of chapter 364 or the procedures for interim rates contained in chapter 74-195, Laws of Florida, or as otherwise provided by law.

(14) DEPARTMENT OF REVENUE.—

(a) *Assessments.*—An assessment of tax, penalty, or interest by the Department of Revenue is not a final order as defined by this chapter. Assessments by the Department of Revenue shall be deemed final as provided in the statutes and rules governing the assessment and collection of taxes.

(b) *Taxpayer contest proceedings.*—

1. In any administrative proceeding brought pursuant to this chapter as authorized by s. 72.011(1), the taxpayer shall be designated the "petitioner" and the Department of Revenue shall be designated the "respondent," except that for actions contesting an assessment or denial of refund under chapter 207, the Department of Highway Safety and Motor Vehicles shall be designated the "respondent," and for actions contesting an assessment or denial of refund under chapters 210, 550, 561, 562, 563, 564, and 565, the Department of Business and Professional Regulation shall be designated the "respondent."

2. In any such administrative proceeding, the applicable department's burden of proof, except as otherwise specifically provided by general law, shall be

limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the applicable department made the assessment.

3.a. Prior to filing a petition under this chapter, the taxpayer shall pay to the applicable department the amount of taxes, penalties, and accrued interest assessed by that department which are not being contested by the taxpayer. Failure to pay the uncontested amount shall result in the dismissal of the action and imposition of an additional penalty of 25 percent of the amount taxed.

b. The requirements of s. 72.011(2) and (3)(a) are jurisdictional for any action under this chapter to contest an assessment or denial of refund by the Department of Revenue, the Department of Highway Safety and Motor Vehicles, or the Department of Business and Professional Regulation.

4. Except as provided in s. 220.719, further collection and enforcement of the contested amount of an assessment for nonpayment or underpayment of any tax, interest, or penalty shall be stayed beginning on the date a petition is filed. Upon entry of a final order, an agency may resume collection and enforcement action.

5. The prevailing party, in a proceeding under ss. 120.569 and 120.57 authorized by s. 72.011(1), may recover all legal costs incurred in such proceeding, including reasonable attorney's fees, if the losing party fails to raise a justiciable issue of law or fact in its petition or response.

6. Upon review pursuant to s. 120.68 of final agency action concerning an assessment of tax, penalty, or interest with respect to a tax imposed under chapter 212, or the denial of a refund of any tax imposed under chapter 212, if the court finds that the Department of Revenue improperly rejected or modified a conclusion of law, the court may award reasonable attorney's fees and reasonable costs of the appeal to the prevailing appellant.

(c) *Proceedings to establish paternity or paternity and child support; orders to appear for genetic testing; proceedings for administrative support orders.*—In proceedings to establish paternity or paternity and child support pursuant to s. 409.256 and proceedings for the establishment of administrative support orders pursuant to s. 409.2563, final orders in cases referred by the Department of Revenue to the Division of Administrative Hearings shall be entered by the division's administrative law judge and transmitted to the Department of Revenue for filing and rendering. The Department of Revenue has the right to seek judicial review under s. 120.68 of a final order entered by an administrative law judge. The Department of Revenue or the person ordered to appear for genetic testing may seek immediate judicial review under s. 120.68 of an order issued by an administrative law judge pursuant to s. 409.256(5)(b). Final orders that adjudicate paternity or paternity and child support pursuant to s. 409.256 and administrative support orders rendered pursuant to s. 409.2563 may be enforced pursuant to s. 120.69 or, alternatively, by any method prescribed by law for the enforcement of judicial support orders, except con-

tempt. Hearings held by the Division of Administrative Hearings pursuant to ss. 409.256, 409.2563, and 409.25635 shall be held in the judicial circuit where the person receiving services under Title IV-D resides or, if the person receiving services under Title IV-D does not reside in this state, in the judicial circuit where the respondent resides. If the department and the respondent agree, the hearing may be held in another location. If ordered by the administrative law judge, the hearing may be conducted telephonically or by videoconference.

(15) DEPARTMENT OF HEALTH.—Notwithstanding s. 120.57(1)(a), formal hearings may not be conducted by the State Surgeon General, the Secretary of Health Care Administration, or a board or member of a board within the Department of Health or the Agency for Health Care Administration for matters relating to the regulation of professions, as defined by chapter 456. Notwithstanding s. 120.57(1)(a), hearings conducted within the Department of Health in execution of the Special Supplemental Nutrition Program for Women, Infants, and Children; Child Care Food Program; Children's Medical Services Program; the Brain and Spinal Cord Injury Program; and the exemption from disqualification reviews for certified nurse assistants program need not be conducted by an administrative law judge assigned by the division. The Department of Health may contract with the Department of Children and Family Services for a hearing officer in these matters.

(16) DEPARTMENT OF ENVIRONMENTAL PROTECTION.—Notwithstanding the provisions of s. 120.54(1)(d), the Department of Environmental Protection, in undertaking rulemaking to establish best available control technology, lowest achievable emissions rate, or case-by-case maximum available control technology for purposes of s. 403.08725, shall not adopt the lowest regulatory cost alternative if such adoption would prevent the agency from implementing federal requirements.

(17) FLORIDA BUILDING COMMISSION.—

(a) Notwithstanding the provisions of s. 120.542, the Florida Building Commission may not accept a petition for waiver or variance and may not grant any waiver or variance from the requirements of the Florida Building Code.

(b) The Florida Building Commission shall adopt within the Florida Building Code criteria and procedures for alternative means of compliance with the code or local amendments thereto, for enforcement by local governments, local enforcement districts, or other entities authorized by law to enforce the Florida Building Code. Appeals from the denial of the use of alternative means shall be heard by the local board, if one exists, and may be appealed to the Florida Building Commission.

(c) Notwithstanding ss. 120.565, 120.569, and 120.57, the Florida Building Commission and hearing officer panels appointed by the commission in accordance with s. 553.775(3)(c)1. may conduct proceedings to review decisions of local building code officials in accordance with s. 553.775(3)(c).

**History.**—s. 41, ch. 96-159; s. 13, ch. 98-166; s. 10, ch. 99-8; s. 4, ch. 99-397; s. 1, ch. 2000-141; s. 17, ch. 2000-151; s. 2, ch. 2000-160; s. 11, ch. 2000-304; s. 4, ch. 2000-305; ss. 2, 11, ch. 2000-312; s. 4, ch. 2000-355; s. 3, ch. 2000-367; s.

18, ch. 2001-158; s. 2, ch. 2001-279; s. 8, ch. 2002-173; s. 1, ch. 2002-239; s. 3, ch. 2003-36; s. 139, ch. 2003-261; s. 1, ch. 2004-52; s. 7, ch. 2004-334; ss. 12, 13, ch. 2005-39; s. 1, ch. 2005-96; s. 13, ch. 2005-147; s. 1, ch. 2005-209; s. 5, ch. 2006-45.

<sup>1</sup>Note.—Chapter 2007-40 redesignated the Secretary of Health as the State Surgeon General.

### **120.81 Exceptions and special requirements; general areas.—**

#### **(1) EDUCATIONAL UNITS.—**

(a) Notwithstanding s. 120.536(1) and the flush left provisions of s. 120.52(8), district school boards may adopt rules to implement their general powers under s. 1001.41.

(b) The preparation or modification of curricula by an educational unit is not a rule as defined by this chapter.

(c) Notwithstanding s. 120.52(15), any tests, test scoring criteria, or testing procedures relating to student assessment which are developed or administered by the Department of Education pursuant to s. 1003.43, s. 1003.438, s. 1008.22, or s. 1008.25, or any other statewide educational tests required by law, are not rules.

(d) Notwithstanding any other provision of this chapter, educational units shall not be required to include the full text of the rule or rule amendment in notices relating to rules and need not publish these or other notices in the Florida Administrative Weekly, but notice shall be made:

1. By publication in a newspaper of general circulation in the affected area;

2. By mail to all persons who have made requests of the educational unit for advance notice of its proceedings and to organizations representing persons affected by the proposed rule; and

3. By posting in appropriate places so that those particular classes of persons to whom the intended action is directed may be duly notified.

(e) Educational units, other than the state universities and the Florida School for the Deaf and the Blind, shall not be required to make filings with the committee of the documents required to be filed by s. 120.54 or s. 120.55(1)(a)4.

(f) Notwithstanding s. 120.57(1)(a), hearings which involve student disciplinary suspensions or expulsions may be conducted by educational units.

(g) Sections 120.569 and 120.57 do not apply to any proceeding in which the substantial interests of a student are determined by a state university or a community college.

(h) Notwithstanding ss. 120.569 and 120.57, in a hearing involving a student disciplinary suspension or expulsion conducted by an educational unit, the 14-day notice of hearing requirement may be waived by the agency head or the hearing officer without the consent of parties.

(i) For purposes of s. 120.68, a district school board whose decision is reviewed under the provisions of s. 1012.33 and whose final action is modified by a superior administrative decision shall be a party entitled to judicial review of the final action.

(j) Notwithstanding s. 120.525(2), the agenda for a special meeting of a district school board under author-

ity of s. 1001.372(1) shall be prepared upon the calling of the meeting, but not less than 48 hours prior to the meeting.

(k) Students are not persons subject to regulation for the purposes of petitioning for a variance or waiver to rules of educational units under s. 120.542.

#### **(2) LOCAL UNITS OF GOVERNMENT.—**

(a) Local units of government with jurisdiction in only one county or part thereof shall not be required to make filings with the committee of the documents required to be filed by s. 120.54.

(b) Notwithstanding any other provision of this chapter, units of government with jurisdiction in only one county or part thereof need not publish required notices in the Florida Administrative Weekly, but shall publish these notices in the manner required by their enabling acts for notice of rulemaking or notice of meeting. Notices relating to rules are not required to include the full text of the rule or rule amendment.

#### **(3) PRISONERS AND PAROLEES.—**

(a) Notwithstanding s. 120.52(12), prisoners, as defined by s. 944.02, shall not be considered parties in any proceedings other than those under s. 120.54(3)(c) or (7), and may not seek judicial review under s. 120.68 of any other agency action. Prisoners are not eligible to seek an administrative determination of an agency statement under s. 120.56(4). Parolees shall not be considered parties for purposes of agency action or judicial review when the proceedings relate to the rescission or revocation of parole.

(b) Notwithstanding s. 120.54(3)(c), prisoners, as defined by s. 944.02, may be limited by the Department of Corrections to an opportunity to present evidence and argument on issues under consideration by submission of written statements concerning intended action on any department rule.

(c) Notwithstanding ss. 120.569 and 120.57, in a preliminary hearing for revocation of parole, no less than 7 days' notice of hearing shall be given.

(4) REGULATION OF PROFESSIONS.—Notwithstanding s. 120.569(2)(g), in a proceeding against a licensed professional or in a proceeding for licensure of an applicant for professional licensure which involves allegations of sexual misconduct:

(a) The testimony of the victim of the sexual misconduct need not be corroborated.

(b) Specific instances of prior consensual sexual activity between the victim of the sexual misconduct and any person other than the offender is inadmissible, unless:

1. It is first established to the administrative law judge in a proceeding in camera that the victim of the sexual misconduct is mistaken as to the identity of the perpetrator of the sexual misconduct; or

2. If consent by the victim of the sexual misconduct is at issue and it is first established to the administrative law judge in a proceeding in camera that such evidence tends to establish a pattern of conduct or behavior on the part of such victim which is so similar to the conduct or behavior in the case that it is relevant to the issue of consent.

(c) Reputation evidence relating to the prior sexual conduct of a victim of sexual misconduct is inadmissible.

(5) HUNTING AND FISHING REGULATION.—Agency action which has the effect of altering established hunting or fishing seasons, or altering established annual harvest limits for saltwater fishing if the procedure for altering such harvest limits is set out by rule of the Fish and Wildlife Conservation Commission, is not a rule as defined by this chapter, provided such action is adequately noticed in the area affected through publishing in a newspaper of general circulation or through notice by broadcasting by electronic media.

(6) RISK IMPACT STATEMENT.—The Department of Environmental Protection shall prepare a risk impact statement for any rule that is proposed for approval by the Environmental Regulation Commission and that establishes or changes standards or criteria based on impacts to or effects upon human health. The Department of Agriculture and Consumer Services shall prepare a risk impact statement for any rule that is proposed for adoption that establishes standards or criteria based on impacts to or effects upon human health.

(a) This subsection does not apply to rules adopted pursuant to federally delegated or mandated programs

where such rules are identical or substantially identical to the federal regulations or laws being adopted or implemented by the Department of Environmental Protection or Department of Agriculture and Consumer Services, as applicable. However, the Department of Environmental Protection and the Department of Agriculture and Consumer Services shall identify any risk analysis information available to them from the Federal Government that has formed the basis of such a rule.

(b) This subsection does not apply to emergency rules adopted pursuant to this chapter.

(c) The Department of Environmental Protection and the Department of Agriculture and Consumer Services shall prepare and publish notice of the availability of a clear and concise risk impact statement for all applicable rules. The risk impact statement must explain the risk to the public health addressed by the rule and shall identify and summarize the source of the scientific information used in evaluating that risk.

(d) Nothing in this subsection shall be construed to create a new cause of action or basis for challenging a rule nor diminish any existing cause of action or basis for challenging a rule.

**History.**—s. 42, ch. 96-159; s. 17, ch. 97-176; s. 49, ch. 99-2; s. 65, ch. 99-245; s. 7, ch. 99-379; s. 28, ch. 99-398; s. 4, ch. 2000-214; s. 897, ch. 2002-387.