

# Section 120.535

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## CHAPTER 91-30

Section 3. Section 120.535, Florida Statutes, is created to read:

120.535 Rulemaking required.

(1) Rulemaking is not a matter of agency discretion. Each agency statement defined as a rule under s. 120.52(16) shall be adopted by the rulemaking procedure provided by s. 120.54 as soon as feasible and practicable. Rulemaking shall be presumed feasible and practicable to the extent provided by this subsection unless one of the factors provided by this subsection is applicable.

(a) Rulemaking shall be presumed feasible unless the agency proves that:

1. The agency has not had sufficient time to acquire the knowledge and experience reasonably necessary to address a statement by rulemaking; or
2. Related matters are not sufficiently resolved to enable the agency to address a statement by rulemaking; or
3. The agency is currently using the rulemaking procedure expeditiously and in good faith to adopt rules which address the statement.

(b) 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:

1. Detail or precision in the establishment of principles, criteria, or standards for agency decisions is not reasonable under the circumstances; or
2. 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 interest of a party based on individual circumstances.

(2)(a) Any person substantially affected by an agency statement may seek an administrative determination that the statement violates subsection (1). A petition for an administrative determination that the statement violates subsection (1). A petition for an administrative determination of an agency statement shall be in writing and shall state with particularity facts sufficient to show:

1. That the person is substantially affected by the statement.

2. That the statement constitutes a rule under s. 120.52(16), in which case the petition shall include the text of the statement or a description of the statement.

3. That the agency has not adopted the statement by the rulemaking procedure provided in s. 120.54.

(b) The petition shall be filed with the division which shall, immediately upon receipt, forward copies to the agency whose statement is challenged, to the Department of State, and to the committee. The Department of State shall publish notice of petition which shall include the text or a description of each statement challenged in the first available issue of the Florida Administrative Weekly pursuant to s. 120.55(1)(b). Within 10 days after receiving the petition, the division director shall, if the petition complies with the above requirements, assign a hearing officer who shall conduct a hearing within 30 days thereafter, unless the petition is withdrawn. The hearing officer may extend the hearing date for good cause. If a hearing is held and the petitioner proves that allegations of the petition, the agency shall have the burden of proving that rulemaking is not feasible and practicable under subsection (1).

(3) Within 30 days after the hearing, the hearing officer shall render a decision and state the reasons for the decision in writing. The hearing officer may determine whether all or part of a statement violates subsection (1). The decision of the hearing officer 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.

(4) When a hearing officer determines that all or part of an agency statement violates subsection (1), that agency shall immediately discontinue all reliance upon the statement or any substantially similar statement as a basis for agency action.

(5) Subsequent to a determination that an agency statement violates subsection (1), if an agency publishes, pursuant to s. 120.54(4), proposed rules which address the statement and proceeds expeditiously and in good faith to adopt rules which address that statement, the agency shall be permitted to reply upon the statement or a substantially similar statement as a basis for agency action. If an agency fails to adopt rules which address the statement within 180 days of publishing proposed rules, for purposes of this section, a presumption is created that the agency is not action expeditiously and in good faith to adopt rules. If the agency's proposed rules are challenged pursuant to s. 120.54(4), the 180-day period for adoption of rules is tolled until a final order is entered in the proceeding.

(6) Subsequent to determination that an agency statement violates subsection (1), if an agency relies upon the statement or any substantially similar statement as the basis for agency action, and the substantial interests of a person are determined by the agency action, that person is entitled to payment by the agency of reasonable costs and attorney's fees incurred by the person, if the person successfully demonstrates that the agency is not permitted to rely upon the statement as a basis for agency action under subsection (4) or subsection (5). If an agency publishes proposed rules and proceeds expeditiously and in good faith to adopt such rules under subsection (5), the agency shall not be required to pay costs and attorney's fees pursuant to this

subsection. An action to recover costs and attorney's fees may be brought pursuant to s. 120.57(1) or this section. 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.

(7) Hearings held under this section shall be conducted in the same manner as provided in s. 120.57, except that the hearing officer's order shall be final agency action.

(8) All proceedings to determine a violation of subsection (1) shall be brought pursuant to this section. A proceeding pursuant to this section may be brought in conjunction with a proceeding under any other section of this chapter, or consolidated with such a proceeding.

(9) Prisoners as defined in s. 944.02(5) are not eligible to seek an administrative determination of an agency statement under this section.

### **CHAPTER 91-191**

AN ACT relating to administrative procedures; amending ss. 10, 11, 12, HB 1879, enacted in the 1991 regular session, relating to administrative procedures; changing the effective date of HB 1879; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Sections 10, 11, and 12 of House Bill 1879, enacted in the 1991 regular session, are amended to read:

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

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

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

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

Approved by the Governor May 28, 1991.

Filed in Office Secretary of State May 28, 1991.

## **CHAPTER 92-166**

Section 5. Subsection (10) is added to section 120.535, Florida Statutes, to read:

120.535 Rulemaking required.--

(10) Agency statements that relate to cost-recovery clauses, factors, or mechanisms implemented pursuant to chapter 366 are exempt from the requirements of this section.

## **CHAPTER 96-159**

Section 1. It is the intent of the Legislature to consider the impact of any agency rulemaking required by proposed legislation and to determine whether the proposed legislation provides adequate and appropriate standards and guidelines to direct the agency's implementation of the proposed legislation.

Section 8. Section 120.535, Florida Statutes, is hereby repealed.

Section 9. (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, interpret, or make specific the particular 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, 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 the particular powers and duties conferred by the same statute.

(2) By October 1, 1997, each agency shall provide to the Administrative Procedures Committee a listing of each rule, or portion thereof, adopted by that agency before October 1, 1996, which exceeds the rulemaking authority permitted by this section. For those rules of which only a portion exceeds the rulemaking authority permitted by this section, the agency shall also identify the language of the rule which exceeds this authority. The Administrative Procedures Committee shall combine the lists and provide the cumulative listing to the President of the Senate and the Speaker of the House of Representatives. The Legislature shall, at the 1998 Regular Session, consider whether specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 1999, each agency shall initiate proceedings pursuant to s. 120.54, Florida Statutes, to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist. By February 1, 1999, the Administrative Procedures Committee shall submit to the President of the Senate and the Speaker of the House of Representatives a report identifying those rules that an agency had previously identified as exceeding the rulemaking authority permitted by this section for which proceedings to repeal the rule have not been initiated. As of July 1, 1999, 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) All proposed rules or amendments to existing rules filed with the Department of State on or after October 1, 1996, shall be based on rulemaking authority no broader than that permitted by this section. A rule adopted before October 1, 1996, and not included on a list submitted by an agency in accordance with subsection (2) may not be challenged before November 1, 1997, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section. A rule adopted before October 1, 1996, and included on a list submitted by an agency in accordance with subsection (2) may not be challenged before July 1, 1999, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section.

(4) 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.