CHANGES IN THE ADMINISTRATIVE PROCEDURE ACT
BY THE 1976 LEGISLATURE

Chapter 76-131, Laws of Florida

Chapter 76-131, the general revision to the Administrative Procedure Act, is primarily a house-keeping and clarifying Act. Prior to this amendment the Act appeared to require each agency to adopt every form it uses as a rule. Because this would clutter up the Code and impose an unnecessary burden and expense upon the agencies, this amendment requires only that each agency adopt a list of its forms and state how a copy may be obtained without cost. To avoid having an agency impose a requirement or solicit information by the use of a form, the Act is amended to require forms which have this effect to be adopted as rules.

Internal management memoranda are further defined to exclude any such memoranda which have an effect outside the agency promulgating them and to place such memoranda in the general category of rules.

The requirement that meetings, hearings and workshops be noticed is made clear and agendas for them must now be prepared in time to reach any person requesting one not less than seven (7) days prior to the meeting.

Conforming to a judicial decision, the jurisdiction of the Division of Administrative Hearings to declare a rule invalid on the ground that the legislative authority is invalidly delegated is deleted and an agency whose rule is declared invalid is now required to give notice in the Florida Administrative Weekly.

The actions an agency may take relative to a proposed rule during the various phases of the adoption process are clearly set out and the fact that existing rules are subject to committee review is clearly stated. Procedures for responding to objections by the committee are provided. The period during which an agency must respond to a committee objection is increased from thirty (30) to forty-five (45) days when the agency is headed by a collegial body.

Agencies are permitted to adopt implementing rules prior to the effective date of statutes under prescribed circumstances but such rules may not be enforced until the statute is effective.

Copies of various petitions and agency responses to petitions are required to be transmitted to the committee and some are required to be published in the Florida Administrative Weekly.

Subscription price of the Florida Administrative Weekly is increased from five dollars ($5) to twenty-five dollars ($25), and seven (7) copies of the Code and Weekly are made available to the committee without charge.

Educational units conducting student expulsion or suspension hearings are exempt from a minimum notice requirement and the requirement that a hearing officer from the Division be used.

The intent of the Legislature that its members and employees not be subject to subpoena to testify relative to their legislative duties is clearly stated.

Agencies receiving applications for licenses or permits are required to request needed additional information within a specified time and to issue or deny the requested license within ninety (90) days. Certain exceptions are provided and other exceptions may be granted by the Administration Commission on a case-by-case basis.

Supersedeas is made a matter of right, under specified conditions, when judicial review is sought of an agency action which has the effect of suspending or revoking a license.

Some provisions of the Act are transferred from one section to another or are placed in new sections in the interest of providing a logical arrangement of material and making the Act easier to work with.

Chapter 76-207, Laws of Florida

Because at least one court had held that the transitional provisions of §120.72, F.S., applied only to administrative adjudicative proceedings conducted under the provisions of Chapter 120, it was necessary to amend this section to make it clear that these provisions apply to these proceedings regardless of the statute under which they had been begun. The Department of Revenue was exempt from the old Administrative Procedure Act, and it was this type of hearing to which this amendment was principally addressed.

Chapter 76-276, Laws of Florida

This law is a modification of Chapter 76-1, The Florida Economic Impact Disclosure Act of 1975, which was passed over the Governor's veto and which is repealed by this act.

There are several significant differences in the two acts:

1. The present act requires a statement of economic impact only upon agency <u>rules</u>, while the repealed act spoke to all agency <u>actions</u>.

2. The present act requires the Legislature to "consider" any economic impact a proposed law will have on the public, a requirement not found in Chapter 76-1.

3. The provisions of Chapter 76-1 permitting members of the Legislature, the Governor or members of the Cabinet to request an economic impact statement on proposed agency action is not found in the present act.

4. Both acts require the preparation of a statement of economic impact for all agency rules. The repealed act required the full statement to be filed with the Department of State and with the Joint Administrative Procedures Committee, while the present act requires only the filing of ". . . a summary of the estimate of the economic impact of the proposed rule. . . . ."

Both laws eliminate the agencies' option of determining that a statement of economic impact is impossible to estimate and stating the reasons for the determination rather than the economic impact estimate.

Senate Bill 1384

Senate Bill 1384 was the implementing legislation for the Constitutional Amendment proposed by Committee Substitute for Senate Joint Resolutions 619 and 1398 and its effective date was contingent upon voter approval of the proposed amendment. The bill was vetoed by the Governor on June 29, 1976.

This bill created §120.547, F.S., to replace §120.545, F.S., which it was to repeal. The first five subsections were identical to the corresponding subsections of existing law and the final three subsections set out the procedures to be used by the Joint Administrative Procedures Committee when an agency refused to modify, amend, withdraw or repeal a rule to which the Committee had objected.

Under these provisions, the Committee was required to notify the Department of State whenever an agency had refused to modify, amend, withdraw or repeal a rule in response to an objection by the Committee or whenever the agency had failed to respond to an objection within the prescribed time. Upon receipt of the Committee's notice, the Department of State was required to give notice in the Florida Administrative Weekly of the Committee's action. Effective upon publication of this notice, the rule would have been suspended until acted upon by the full Legislature by concurrent resolution.

The suspension of any rule could have been deferred until acted upon by the Legislature by a majority vote of the Governor and Cabinet and would have terminated upon consideration by the Legislature. If the concurrent resolution disapproving a rule were to have been passed by both houses of the Legislature, the temporary suspension would have been replaced by a permanent nullification. If the concurrent resolution failed, the suspension would have terminated and the rule would have resumed full force and effect five (5) days following the final vote on the resolution.

CS/SCR 619/1398

Under the present provisions of the Administrative Procedure Act, as amended by the 1976 Legislature, an agency is provided three (3) options whenever the Joint Administrative Procedures Committee objects to a rule. The agency may withdraw the rule in whole or in part; it may modify the rule to meet the objection; or <u>it may refuse to modify or withdraw</u>. If the agency refuses to modify or withdraw a rule, the Committee's only authorized response is to run a notice in the Florida Administrative Weekly stating the grounds for the objection and to require that a footnote be placed with the rule in the Florida Administrative Code stating that the Committee has found the rule to be outside the delegated legislative authority.

When the Act was originally drafted, it was felt that the expressed, publicized disapproval of a joint standing committee of the Legislature would be a sufficient deterrent to protect the people of Florida from the effects of unlawful rules and regulations. In short, it was anticipated that it would be a rare occasion when an agency would refuse to modify a rule to which the Committee had objected and would insist upon continuing to enforce it after having been notified that the rule was without authority and violative of legislative intent.

Within a very short time, it became apparent that this was an overly optimistic attitude. At the Committee's second meeting in February 1975, a rule was found to be totally without statutory authority. The agency promptly refused to modify to meet that objection and that rule is still being enforced today, some seventeen (17) months later.

This tendency of the various agencies of the state to refuse to modify or withdraw an objectionable rule accelerated rapidly. At the June 1975 meeting there were eleven (11) refusals to modify or withdraw rules which the Committee found to be invalid. Apparently, the Committee's footnote in the Florida Administrative Code had proved ineffective and the agencies had learned that a rule to which the Committee had objected could be enforced just as effectively as a legal rule.

This situation reached its apex in January of this year. Following the Committee's January meeting there were nineteen (19) refusals to modify, compounded by three (3) cases in which the agency agreed to modify but in which no action has been taken as of this date, and eight (8) other cases in which the agency agreed to modify but the proposed modifications were not within statutory authority. During the first half of this year, the various agencies refused to withdraw or modify forty-eight (48) illegal rules to which the Committee had certified an objection.

The concept of legislative oversight is the cornerstone of the Administrative Procedure Act. If the Committee's review of administrative rules is to have no effect, then the effectiveness of the whole act is so diminished as to make it questionable whether the remaining provisions of the Act can be justified. It became obvious that unless the Committee's review could be made genuinely meaningful the basic thrust of the Act would be thwarted.

The 1976 Legislature acted to remedy this situation. By a unanimous vote of both houses, an amendment to the State Constitution was submitted to the voters for approval at the next General Election.

The proposed amendment is simplicity, itself. It states very clearly, that if the Legislature as a whole finds that a rule is without, or in excess of, delegated legislative authority, the rule may be nullified by a Concurrent Resolution passed by both houses.

Then, to cover rules promulgated while the Legislature is not in session, and thus to prevent submitting the people of Florida to an illegal rule for as long as ten (10) months, the amendment provides for the suspension of administrative rules on the same grounds, ". . . as provided by law." This suspension could last only until the following session of the Legislature at which time the suspension would self-destruct under every circumstance.

Next, in order to be completely sure that there could never be a situation in which any harm could come to the people of Florida as a result of a rule suspension, the amendment permits the Governor and Cabinet, by a majority vote, to defer the suspension until the next session.

What the amendment does can be stated in a few words: Whenever an agency adopts an illegal rule, that is, a rule which goes beyond its legislatively delegated authority, that rule may be nullified by a Concurrent Resolution of the full Legislature and may be suspended as provided by law in the interim unless the Governor and Cabinet act to defer the suspension.

What the amendment does NOT do requires a little more space and a few more words:

1. It is NOT an intrusion by the Legislature into the Executive Branch. On the contrary, it is a shield against further intrusions into the Legislative Branch by Executive agencies. Whenever an agency promulgates a rule without legislative authority, it has usurped the Legislature's law-making prerogative and has imposed an illegal law upon the people.

2. It is NOT an intrusion by the Legislature into the Judicial Branch for it does NOT deprive any citizen of any right to any kind of administrative or judicial proceeding now available to him.

3. It does NOT give the Legislature or its Committee any authority to suspend or to nullify any rule on any ground or for any reason except that the agency did not have authority to make the rule in the first place.

4. It is NOT, to quote the Governor's veto message to the implementing legislation, Senate Bill 1384, ". . . .an experiment in government foreign to our tradition of checks and balances. . . ." It is, instead, a decided enhancement of the checks and balances inherent in our scheme of government. What could be more appropriate than to have the Legislature check upon legislatively created authority?

5. It is NOT, again to quote the Governor's veto message, ". . . .an effort to sidestep the role of the Governor in the lawmaking process." A Concurrent Resolution nullifying an administrative rule is not a part of the law-making process. It is a legislative rebuke to an agency and an enforceable demand that the agency cease to usurp the law-making function of the Legislature.

It has become apparent that this amendment will face opposition at the polls this November. The Governor, in his veto message to Senate Bill 1384 has indicated that he will strongly oppose it and, of course, we may expect him to be joined by many of the agencies of the Executive Branch. As a result, smoke screens will no doubt be laid down, confusing and extraneous issues will probably be raised and numerous red herrings drawn across the trail. It, therefore, appears to be important that the voting public be made aware of the simple, basic premise of the amendment.

Although Florida was in the vanguard of states providing legislative review of administrative rules, the effectiveness of our program is falling behind. Of the twenty-two (22) states which have legislative review, fourteen (14) permit the Legislature to nullify rules and of these, four (4) provide for suspension by a legislative committee. In all but one of these states, the mechanism for nullification is by resolution.

The amendment permits an ILLEGAL rule to be nullified by the Legislature and suspended with the consent of the Governor and Cabinet until the Legislature meets. Those who support this amendment believe that agencies should not promulgate rules which go beyond the authority granted by the Legislature. Those who oppose the amendment apparently believe that it is perfectly all right to subject the people of Florida to rules and regulations which are unauthorized, illegal and often in direct conflict with laws duly enacted by their elected representatives.