SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stengle	Swindell	1.GO	
2.			2.	
3.			3.	

SUBJECT: BILL NO. AND SPONSOR:

Administrative Procedure Act

Proposed CS/SB 608 by Governmental Operations and Senator W.D. Childers

I. SUMMARY:

A. Present Situation:

Chapter 120, F.S., the Administrative Procedure Act, establishes the procedures required for an executive agency to promulgate rules. Section l20.54(15), F.S., provides that no agency has inherent rulemaking authority, but an agency may adopt rules to properly implement statutes. Section 120.54(7), F.S., requires that each rule adopted be accompanied by a reference to the specific section of law that authorizes the agency rulemaking, as well as by a reference to the section of law that is being implemented by rule.

As a check on legislatively delegated rulemaking authority, s. 120.545, F.S., requires the Administrative Procedures Committee to examine each proposed rule and determine whether the rule is within the statutory authority upon which it is based. If the committee determines that it is not, the committee may object to the rule.

Sections 120.54(4) and 120.56, F.S., allow affected persons to seek an administrative determination by a hearing officer in the Division of Administrative Hearings (DOAH) whether a proposed rule or existing rule is an invalid exercise of delegated legislative authority. Chapter 120, F.S., does not specifically define "invalid exercise of delegated legislative authority."

In s. 120.68, F.S., district courts of appeal are given appellate review authority over agency rulemaking, as well as final orders of DOAH hearing officers in challenges to proposed and existing rules. There is no requirement that the Administrative Procedures Committee be notified of any such appeal. Numerous appellate decisions have defined the scope of an invalid exercise of delegated legislative authority, which includes an agency materially failing to adhere to the required rulemaking procedures of s. 120.54, F.S. [e.g., Florida State University v. Dann, 400 So.2d 1304 (Fla. 1st DCA 1981)]; an agency exceeding the scope of its legislatively delegated authority [e.g, 4245 Corp. v. Division of Beverage, 371 So.2d 1032 (Fla. 1st DCA 1978)]; an agency rule enlarging, modifying, or contravening specific provisions of the law it is implementing [e.g., Grove Isle, Ltd. v. State Department of Environmental Regulation, 454 So.2d 571 (Fla. 1st DCA 1984)]; an agency adopting a rule that is impermissibly vague, that fails to establish adequate standards for agency decisions based on the rule, or that vests unbridled discretion in the agency [e.g., Barrow v. Holland, 125 So.2d 749 (Fla. 1960)]; and an agency adopting a rule that is arbitrary or capricious [e.q., Agrico Chemical Company v. State Department of

Environmental Regulation, et al., 365 So.2d 759 (Fla. 1st DCA 1978)].

Section 120.54(2)(b), F.S., requires each agency to prepare a detailed economic impact statement for each proposed rule, and to include therein an analysis of the proposed rule's impact on small business. Prior to intended rule adoption, s. 120.54(11)(a), F.S., requires the agency to file with the Administrative Procedures Committee its economic impact statement, which includes its analysis of the impact on small business, along with a separate written statement of the impact on small business. Thus, the agency is required to furnish duplicative information to the committee.

Section 120.57(b), F.S., 1986 Supp., allows affected persons to challenge agency action other than rulemaking by filing a hearing request with the agency, which must be granted or denied within 15 days. At its option, the agency may request that a DOAH hearing officer be assigned to conduct the hearing; the agency must make its request to DOAH within 10 days of its receipt of the request for hearing, 5 days less than the time allowed for the agency to deny the hearing request.

B. Effect of Proposed Changes:

The definition of "invalid exercise of delegated legislative authority" that is established in case law would be codified. Language requiring the Administrative Procedures Committee to determine whether a rule is within the authority upon which it is based would be replaced with language requiring the committee to determine whether a rule is an invalid exercise of delegated legislative authority. The bill would also prohibit an agency from citing legislative statements of intent or policy as the authority for the agency rulemaking.

The agency would be required to furnish the Administrative Procedures Committee with a copy of any notice of appeal seeking review of final agency action in challenges of proposed or existing rules.

The requirement that the agency submit a duplicative statement of the impact on small business to the Administrative Procedures Committee would be eliminated. The time within which an agency could request a DOAH hearing officer after receiving a request for hearing would be expanded from 10 days to 15 days to conform to the time period during which the hearing could be denied.

II. ECONOMIC IMPACT AND FISCAL NOTE:

A. Public:

None

B. Government:

None

III. COMMENTS:

An identical bill, HB 710, has been filed.

IV. AMENDMENTS:

None

A bill to be entitled

An act relating to the Administrative Procedure Act; amending s. 120.52, F.S., defining the term “invalid exercise of delegated legislative authority”; amending s. 120.54, F.S., prohibiting the use of general intent or general policy as a basis for rule promulgation; deleting the requirement that a separate statement of a rule’s effect upon small business be submitted to the committee; amending s. 120.545, F.S., providing clarifying language to create uniform terminology for review of rules; amending s. 120.57, F.S., providing 15 days for agency request for hearing officer; amending s. 120.59, F.S., clarifying statutory sections under which administrative hearing or judicial review is available; amending s. 120.68, F.S., requiring agencies to submit copies of certain appeal petitions to the committee; providing an effective date.

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

Section 1. Subsections (8) through (15) of section 120.52, Florida Statutes, are renumbered as subsections (9) through (16) respectively, and a new subsection (8) is added to said section to read:

120.52 Definitions.--As used in this act:

(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 anyone or more of the following apply:

(a) The agency has materially failed to follow the app1icable rulemaking procedures set forth in s. 120.54;

(b) The agency has exceeded its grant of ru1emaking authority, citation to which is required by s. 120.54(7);

(c) The rule en1arges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7);

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

(e) The rule is arbitrary or capricious.

Section 2. Subsection (7) and paragraph (a) of subsection (11) of section 120.54, Florida Statutes, 1986 Supplement, are amended to read:

120.54 Rulemaking; adoption procedures.- -

(7) Each rule adopted shall be accompanied by a reference to the specific rulemaking authority pursuant to which the rule was adopted and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific. No rule shall cite as the law implemented any legislative statement of general intent or general policy.

(11) (a) 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 the estimate of economic impact required by subsection (2); a statement of the extent to which the proposed rule establishes standards more restrictive than federal standards or a statement that the proposed rule is no more restrictive than federal standards or that a federal rule on the same subject does not exist; ~~a written statement of the impact on small business as defined in the Florida Small and Minority Business Assistance Act of 1985;~~ and the notice required by subsection (1). After the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, the adopting agency shall file any changes in the proposed rule and the reasons therefor with the committee or advise the committee that there are no changes. In addition, when any change is made in a proposed rule, other than a technical change, the adopting agency shall provide a detailed statement of such change by certified mail or actual delivery to any person who requests it in writing at the public hearing. The agency shall file the change with the committee, and provide the statement of change to persons requesting it, at least 7 days prior to filing the rule for adoption. Educational units, other than units of the State University System and the Florida School for the Deaf and the Blind, and local units of government with jurisdiction in only one county or part thereof shall not be required to make filings with the committee. This paragraph does not apply to emergency rules adopted pursuant to subsection (9). However, agencies, other than those listed herein, adopting emergency rules shall file a copy of each emergency rule with the committee.

Section 3. Paragraph (a) of subsection (1) of section 120.545, Florida Statutes, is amended to read:

120.545 Committee review of agency rules.--

(l) As a legislative check on legislatively created authority, the committee shall examine each proposed rule, except for those proposed rules exempted by s. 120.54(11)(a), and its accompanying material, and may examine any existing rule, for the purpose of determining whether:

(a) The rule is an invalid exercise of delegated legislative authority ~~within the statutory authority upon which it is based~~;

Section 4. Paragraph (b) of subsection (1) of section 120.57, Florida Statutes, 1986 Supplement, is amended to read:

120.57 Decisions which affect substantial interests. --

The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless such proceedings are exempt pursuant to subsection (5). Unless waived by all parties, subsection (l) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, subsection (2) applies in all other cases.

(l) FORMAL PROCEEDINGS.--

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

1. A request for a hearing shall be granted or denied within 15 days of receipt.

2. All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days; however, the l4-day notice requirement may be waived with the consent of all parties. In a preliminary hearing for the revocation of parole, no less than 7 days' notice shall be given. In a hearing involving a student disciplinary suspension or expulsion conducted by an educational unit, the 14-day notice requirement may be waived by the agency head or the hearing officer without the consent of the parties. The notice shall include:

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

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

c. A reference to the particular sections of the statutes and rules involved.

d. Except for any hearing before an unemployment compensation appeals referee, a short and plain statement of the matters asserted by the agency and by all parties of record at the time notice is given. If the agency or any party is unable to state the matters in sufficient detail at the time initial notice is given, the notice may be limited to a statement of the issues involved, and thereafter, upon timely written application, a more definite and detailed statement shall be furnished not less than 3 days prior to the date set for the hearing.

3. Except for any proceeding conducted as prescribed in s. 120.54(4) or s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency elects to request a hearing officer from the division, it shall so notify the division within <u>15</u> ~~10~~ days of receipt of the petition or request. 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 of receipt of the notice of appeal if the commission elects to request the assignment of a hearing officer. On the request of any agency, the division shall assign a hearing officer with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to the formal proceeding, except as a party litigant, as long as the division has jurisdiction over the formal proceeding. Any party may request the disqualification of the hearing officer by filing an affidavit with the division

prior to the taking of evidence at a hearing, stating the grounds with particularity.

4. 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 any order or hearing officer's recommended order, and to be represented by counsel. 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 it.

5. All pleadings, motions, or other papers filed in the proceeding must be signed by a party, the party's attorney, or the party's qualified representative. The signature of a party, a party's attorney, or a party's qualified representative constitutes a certificate that he has read the pleading, motion, or other paper and that, to the best of his knowledge, information, and belief formed after 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 hearing officer, upon motion or his own initiative, shall impose upon the person who signed it, a 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.

6. The record in a case governed by this subsection shall consist only of:

a. All notices, pleadings, motions, and intermediate rulings;

b. Evidence received or considered;

c. A statement of matters officially recognized;

d. Questions and proffers of proof and objections and rulings thereon;

e. Proposed findings and exceptions;

f. Any decision, opinion, proposed or recommended order, or report by the officer presiding at the hearing;

g. All staff memoranda or data submitted to the hearing 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;

h. All matters placed on the record after an ex parte communication pursuant to s. 120.66(2); and

i. The official transcript.

7. 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. In any proceeding before a hearing officer initiated by a consumptive use permit applicant pursuant to

subparagraph 13., the applicant shall bear the cost of accurately and completely preserving all testimony and providing full or partial transcripts to the water management district. At the request of any other party, full or partial transcripts shall be provided at no more than cost.

8. Findings of fact shall be based exclusively on the evidence of record and on matters officially recognized.

9. Except as provided in subparagraph 12., the hearing officer shall complete and submit to the agency and all parties a recommended order consisting of his findings of fact, conclusions of law, interpretation of administrative rules, and recommended penalty, if applicable, and any other information required by law or agency rule to be contained in the final order. The agency shall allow each party at least 10 days in which to submit written exceptions to the recommended order.

10. 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 and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete 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. When there is an appeal, the court in its discretion may award reasonable attorney’s fees and 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.

11. If the hearing officer assigned to a hearing becomes unavailable, the division shall assign another hearing officer who shall use any existing record and receive any additional evidence or argument, if any, which the new hearing officer finds necessary.

12. A hearing officer who is a member of an agency head may participate in the formulation of the final order of the agency, provided he has completed all his duties as hearing officer.

13. In any application for a license or merger pursuant to title XXXVIII which is referred by the agency to the division for hearing pursuant to this section, the hearing officer 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.

14. In any application for a consumptive use permit pursuant to part II of chapter 373, the water management district on its own motion may, or, at the request of the applicant for the permit, shall, refer the matter to the division for the appointment of a hearing officer to conduct a hearing under this section.

Section 5. Subsection (4) of section 120.59, Florida Statutes, is amended to read:

120.59 Orders.--

(4) Parties shall be notified either personally or by mail of any order; and, unless waived, a copy of the final order shall be delivered or mailed to each party or to his attorney of record. Each notice shall inform the recipient of any administrative hearing or judicial review that is available under ss. 120.57 or 120.68 ~~which may be available to him~~, shall indicate the procedure which must be followed to obtain the hearing or judicial review, and shall state the time limits which apply.

Section 6. Subsection (2) of Section 120.68, Florida Statutes, is amended to read:

120.68 Judicial review.--

(2) Except in matters for which judicial review by the Supreme Court is provided by law, all proceedings for review shall be instituted by filing a petition in the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides. If the appeal is of an order rendered in a proceeding initiated under subsection (4) of s. 120.54 or under s. 120.56, the agency whose rule is being challenged shall transmit a copy of the notice of to the committee. Review proceedings shall be conducted in accordance with the Florida Appellate Rules.

Section 7. This act shall take effect October 1, 1987.

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HOUSE SUMMARY

Defines the term “invalid exercise of delegated legislative authority” for the purpose of the Administrative Procedure Act. Provides that no rule shall cite as the law implemented any legislative statement of general intent or general policy. Provides that the Administrative Procedures Committee may examine any proposed or existing rule for the purpose of determining if the rule is an invalid exercise of delegated legislative authority.