

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

DATE: March 21, 1996 Revised: _____

SUBJECT: Administrative Rules

	<u>Analyst</u>	<u>Staff Director</u>	<u>Reference</u>	<u>Action</u>
1.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Favorable/CS</u>
2.	_____	_____	_____	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____

I. Summary:

The committee substitute seeks to resolve problems which were identified during the rule review initiative instituted by the Senate President during the interim. The problems that were identified were: (A) a lack of regular review of rules by agencies; (B) inefficient rules; (C) lack of rule coordination; (D) excess numbers of rules; and (E) rule inflexibility.

The committee substitute seeks to improve agency rules by requiring agencies to perform an annual review of rules and by requiring the filing of annual rule reports with the Legislature. Additionally, the annual review is intended to improve efficiency by requiring agencies to coordinate their rules with agencies with concurrent or overlapping jurisdiction to decrease costs and reduce paperwork for government and the private sector.

The committee substitute attempts to reduce the number of administrative rules through standardization of rules, where possible. The committee substitute would: delete a statutory requirement that the Department of Management Services (DMS) adopt rules regarding selective service registration and state employment; require the DMS to adopt uniform personnel rules, and provide exceptions; require DMS to adopt uniform sexual harassment rules that would apply to all executive agencies; require agencies to use model appointment and promotion rules adopted by DMS; remove a requirement that each agency adopt its own rules regarding the use of volunteers, and provide for uniform rules by the DMS; and require DMS to adopt uniform design-build contract rules.

The committee substitute would amend the following sections of the Florida Statutes: 110.1128, 110.201, 110.217, 110.503, 255.25, 287.055. The committee substitute would create section 110.1121, Florida Statutes.

II. Present Situation:

Chapter 120, F.S., the Administrative Procedure Act (APA), governs agency rulemaking. Section 120.52, F.S., defines a rule as an “agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedure, or practice requirements of an agency . . .” The term includes forms which impose requirement or solicit information not specifically required by statute or existing rule.

Rulemaking is not a matter of agency discretion. Section 120.535(1), F.S., provides that each agency statement which meets the definition of a rule must be adopted as a rule as soon as feasible and practicable. Rulemaking is presumed to be feasible and practicable unless the agency can prove otherwise.

By letter dated June 22, 1995, the President of the Senate requested state agencies to review their administrative rules and to submit recommendations regarding which rules could be repealed because “. . . they are unnecessary, redundant, overlapping or obsolete.” Furthermore, agencies were requested to review how their rules dictate the implementation of programs and their operation and to recommend how their rules could be modified or repealed in order to increase efficiency and effectiveness.

Fourteen agencies made individual responses to the Senate President’s letter. The remaining agencies made a coordinated response through the Governor’s office pursuant to Executive Orders 94-256 and 95-74. The fourteen agencies which responded individually to the Senate President’s rule review request identified 2,066 rules for repeal. In Stage One of the review, these fourteen agencies identified 224 rules which were obsolete; 292 rules which were redundant of other rules or statutes; 90 rules which overlapped other rules; 539 rules which were unnecessary; and 278 rules which they recommended for repeal for other reasons, for a total of 1,423 rules.

In Stage Two, these fourteen agencies recommended the repeal of an additional 643 rules. These fourteen agencies identified savings of \$1,131,078 from the repeal of these rules. In most instances, the repeal of rules did not require legislative action. Standing committees currently are reviewing the few instances where legislative action will be required to repeal rules.

The Governor’s Office provided a coordinated response for the remaining agencies on February 2, 1996. These rule repeal recommendations are being reviewed by standing committees and final calculations on these rule repeals are not yet complete.

Staff identified certain problems during the rule review process. The problems which were identified are:

A. Lack of Regular Review of Rules - During the rule review process, it became apparent that most agencies were not in the habit of regularly reviewing their rules. As a result, there were many rules which were obsolete or unnecessary. As stated above, the review conducted by the fourteen agencies which responded individually resulted in the identification of 224 rules which were obsolete and 539 rules which were unnecessary.

B. Rule Inefficiency - In addition to the inefficiency caused by maintaining obsolete and unnecessary rules in the Florida Administrative Code, additional rule inefficiency was observed in the identification of 292 rules which were redundant of other rules or statutes.

C. Lack of Coordination - There were 90 rules which were identified as overlapping of other rules. Rules of other agencies which provide overlapping regulation were not identified in the review process.

D. Excess Rules - The fourteen agencies which responded individually identified 278 rules which did not fit into the unnecessary, redundant, overlapping, or obsolete categories. They also identified an additional 643 rules recommended for repeal in Stage Two. As well, it would be appropriate to include the unnecessary (539 rules) and redundant rules (292 rules) which were identified under this heading.

E. Rule Inflexibility - When agencies adopt rules to implement, enforce, and interpret a statute, they cannot address every possible situation which might fall within the statutory scheme or the administrative rule. No matter how well-drafted a rule is, it is not uncommon for an agency to be faced with a situation that it did not contemplate when drafting the rule. If an agency is never able to provide a waiver or variance to the rule, there may be circumstances when its literal, rigid application may cause an undue hardship on a regulated person; may cause that regulated person to be treated unfairly; or may lead to absurd results.

During the interim, waiver of rules and variances to rules were considered as means to permit agencies more flexibility in the application of their rules. When a rule is waived, the entire rule is not applied. When a variance to a rule is granted, the rule is still applied, but one or more of its requirements are altered. While authority to grant waivers or variances would result in more rule flexibility, there are statutory and constitutional issues which must be considered prior to providing a general grant of authority to permit waivers and variances.

A rule cannot substantively modify or amend the empowering statute by adding or deleting requirements. Neither can an agency, without sufficient statutory criteria expressed in the statute, create waivers or exemptions which vary a statute's impact by restricting or limiting its operation.¹ In the case, Booker Creek Preservation, Inc. v. Southwest Florida Water Management District², the court distinguished statutory authority which required adoption of a rule establishing permitting criteria for activity in certain wetlands with statutory authority which only authorized, but did not require, the adoption of a rule to require permits for management and storage of surface waters. In the former, the court concluded that there was no authority to create exemptions to the wetland permit which were not specified in statute because the legislature had mandated that a permit was required for activity in this type of wetland, and it

¹Booker Creek Preservation, Inc. v. Southwest Florida Water Management District, 534 So. 2d 419 (Fla. 5th DCA 1988).

² *Ibid.*

was ultra vires for an exemption to be granted. In the latter case, however, the court reasoned that because the authority to adopt the rule for management and storage of surface water was permissible only if it did not impose a legislative requirement. As the surface water permit had been created by the district as it was permitted (but not required) to do, the district also could create exemptions in its rule, so long as they were consistent with statute. In other words, “. . . what an agency in its own discretion chooses to require, it may also choose not to require.”³

An agency may provide an explicit exemption within a rule or provide authority (and criteria) for waiver on a case-by-case basis.⁴ Waiver may be based upon equitable considerations if statutory authority supports it.⁵ Furthermore, “. . . it is now well established that an agency may not waive its rule unless the rule expressly so provides.”⁶ Currently, the Florida Administrative Code contains many rules which permit waiver or variance.⁷

The Department of Management Services (DMS) is created by s. 20.22(1), F.S. The head of DMS is a secretary appointed by the Governor, subject to confirmation by the Senate. Section 20.22(2), F.S., provides for the establishment of twelve divisions within DMS: (1) Administration; (2) Building Construction; (3) Communications; (4) Facilities Management; (5) Information Services; (6) Motor Pool; (7) Aircraft; (8) Motor Vehicles; (9) Personnel Management Services; (10) Purchasing; (11) Retirement; (12) State Employees’ Insurance; (13) Administrative Hearings; and (14) Capitol Police.

³ F. Scott Boyd, *How the Exception Makes the Rule: Agency Waiver of Statutes, Rules, and Precedent in Florida*, 7 St. Thomas L. Rev. 287, 299 (1995).

⁴ *Ibid* at 299.

⁵ *Ibid* at 299.

⁶ F. Scott Boyd, *How the Exception Makes the Rule: Agency Waiver of Statutes, Rules, and Precedent in Florida*, 7 St. Thomas L. Rev. 287, 299 (1995).

⁷ Staff conducted a computerized search of the Florida Administrative Code where the words “rule” and “waiver” and “rule” and “variance” were used in the same sentence. The computer identified 427 instances using “waiver” and 143 instances using “variance.” Upon review of the provisions, not all involved the type of waiver and variance under consideration here, but many were applicable.

Section 110.1128, F.S., prohibits the offering of state employment to individuals who are required to register with the Selective Service System under the Military Selective Service Act without proof of registration. Furthermore, the section provides that no person who has failed to register as required, subsequent to October 1, 1988, and who is currently employed by the state may be promoted to a higher position without proof of registration. The section requires DMS to adopt rules necessary to carry out the administration of the requirements of that section. According to DMS, the provisions of statute are sufficient to administer the requirements of the section and no administrative rules are necessary to administer the provisions.

Section 110.201, F.S., requires DMS to develop personnel rules, guidelines, records, and reports relating to employees and positions in the career service system. In addition, the section requires DMS, when appropriate, to develop model personnel rules which may be used by employing agencies.

Section 110.217, F.S., requires DMS to develop model appointment and promotion rules which may be used by employing agencies. The section requires DMS to receive approval of the Administration Commission prior to their adoption. Employing agencies electing to adopt appointment and promotion rules that are inconsistent with the model rules must submit their rules to the department for review, as well as receive approval from the Administration Commission. As well, each employing agency is delegated the adopting rules for determining eligibility for career service positions.

Section 110.503, F.S., requires each department or agency utilizing the services of volunteers to develop written rules governing the recruitment, screening, training, responsibility, utilization, and supervision of volunteers.

Section 255.25, F.S., requires each state agency to develop procedures and adopt rules to ensure that its leasing practices are in substantial compliance with leasing rules adopted by DMS. Furthermore, the section requires state agencies to obtain approval of DMS prior to leasing a building.

Section 287.055(2)(f), F.S., defines the term “project” under the Consultants’ Competitive Negotiation Act to mean a fixed capital outlay study or planning activity described in the public notice of the state or a state agency. The definition requires each agency to prescribe by rule procedures for the determination of a project under its jurisdiction. Section 287.055(3)(d), F.S., requires each agency to adopt administrative procedures for the evaluation of professional services. As well, s. 287.055(10)(c), F.S., requires each agency to adopt rules or ordinances for the award of design-build contracts and specifies the minimum requirements.

III. Effect of Proposed Changes:

The committee substitute seeks to resolve problems which were identified during the rule review initiative instituted by the Senate President during the interim. The problems that were identified were: (A) a lack of regular review of rules by agencies; (B) inefficient rules; (C) lack of rule coordination; (D) excess numbers of rules; and (E) rule flexibility.

A. Lack of Regular Rule Review - Section 10 of the committee substitute would seek to improve agency rules by requiring agencies to review and revise their rules as necessary in order to ensure that they are correct and current. As well, agencies would be required to perform a formal review and revision of their rules every two years and, if appropriate, to revise them. In the annual review, each agency would be required to: (1) identify and correct rule deficiencies; (2) clarify and simplify rules; (3) delete obsolete or unnecessary rules; (4) delete rules that are redundant of statutes; (5) seek to improve efficiency, reduce paperwork or decrease costs to government and the private sector; and (6) 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.

Furthermore, beginning October 1, 1997, and by October 1 of every other year thereafter, the committee substitute would require the head of each agency to file a report with: (1) the President of the Senate; (2) the Speaker of the House of Representatives; and (3) each appropriate standing committee of the Legislature. The agency head would certify in the report that the agency had complied with the requirements of the subsection. As well, the report would be required to specify any changes to rules made by the agency as a result of the review and, when appropriate, to recommend statutory changes that will promote efficiency, reduce paperwork, or decrease costs to government and the private sector.

B. Rule Inefficiency - The annual review which would be required by the committee substitute is intended to improve rule efficiency in two ways. First, by requiring agencies to conduct regular reviews of their rules, it is hoped that agencies will not continue to clutter the Florida Administrative Code with obsolete, redundant or unnecessary rules. Maintaining extraneous, out-of-date, out-of-use rules can be confusing to the regulated public by making it more difficult to find current rules and by raising questions about what the real standards are. Second, the annual review is intended to improve rule efficiency by requiring agencies to seek ways to decrease costs and reduce paperwork for government and the private sector.

C. Lack of Coordination - The annual review which would be required by the committee substitute is intended to improve efficiency across agency lines, as well. Subparagraph (19)(a)6. of s. 120.54, F.S., would require agencies to seek ways to coordinate their rules with agencies with concurrent or overlapping jurisdiction in order to decrease costs and reduce paperwork for government and the private sector.

D. Excess Rules - Additionally, the committee substitute attempts to reduce the number of administrative rules. Rule reduction is accomplished by providing for the creation, where practical, of uniform rules that each agency must follow, while authorizing exceptions where necessary. As such, the committee substitute would:

(1) Provide Uniform Personnel Rules - The committee substitute would require the Department of Management Services to adopt uniform rules relating to:

(a) Selective Service System Registration Administration Rules - The committee substitute would strike the requirement in s. 110.1128, F.S., that DMS adopt rules to carry out the administration of the requirements of the section. Each agency would be required to provide for a review of any denial of employment or promotion based upon the section.

(b) Personnel Actions - The Department of Management Services would be required to adopt uniform rules regarding appointment, promotion, demotion, reassignment, and separation. Sections 110.201, 110.217, F.S.

(c) Volunteers - The Department of Management Services would be required to adopt uniform rules regarding agency use of volunteers. Section 110.503, F.S., would be amended.

(d) Appointment and Promotion Rules; Career Service Eligibility - The committee substitute would amend s. 110.217, F.S., which now requires DMS to adopt model appointment and promotion rules but does not require agencies to use these rules. Instead, the committee substitute would require the DMS, in consultation with affected agencies, to adopt uniform rules. The uniform rules would not be effective until approved by the Administration Commission. Exceptions would be authorized. As well, the committee substitute would delete (2) of the section, which provides that each employing agency is responsible for adopting career service eligibility rules.

(2) Provide Uniform Design-Build Contracts - The committee substitute would amend s. 287.055, F.S., and require the Department of Management Services to adopt uniform rules for use by each state agency, except for the Department of Transportation, for the award of design-build contracts.

(3) Provide Uniform Leasing Procedures - Section 255.25(2)(c), F.S., would be amended to require the Department of Management Services to adopt uniform leasing rules which would apply to each state agency other than the Department of Transportation.

E. Rule Inflexibility - The committee substitute does not contain a provision for waiver and variance as there is a provision contained in PCS for SB 2290.

F. Sexual Harassment Policy - The committee substitute would create s. 110.1221, F.S., which would provide that it is the policy of the state that sexual harassment is a form of discrimination. The committee substitute would require DMS, in consultation with other affected agencies, to adopt sexual harassment rules applicable to all executive agencies. The rules would be required to be approved by the Administration Commission prior to adoption by the DMS. Furthermore, it would require that the rules must define "sexual harassment" in a manner consistent with the federal definition.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

The committee substitute should result in fewer rules across agencies which regulate the same subjects, and provide for more uniform rules.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.