SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/SB 1584

SPONSOR: Governmental Oversight and Productivity Committee and Senator Aronberg

SUBJECT: Administrative Procedures

DATE: April 1, 2003 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	White	Wilson	GO	Fav/CS
2.			JU	
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I. Summary:

This bill amends numerous provisions in ch. 120, F.S, which is known as the Administrative Procedure Act (APA). Specifically, the bill:

- Provides definitions for the terms “arbitrary” and “capricious.”
- Amends the requirement that “specific rules or statutes” be cited in petitions for ch. 120, F.S., hearings to also require a statement explaining how the alleged facts relate to the specific rules or statutes.
- Provides that an ALJ’s hearing in a rule challenge proceeding is de novo and that the standard of proof to be used in the hearing is a preponderance of the evidence.
- Revises the time frame for and impact of an agency’s response in an unadopted rule challenge.
- Requires an administrative law judge (ALJ) to enter an initial scheduling order upon the request of any party.
- Requires an ALJ to enter an order relinquishing jurisdiction to the agency when the ALJ determines that no genuine issue as to any material fact exists.
- Provides when an agency need not rule on party exceptions.
- Adds “needlessly increasing the cost of litigation” to the definition of “improper purpose.”
- Provides that s. 57.105, F.S., damage and attorney’s fee awards are available in administrative proceedings.
- Provides for automatic approval and issuance of licenses under certain circumstances.
- Clarifies that agency findings for emergency rules are judicially reviewable.
- Increases the maximum attorney’s fee and cost award available pursuant to s. 57.111, F.S., from $15,000 to $50,000.

This bill substantially amends the following sections of the Florida Statutes: 120.54, 120.569, 120.57, 120.595, 120.60, and 120.68.

II. Present Situation:

Overview of Chapter 120, F.S., the Administrative Procedure Act (APA): The APA allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions.[1] For purposes of ch. 120, F.S., the term "agency" is defined in s. 120.52, F.S. as each:

- State officer and state department, and each departmental unit described in s. 20.04, F.S.[2]
- Authority, including a regional water supply authority.
- Board and commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.
- Regional planning agency.
- Multicounty special district with a majority of its governing board comprised of nonelected persons.
- Educational units.
- Entity described in chapters 163 (Intergovernmental Programs), 373 (Water Resources), 380 (Land and Water Management), and 582 (Soil and Water Conservation) and s. 186.504 (regional planning councils).
- 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.

The definition expressly excludes any legal entity or agency created in whole or in part pursuant to chapter 361, part II (Joint Electric Power Supply Projects), an expressway authority pursuant to chapter 348, 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 the section, or any multicounty special district with a majority of its governing board comprised of elected persons. The definition expressly includes a regional water supply authority.

The Division of Administrative Hearings (DOAH), which consists of an independent group of administrative law judges (ALJs), conducts hearings under ch. 120, F.S., when certain agency decisions, e.g., rules and determinations of a party's substantial interest, are challenged by substantially affected persons.[3] [4]

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[1] *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, by Judge Linda M. Rigot, The Florida Bar Journal, Jan. 2001, at 14.

[2] Section 20.04, F.S., sets the structure of the executive branch of state government.

[3] DOAH proceedings are conducted like nonjury trials and are governed by ch. 120, F.S.

[4] Although DOAH is administratively assigned to the Department of Management Services (DMS), *see* s. 20.22, F.S., the DMS does not have statutory authority over DOAH; it is responsible directly to the Governor and Cabinet. The director is appointed by a majority vote of the Administration Commission, that is the Governor and the Cabinet, and the appointment must be confirmed by the Senate. Section 120.65, F.S. The DOAH is a separate budget entity. It is funded, however, entirely from trust funds rather than from general revenue. Thus, the funding is directly correlated to the work the division does for

Proposed or existing rule challenges: Section 120.56, F.S., provides that a person, who is substantially affected by a rule or proposed rule, may file a petition seeking an administrative determination of the invalidity of a rule or proposed rule on the ground that the rule is an, "invalid exercise of delegated legislative authority." This term is defined in s. 120.52(8), F.S., to mean that the rule, ". . . goes beyond the powers, functions, and duties delegated by the Legislature."[5] Subsection (8) further provides that 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;
(f) The rule is not supported by competent substantial evidence; or
(g) 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.

Finally, subsection (8) requires that the rule be authorized by a grant of rulemaking authority and that it implement the specific powers and duties provided by the enabling legislation. In *Southwest Fla. Water Mgmt. Dist.v. Save the Manatee Club, Inc.*,[6] the court held that, "The authority for an administrative rule is not a matter of degree. The question is whether the statute contains a specific grant of legislative authority for the rule, not whether the grant of authority is explicit enough."

Standard of review in rule challenges: Recently, the court in *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc.*,[7] noted that the applicable standard of review for a rule challenge, to the extent that the ALJ's or reviewing court's conclusions are interpretations of law, is de novo, meaning that the court tries the matter as though it has not been heard before and no decision has been rendered. To the extent, however, that an ALJ's or reviewing court's conclusions in reviewing a rule challenge rest on findings of fact, the ALJ and reviewing court are limited to the "competent substantial evidence" appellate standard of review, which permits the reviewing body to consider only whether the rule is supported by legally sufficient evidence.[8] In other words, the reviewing body may not: (a) reweigh the evidence; (b) make determinations regarding credibility; or (c) substitute its judgment for that of the agency.[9]

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executive agencies. *The Florida Division of Administrative Hearings*, by Judge William C. Sherril, Jr., The Florida Bar Journal, Jan. 2001, at 23.
[5] Section 120.52(8), F.S.
[6] 773 So.2d 594, 599 (Fla. 1st DCA 2000).
[7] 808 So.2d 243 (Fla. 1st DCA 2002).
[8] *Id.* at 254-255, 257.
[9] *Id.*.

The court's holding was based on the language of s. 120.56(8)(f), F.S., which requires rules to be supported by "competent substantial evidence." According to the court, they believed this paragraph of law evidenced the Legislature's intent that agency rules be subject to a "competent substantial evidence" standard of review in DOAH proceedings, and that an ALJ's order be subject to a "competent substantial evidence" appellate standard of review in the district court.[10]

The court's holding seemed to be influenced by the fact that although the legal term of art, "competent substantial evidence," is widely understood by lawyers and has been repeatedly defined in court opinions when used as an appellate standard of review, the term is not widely understood when used as a burden of proof. Rather, legal terms of art in the context of burdens of proof are "preponderance of the evidence," "clear and convincing evidence," and "beyond a reasonable doubt."

The court's holding appears to require that an agency develop a record demonstrating that a rule is supported by "competent substantial evidence" before the ALJ hears the rule challenge, and it leaves the ALJ, who should act as a neutral fact finder, without the ability to weigh the evidence presented by an agency at the DOAH hearing. This result does not appear to have been contemplated by any provision in ch. 120, F.S.

Further, the court's holding appears to conflict with s. 120.57(1)(j), F.S., which provides that in hearings involving disputed issues of fact that an ALJ's or other presiding officer's findings of fact should be based on a "preponderance of the evidence," and with the rule challenge burden of proof standards set forth in statute and other case law, as discussed below.

Burdens of proof in rule challenges: Pursuant to s. 120.56(2)(a), F.S., the petitioner has the burden of going forward in a proceeding to challenge proposed agency rules, and the agency then has the burden to establish by a "preponderance of the evidence" that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised by the petitioner. In paragraph (c), the subsection further provides that a proposed rule is not to be presumed valid or invalid.

Pursuant to case law, the burden of proof in a proceeding to challenge existing agency rules is on the attacking party who must show that the rule constitutes an invalid exercise of delegated authority. The rationale behind this requirement is that duly promulgated agency rules are presumptively valid until invalidated in a rule challenge proceeding.[11] This burden of proof has been described by the courts as stringent, particularly when the rule has been in the Florida Administrative Code for several legislative sessions without disapproval or interference by either the Legislature or its Administrative Procedures Committee.[12]

Unadopted rule challenges: Section 120.56(4), F.S., also provides a mechanism for a substantially affected person to seek an administrative determination that an agency statement of generally applicable policy should have been adopted as a rule. The underlying basis for this

[10] *Id.* at 257.
[11] *See, e.g., Cortes v. State, Bd. of Regents*, 655 So.2d 132 (Fla. 1st DCA 1995), reh'g denied, (June 13, 1995); *City of Palm Bay v. State, Dept. of Transp.*, 588 So.2d 624, 16 F.L.W. D2702 (Fla. Dist. Ct. App. 1st Dist. 1991);
[12] *Jax Liquors, Inc. v. Division of Alcoholic Beverages and Tobacco, Dept. of Business Regulation*, 388 So.2d 1306 (Fla. Dist. Ct. App. 1st Dist. 1980).

challenge is found in s. 120.54(1)(a), F.S., which requires that all agency statements meeting the definition of "rule" in s. 120.52, F.S., to be adopted by the rulemaking procedure as soon as feasible and practicable.

If an ALJ enters a final order that all or part of an agency statement violates s. 120.54(1)(a), F.S., the agency must discontinue all reliance on the statement.[13] If, however, prior to entry of such a final order, the agency publishes proposed rules that address the challenged statement and proceeds expeditiously and in good faith to adopt rules which address the statement, the agency may rely upon the statement or a substantially similar statement as a basis for agency action if the statement satisfies s. 120.57(1)(e), F.S.[14] If the agency fails to adopt rules that address the statement within 180 days after publishing the proposed rules, a presumption is created that the agency is not acting expeditiously and in good faith to adopt rules.[15] Further, if the agency's proposed rules are challenged on grounds that they are an invalid exercise of delegated legislative authority, then the 180-day period is tolled until a final order is entered in this proceeding. [16]

A recent case construing the time frame for and impact of an agency's response in an unadopted rule challenge is *Osceola Fish Farmers Association v. DOAH.*[17] In this case, the Osceola Fish Farmer Association (OFFA) filed a challenge that argued that the South Florida Water Management District's (SFWMD's) policy of not requiring itself to obtain a permit to drawdown lakes, although SFWMD rule and statute requires a permit for water withdrawals, was an unadopted rule.[18] Prior to the hearing on this challenge, the SFWMD filed a notice indicating that it was publishing a proposed rule to address this policy.[19] The hearing was then conducted and after the hearing a proposed rule was published.[20] At the conclusion of the hearing, the OFFA requested that the ALJ enter a final order notwithstanding the impending publication of the rule; however, the ALJ declined and instead entered an order placing the unadopted rule challenge in abeyance pending the SFWMD's adoption of the rule.[21]

After the order placing the case in abeyance was issued, the OFFA filed an administrative challenge arguing that the proposed rule was an invalid exercise of delegated legislative authority.[22] A hearing was held in which the ALJ found the rule invalid on this ground.[23] The OFFA then moved to have its unadopted rule challenge opened for a determination on the merits; however, the ALJ entered an order denying the unadopted rule challenge, as the claim was moot because SFWMD's publication of the rule satisfied the requirements of s. 120.56(4)(e), F.S.[24]

[13] Section 120.54(4)(d), F.S.
[14] Section 120.56(4)(e), F.S.
[15] *Id.*
[16] *Id.*
[17] 830 So.2d 932, 934 (Fla. 4th DCA 2002).
[18] *Id.* at 932-933.
[19] *Id.* at 933.
[20] *Id.*
[21] *Id.*
[22] *Id.* at 933-934.
[23] *Id.* at 934.
[24] *Id.*

The OFFA appealed the ALJ's denial of its unadopted rule challenge, and the court affirmed the ALJ's decision, holding that an agency may avoid an adverse ruling in a s. 120.56(4)(a), F.S., proceeding and the consequences of an attorney's fees and costs award under s. 120.595(4), F.S., if the agency, in compliance with s. 120.56(4)(e), F.S., publishes, prior to entry of a final order, a proposed rule addressing the challenged statement and proceeds expeditiously and in good faith to adopt the rule.[25] The court found that the purpose of s. 120.56(4)(e), F.S., is to force an agency to publish a proposed rule and to proceed in good faith to adopt the rule.[26] The court indicated that this statutory purpose had been met given that the SFWMD had published the rule, notwithstanding the fact that the ALJ's denial of the unadopted rule challenge meant that the OFFA could not collect an attorney's fee and cost award for that challenge.[27]

Challenges to agency determinations of a party's substantial interests: Section 120.569, F.S., provides that a party, who wishes to challenge an agency determination of his or her substantial interests, must file a petition for a hearing with the agency, and states that an agency request for an ALJ must be made to the DOAH within 15 days after receiving the petition.[28] [29] In general, agencies request ALJs for cases in which there is a disputed issue of material fact.

Section 120.569, F.S., also specifies notice and pleading requirements, and the time parameters within which a final order must be completed. 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.[30] If the presiding officer finds a violation of these requirements, the officer is required to impose an appropriate sanction, which may include an order to pay the other party's expenses, including attorney's fees, incurred because of the improper filing.[31]

Additional procedures for administrative cases: Section 120.57(1), F.S., applies to hearings in which there is a disputed issue of material fact. In the majority of cases, these hearings are conducted by an ALJ.[32] The subsection sets forth evidentiary procedures, specifies the permissible contents of the record, and provides that in the event a dispute of material fact no longer exists that any party may move the ALJ to relinquish jurisdiction to the agency.[33] The ALJ may grant or deny the motion to relinquish in his or her discretion.[34]

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[25] *Id.* 934-935.
[26] *Id.* at 934.
[27] *Id.* at 934-935.
[28] Section 120.569(2)(a), F.S.
[29] Section 120.569, F.S., applies except when mediation is elected by all parties pursuant to s. 120.573, or when a summary hearing is elected by all parties pursuant to s. 120.574, F.S.
[30] Section 120.569(2)(e), F.S.
[31] Section 120.569(2)(e), F.S.
[32] *See* s. 120.57(1)(a) (providing that an ALJ or an agency head or member thereof may conduct the hearing);,and Sections 120.80 and 120.81, F.S. (specifying exceptions when an agency must conduct its own hearing).
[33] Section 120.57(1), F.S.
[34] Section 120.57(1)(i), F.S.

Further, the subsection provides that a presiding officer is to issue a recommended order that contains findings of fact, conclusions of law, and a recommended disposition or penalty.[35] The agency must allow each party 15 days in which to submit written exceptions to the recommended order.[36] The agency may adopt the recommended order as its final order, or in its final order the agency may: (a) reject or modify the order's conclusions of law and interpretations of rules over which the agency has jurisdiction if it states its reasons for doing so with particularity, and finds that its substituted conclusion is as reasonable than that which it rejected or modified; or (b) may reject or modify findings of fact if, after a review of the entire record, it states with particularity that the findings of fact were not based on competent substantial evidence or that the proceedings on which the finding were based did not comply with essential requirements of law.[37] The agency may reduce or increase a recommended penalty only when it states its reason for the change with particularity.[38]

Section 120.57(2), F.S., applies to hearings that do not involve a disputed issue of material fact. Generally, these hearings are conducted by the agency, and the subsection requires that the agency: (a) provide reasonable notice to affected persons of its action; (b) provide the parties an opportunity to present evidence in opposition to the agency action; and (c) provide a written explanation to the parties if it overrules the parties' objections.[39]

Cost and attorney's fee awards in administrative proceedings: Section 120.595, F.S.,[40] provides for an award of costs and attorney's fees in certain ch. 120, F.S., proceedings as follows:

- In a proceeding to challenge to agency action pursuant to s. 120.57(1), F.S., the final order shall award reasonable costs and attorney's fees to the prevailing party if the ALJ has determined that the nonprevailing adverse party has participated in the proceeding for an improper purpose. The ALJ is to determine whether any party has participated for an improper purpose, as defined in the subsection and in s. 120.569(2)(e), F.S., upon motion. The subsection's definition provides that an "'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 licensing or securing the approval of an activity."[41]

- In a proceeding to challenge proposed agency rules pursuant to s. 120.56(2), F.S., or to challenge existing agency rules pursuant to s. 120.56(3), F.S., if the court or ALJ finds a rule or proposed rule invalid, the agency must be ordered to pay reasonable costs and attorney's fees, unless the agency can demonstrate that its actions were substantially justified or such an award would be unjust. Further, the court or ALJ shall award reasonable costs and attorney's fees to a prevailing agency if the court or ALJ finds that a

[35] Section 120.57(1)(k), F.S.
[36] *Id.*
[37] Section 120.57(1)(l), F.S.
[38] *Id.*
[39] Section 120.57(2), F.S.
[40] The section specifies that it is merely supplemental, and does not abrogate other provisions allowing the award of fees or costs. Section 120.595(1)(a), F.S.
[41] Section 120.595(1), F.S.

party participated for an improper purpose as defined in subsection (1)(e). The attorney's fee awards are capped at $15,000.[42]

- In an unadopted rule challenge pursuant to s. 120.56(4), F.S., the ALJ is required to award a prevailing petitioner reasonable costs and attorney's fees, unless the agency demonstrates that the statement is required to meet a federal government program requirement or for the receipt of federal funds.[43]

- In an appeal of a ch. 120, F.S., proceeding, the court in its discretion may award prevailing party attorney's fees and costs 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. Further, if the court during an appeal finds that an agency improperly rejected or modified findings of fact in a recommended order, the court must award reasonable attorney's fees and costs to a prevailing appellant for both the administrative and appellate proceedings.[44]

Licensing: Section 120.60, F.S., specifies that an agency must approve or deny a license application within 90 days after receipt, unless a shorter period of time is otherwise prescribed by law, within 15 days after the conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and parties, whichever is later. The 90-day period is tolled by the initiation of a proceeding under ss. 120.569 or 120.57, F.S. Further, the section states that the agency must approve an application for a license or for an examination for license if the agency has not approved or denied the application within the prescribed time periods.

Judicial Review of Agency Action: Section 120.68(1), F.S., provides that a party who is adversely affected by final agency action is entitled to judicial review. In subsection (9), it states that no petition challenging an agency rule as an invalid exercise of delegated legislative authority may be instituted pursuant to this section, except to review an order entered in a rule challenge proceeding, unless the sole issue presented by the petition is the constitutionality of a rule and there are no disputed issues of fact. Thus, courts generally hold that they may not determine whether a rule is an invalid exercise of delegated legislative authority unless the rule has first been challenged in a rule challenge proceeding pursuant to the APA.[45]

Damage and attorney's fee awards in civil proceedings: Section 57.105(1), F.S., requires an award of prejudgment interest and a reasonable attorney's fee to a prevailing party in a civil proceeding or action where the court finds that the losing party or his or her attorney knew or should have known that a claim or defense: (a) was not supported by the material facts necessary to establish the claim or defense; or (b) would not be supported by the application of then-existing law to those material facts. This fee is to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney. However, the losing party's attorney

[42] Section 120.595(2) and (3), F.S.
[43] Section 120.595(4), F.S.
[44] Section 120.595(5), F.S.
[45] *See e.g., Cross v. Department of Health & Rehabilitative Services,* 658 So.2d 1139 (Fla. Dist. Ct. App. 1st Dist. 1995).

is not personally responsible if he or she acted in good faith, based on client representations as to the existence of material facts.

Section 57.105(3), F.S., provides that whenever a movant establishes by a preponderance of the evidence that the opposing party has taken any action, including the filing of pleadings, the assertion of any claim or defense, or the filing of a response, for the purpose of unreasonable delay that the court shall award damages to the movant for its reasonable expenses incurred in obtaining the order, including attorney's fees, and other loss resulting from the improper delay.

In *Procacci Commercial Realty, Inc. v. Department of Health and Rehabilitative Services*,[46] the court held that s. 57.105, F.S., applies only to judicial proceedings.

The "Florida Equal Access to Justice Act": In s. 57.111, F.S., Florida's "Equal Access to Justice Act," the Legislature acknowledges that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and of administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state are different from the standard for an award against a private litigant in cases involving a small business party.
Section 57.111, F.S., provides that, unless otherwise provided by law, an award of attorney's fees and costs must be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to ch. 120, F.S. that is initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust. No award of attorney's fees and costs pursuant to this section may exceed $15,000.

III. Effect of Proposed Changes:

Section 1. The bill amends s. 120.52(8)(e), F.S., which currently provides that a rule may not be arbitrary or capricious. The bill adds that, "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." These amendments clarify the meanings of the terms "arbitrary" and "capricious" in a manner consistent with prior case law construction of the terms.[47]

Further, the bill strikes s. 120.52(8)(f), F.S., which requires that a rule be supported by "competent substantial evidence." This requirement is replaced with the bill's requirement in subsection (8)(e) that the rule be supported by "logic or the necessary facts."

Section 2. The bill amends s. 120.54(5)(b)4., F.S., which requires that "specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action" be cited in petitions for administrative hearings under ss. 120.569 and 120.57, F.S., to also require a

[46] 690 So.2d 603, 607, n. 8 (Fla. 1st DCA 1997).
[47] In *Florida Academy of Cosmetic Surgery, Inc.*, 808 So.2d at 255, the court noted that, as used in subsection (8)(e), "arbitrary" means that the rule, "is 'not supported by facts or logic,'" and that "capricious" means that the rule, "is irrational." *See e.g., Agrico Chemical Co. v. DER*, 365 So.2d 759. 763 (Fla. 1st DCA 1978) (stating that, "A capricious action is one which is taken without thought or reason or irrationally. An arbitrary decision is one not supported by facts or logic, or despotic.").

statement explaining how the alleged facts relate to the specific rules or statutes. Further, the bill makes technical grammatical changes to the subparagraph.

Section 3. The bill amends s. 120.56(1)(e), F.S., to provide that an ALJ's hearing on a petition challenging a proposed or existing rule is de novo and that the standard of proof to be used in the hearing shall be a preponderance of the evidence.

The bill amends s. 120.56(3), F.S., to specify that a petitioner, who wishes to challenge the validity of an existing rule, has the burden to prove by a preponderance of the evidence that the existing rule is an invalid exercise of delegated legislative authority as to the objections raised.

The effect of these amendments, in combination with the bill's removal of the "competent substantial evidence" language from ss. 120.52(8)(f) and 120.57(1)(e)1., F.S., should be to overturn the court's decision in *Florida Academy of Cosmetic Surgery, Inc.*[48] As discussed in the "Present Situation" section of this analysis, this case held that an ALJ and appellate court in reviewing a rule challenge are limited to a "competent substantial evidence" standard of review. Under the bill, however, it is made clear that an ALJ's rule challenge hearing is de novo and that the burden of proof in the hearing is a "preponderance of the evidence." The appellate court's standard of review for an appeal of an ALJ's final order in a rule challenge remains "competent substantial evidence" pursuant to s.120.68(7)(b), F.S.

The bill further amends s. 120.56(4)(e), F.S., which specifies that an agency may rely on an agency statement that is challenged as an unadopted rule if, ***prior to entry of a final order finding the statement to be an unadopted rule***, the agency publishes proposed rules that address the statement and proceeds expeditiously and in good faith to adopt these rules. The bill amends this paragraph to create new time frames and legal impacts for agency responses in unadopted rule challenges.

Under the bill:

- If the agency, ***prior to a final hearing on the unadopted rule challenge***, publishes:
    - a proposed rule addressing its statement, then a presumption is created that the agency is acting expeditiously and in good faith to adopt rules and the agency may rely upon the statement as a basis for agency action if the statement meets s. 120.57(1)(e), F.S., requirements; or
    - a notice of rule development, then such publication constitutes good cause to grant a stay of the proceedings and a continuance of the final hearing for 30 days, and if during this period the agency publishes proposed rules, the ALJ must place the case in abeyance pending the outcome of rulemaking and any proceedings that may challenge the proposed rules on grounds that they are an invalid exercise of delegated legislative authority.

[48] 808 So.2d 243 (Fla. 1st DCA 2002).

- If the agency, ***following commencement of the final hearing on the unadopted rule challenge but prior to entry of a final order,*** publishes proposed rules that address the challenged statement and then proceeds expeditiously and in good faith to adopt the rules, the agency may rely upon the statement as a basis for agency action if the statement meets s. 120.57(1)(e), F.S., requirements.

Further, the bill retains the following current law, but places it in a new subparagraph 4. of s. 120.56(4)(e), F.S. Current law provides that if the agency fails to adopt rules that address the challenged agency statement within 180 days after publishing the proposed rules, 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 on grounds that they are an invalid exercise of delegated legislative authority, then the 180-day period is tolled until a final order is entered in this proceeding.

Finally, the bill adds in a new subparagraph 5. of s. 120.56(4)(e), F.S., that 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)-(g), F.S., the agency must immediately discontinue reliance on the statement until rules addressing the subject are properly adopted.

The effect of the bill's amendments to s. 120.56(4)(e), F.S., should be to:

- Provide an incentive to agencies to proceed expeditiously to rulemaking when an unadopted rule challenge appears to be legitimate. If the agency publishes its proposed rule prior to the final hearing, the agency is benefited by a legal presumption that it has complied with the requirements of s. 120.56(4)(e), F.S.

- Clarify that the agency may not continue to rely on the statement underlying the unadopted rule challenge when that statement has been found to be an invalid exercise of delegated legislative authority, as defined in s. 120.52(8)(b)-(g), F.S. Under current law, the agency need only discontinue reliance on the statement when the ALJ enters a final order finding the statement to be an unadopted rule in violation of s. 120.54(1)(a), F.S.; however, pursuant to s. 120.56(4)(e), F.S., as construed in *Osceola Fish Farmers Association*,[49] no final order making such a finding need be entered if the agency has published a proposed rule relating to the statement. Without the final order, the agency may continue to rely upon the invalid statement and a person to whom the invalid statement is applied would have to file another petition, pursuant to s. 120.57(1)e., F.S., which applies to agency action that determines a party's substantial interests based on an unadopted rule. The bill eliminates the need for this additional administrative proceeding by explicitly providing that the statement may not be relied upon if found invalid based on s. 120.52(8)(b)-(g), F.S.

Section 4. The bill amends s. 120.569(2), F.S., to create a new paragraph (o) that requires an ALJ, when requested by any party, to enter an initial scheduling order that establishes a discovery period, including a deadline by which all discovery must be completed, and the date

[49] 830 So.2d 932, 934 (Fla. 4th DCA 2002).

by which the parties must 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.

Section 5. The bill amends s. 120.57(1)(e)1.d., F.S., which specifies what an agency must demonstrate regarding an unadopted rule in a proceeding that is challenging agency action based upon the unadopted rule. One of the factors that must be demonstrated by the agency is that the unadopted rule, "[i]s not arbitrary or capricious." In conformity with its amendment in Section 1., the bill adds that, "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."

Additionally, the bill strikes s. 120.57(1)(e)1.f., F.S., which requires the agency to demonstrate that an unadopted rule is supported by "competent substantial evidence." This requirement is replaced with the bill's requirement in subsection (1)(e)1.d. that the rule be supported by "logic or the necessary facts."

The bill also amends s. 120.57(1)(i), F.S., regarding additional procedures for hearings involving disputed issues of material fact. Currently, any party may move to have the ALJ relinquish jurisdiction to the agency if there is no longer a dispute of material fact, and the ALJ is instructed to rule on the motion. Under the bill, this provision is rephrased to require an ALJ to relinquish jurisdiction if he or she finds that no genuine issue as to any material fact exists.

Finally, the bill amends s. 120.57(1)(k), F.S., to provide that an agency need not rule on exceptions to a recommended order that are drafted by the parties if the exception does not: (a) clearly identify the disputed portion of the recommended order by page number or paragraph; (b) identify the legal basis for the exception; or (c) include appropriate and specific citations to the record.

Section 6. The bill amends s. 120.595, F.S., which provides for attorney's fees and costs award in various ch. 120, F.S. proceedings. Specifically, the bill amends subsection (1), which requires an award of costs and attorney's fees where a non-prevailing party has participated in a s. 120.57(1), F.S. proceeding for an "improper purpose." The definition of this term is expanded by the bill to include needlessly increasing the cost of litigation. The bill also eliminates the subsection's reference to s. 120.569(2)(e), F.S., in defining "improper purpose," so that filing pleadings for an improper purpose is not a condition precedent to an award of attorney's fees under the section.

Further, the bill creates s. 120.595(6), F.S., to specify that other attorney's fees and costs award provisions, including s. 57.105, F.S. which has been construed by the court to only apply to civil proceedings, and s. 57.111, F.S., which applies in state initiated administrative proceedings, are unaffected by s. 120.595, F.S. Section 57.105, F.S., is also amended by this bill in "Section 9.", as discussed below, to specifically apply to administrative proceedings.

Section 7. The bill amends s. 120.60, F.S., which concerns licensing. Currently, s. 120.60, F.S., specifies a certain period of time within which an agency must approve or deny a license application. The section does not, however, specify what occurs if the agency does not approve or deny the license application within that period of time. Under the bill, if an agency does not act within the specified time period, the application is "considered approved" and the license

must be issued, unless the recommended order recommends denial of the license. However, if an examination is a prerequisite to licensure, the bill specifies that issuance of the license is subject to satisfactory completion of that examination.

Section 8. The bill amends s. 120.68, F.S., to clarify that an agency's findings of immediate danger, necessity, and procedural fairness, which are a prerequisite to the adoption of an emergency rule, are judicially reviewable. This is also currently provided in s. 120.54(4)(a)3., F.S.

Section 9. The bill amends s. 57.105, F.S., to create a new subsection (5), which states that an ALJ shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and his or her attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1) through (4). Further, the bill provides that such an award of fees and damages is a final order subject to judicial review as specified in s. 120.68, F.S. Finally, the bill specifies that if the losing party is an agency, as defined in s. 120.52(1), F.S., that the award shall be paid by the agency.

Section 10. The bill amends s. 57.111, F.S., to increase, from $15,000 to $50,000, the amount of attorneys' fees and costs that can be awarded to a prevailing small business party against a state agency in an action initiated by the state agency against the small business party. The current attorney's fee cap was established when this section was created in 1984.

Section 11. The bill provides that the act shall take effect upon becoming a law.

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:

The bill's default issuance provision for licenses will avoid the necessity of filing a petition for a writ of mandamus to compel issuance of the license.

The bill provides that s. 57.105, F.S., damage, prejudgment interest, and attorney's fees and costs awards are available in administrative proceedings. Thus in administrative proceedings:

- Losing private parties must pay prejudgment interest and attorney's fees if found to have asserted a frivolous claim.
- Private parties must pay damages if found to have acted for the purpose of causing unreasonable delay.
- Private parties will be the beneficiaries of the awards when the opposing party has filed a frivolous claim or has acted for the purpose of causing unreasonable delay.

The bill increases the maximum award available for attorney's fees and costs pursuant to s. 57.111, F.S., from $15,000 to $50,000. Accordingly, prevailing small business parties in judicial and administrative proceedings initiated by state agencies may receive larger awards.

C. Government Sector Impact:

By requiring ALJs to enter scheduling orders when requested by a party, the bill may result in the entry of more scheduling orders and may allow cases to be settled more quickly and less expensively.

The bill provides that s. 57.105, F.S., damage, prejudgment interest, and attorney's fees and costs awards are available in administrative proceedings. Thus in administrative proceedings:

- Losing agencies must pay prejudgment interest and attorney's fees if found to have asserted a frivolous claim.
- Agencies must pay damages if found to have acted for the purpose of causing unreasonable delay.
- Agencies will be the beneficiaries of the awards when the opposing party has filed a frivolous or acted for the purpose of causing unreasonable delay.

The bill increases the maximum award available for attorney's fees and costs pursuant to s. 57.111, F.S., from $15,000 to $50,000. Accordingly, a state agency that does not prevail in a case against a small business party in judicial and administrative proceedings initiated by the agency may have to pay larger attorney's fees and costs awards.

There may be an indeterminate fiscal impact on state agencies given the expanded availability s. 57.105, F.S. awards in administrative proceedings and the increase in the s. 57.111, F.S. award maximums.

VI. Technical Deficiencies:

In Section 3., the bill creates a new subparagraph 2. in s. 120.56(4)(e), F.S., to provide that a stay shall be granted in unadopted rule challenge proceedings when a notice of rule development has been published. The rule development should relate to the statement underlying the unadopted rule challenge; however, this nexus is not specified in the bill. It may be desirable to amend the bill to state that the notice of rule development must relate to rules that address the challenged agency statement.

VII. Related Issues:

None.

VIII. Amendments:

None.