

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Governmental Oversight and Accountability

BILL: SB 1696

INTRODUCER: Senator Brandes

SUBJECT: Administrative Procedures

DATE: April 8, 2013

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	McKay	McVaney	GO	Pre-meeting
2.			JU	
3.			AP	
4.				
5.				
6.				

I. Summary:

SB 1696 amends provisions of ch. 120, Florida Statutes, the Administrative Procedure Act (APA), to enhance the opportunity of substantially affected parties to challenge rules, mediate declaratory statements, and be awarded attorney fees in certain challenges. Specifically, the bill:

- Adopts a definition of “small business” applicable to the entire APA;
- Shifts the burden of proof from the challengers to the agencies when the validity of existing rules are challenged;
- Shifts part of the burden from the challengers to the agencies in challenges to unadopted rules;
- Removes a requirement that agencies have 30 days to initiate rulemaking to avoid liability for attorney fees in successful challenges to unadopted rules;
- Removes the defense to an unadopted rule challenge that an agency did not know or should not have known that an agency statement or policy was an unadopted rule;
- Authorizes parties to request mediation in proceedings relating to declaratory statements and rule challenges;
- Removes discretion of agencies, the Governor, and the Governor and Cabinet to identify rules for which first time, minor violations should be addressed by a notice of noncompliance; and
- Removes discretion of Cabinet officers to exempt certain licensing rules from the notice of noncompliance provisions.

The bill also makes conforming changes to statutes cross-referencing provisions renumbered in the bill.

This bill amends sections 120.52, 120.56, 120.595, 120.573, 120.695, 420.9072, 420.9075, and 443.091 of the Florida Statutes.

II. Present Situation:

Rulemaking and the Administrative Procedure Act

The Administrative Procedure Act (APA) in ch. 120, F.S., sets forth a uniform set of procedures that agencies must follow when exercising delegated rulemaking authority. A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency.¹ Rulemaking authority is delegated by the Legislature² through statute and authorizes an agency to “adopt, develop, establish, or otherwise create”³ a rule. Agencies do not have discretion whether or not to engage in rulemaking.⁴ To adopt a rule, an agency must have a general grant of authority to implement a specific law through rulemaking.⁵ The grant of rulemaking authority itself need not be detailed.⁶ The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.⁷

Small Business

The APA provides certain accommodations for small businesses⁸ but only provides a definition of “small business” for use in s. 120.54(3)(b), F.S., which provides that an agency must consider the impact of rulemaking on small businesses defined for that purpose as employing less than 200 employees and having a net worth less than \$5 million.⁹ However, agencies are authorized to define “small business” to include businesses having more than 200 employees.

By contrast, Florida's Equal Access to Justice Act codified in ch. 57, F.S., provides for attorney fees to be awarded in administrative proceedings to a prevailing party who is a small business (defined in that instance as having not more than 25 employees and a net worth of not more than \$2 million).¹⁰

Attorney Fees

In addition to the special attorney fee provisions in the Equal Access to Justice Act, the APA provides for the recovery of attorney fees when a non-prevailing party has participated for an

¹ Section 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

² *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

³ Section 120.52(17), F.S.

⁴ Section 120.54(1)(a), F.S.

⁵ Sections 120.52(8) and 120.536(1), F.S.

⁶ *Save the Manatee Club, Inc.*, *supra* at 599.

⁷ *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

⁸ Sections 120.54, 120.541, and 120.74, F.S.

⁹ Section 120.54(3)(b), F.S., incorporates by reference the definition of “small business” in s. 288.703(6), F.S.

¹⁰ Section 57.111, F.S.

improper purpose; when an agency's actions are not substantially justified; when an agency relies upon an unadopted rule and is successfully challenged after 30 days notice of the need to adopt rules; and when an agency loses an appeal in a proceeding challenging an unadopted rule.¹¹

An agency defense to attorney fees available in actions challenging agency statements defined as rules is that the agency did not know and should not have known that the agency statement was an unadopted rule. Additionally, attorney fees in such actions may be awarded only upon a finding that the agency received notice that the agency statement may constitute an unadopted rule at least 30 days before a petition challenging the agency statement is filed, and the agency fails to publish a notice of rulemaking within that 30 day period.¹²

These attorney fee provisions supplement the attorney fee provisions provided by other laws.¹³

Burden of Proof

In general, laws carry a presumption of validity, and those challenging the validity of a law carry the burden of proving invalidity. The APA retains this presumption of validity by requiring those challenging adopted rules to carry the burden of proving a rule's invalidity.¹⁴ However, in the case of proposed rules, the APA places the burden on the agency to demonstrate the validity of the rule as proposed, once the challenger has raised specific objections to the rule's validity.¹⁵ In addition, a rule may not be filed for adoption until any pending challenge is resolved.¹⁶

In the case of a statement or policy in force that was not adopted as a rule, a challenger must prove that the statement or policy meets the definition of a rule under the APA. If so, and if the statement or policy has not been validly adopted, the agency must prove that rulemaking is not feasible or practicable.¹⁷

Mediation

The APA provides for mediation by agreement of the parties in those cases where the agency offers mediation to a person whose substantial interests are affected by an agency's action.¹⁸ The APA does not require mediation in any particular case.

Declaratory Statements

The APA provides that a substantially affected person may request the issuance of a “declaratory statement” of an agency's opinion on the applicability of a law or rule over which the agency has authority to a particular set of facts set forth in the petition.¹⁹ When issued, a declaratory

¹¹ Section 120.595, F.S.

¹² Section 120.595(4)(b), F.S.

¹³ See, for example, ss. 57.105, 57.111, F.S. These sections are specifically preserved in s. 120.595(6), F.S.

¹⁴ Section 120.56(3), F.S.

¹⁵ Section 120.56(2), F.S.

¹⁶ Section 120.54(3)(e)2., F.S.

¹⁷ Section 120.56(4), F.S.

¹⁸ Section 120.573, F.S.

¹⁹ Section 120.565, F.S.

statement is the agency's legal opinion that binds the agency under principles of estoppel. An agency has the option to deny the petition and typically will do so if a live enforcement action is pending with respect to similar facts.

Minor Violations

The APA directs agencies to issue a "notice of noncompliance" as the first response when the agency encounters a first minor violation of a rule.²⁰ The law provides that a violation is a minor violation if it "does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm." Agencies are authorized to designate those rules for which a violation would be a minor violation. An agency's designation of rules under the provision is excluded from the definition of rulemaking under the APA but may be subject to review and revision by the Governor or Governor and Cabinet.²¹ An agency under the direction of a cabinet officer has the discretion not to use the "notice of noncompliance" once each licensee is provided a copy of all rules upon issuance of a license and annually thereafter.

III. Effect of Proposed Changes:

Section 1 amends s. 120.52, F.S., to adopt a definition of "small business" for the APA. The definition references s. 288.703 which defines "small business" as a business having less than 200 employees and \$5 million in net worth. As described above, that definition is already incorporated elsewhere in the APA. The effect might be interpreted to reduce the flexibility allowed in rulemaking for agencies by expanding the definition to businesses with 200 or more employees.

Section 2 amends s. 120.56, F.S., to shift the burden of proof from challengers to agencies to prove that their existing rules are valid. It also removes the burden of proof on challengers to agency statements defined as rules (but not validly adopted as rules), requiring the agency to prove the statement is not a rule, that it was validly adopted, or that rulemaking is not feasible or not practicable. This change will likely reduce the motivation of parties to challenge proposed rules (for which the agencies now have the burden of proving legal validity) prior to the final adoption, at a time when a finding of invalidity or other change to the proposed rule would not impact existing legal requirements.

Section 3 amends s. 120.595, F.S., relating to attorney fees in APA proceedings. The bill eliminates the defense that the agency did not know and should not have known a statement was an unadopted rule; and eliminates a requirement that an agency may not be responsible for attorney fees unless provided 30 days notice that the statement may constitute an unadopted rule prior to the filing of the challenge and that the agency failed to file a notice of rulemaking to correct the deficiency. The effect will be that attorney fees could be awarded even if the agency immediately initiates rulemaking in response to the petition challenging the unadopted rule.

²⁰ Section 120.695, F.S. The statute contains the following legislative intent: "It is the intent of the Legislature that an agency charged with enforcing rules shall issue a notice of noncompliance as its first response to a minor violation of a rule in any instance in which it is reasonable to assume that the violator was unaware of the rule or unclear as to how to comply with it."

²¹ Section 120.695(2)(c), (d), F.S. The statute provides for final review and revision of these agency designations to be at the discretion of elected constitutional officers.

Section 4 amends s. 120.573, F.S., relating to mediation of disputes, to authorize a party to request mediation in any case involving a challenge to the validity of an existing rule, proposed rule or an unadopted rule, or a proceeding pursuant to a petition seeking declaratory statement. This may have little impact on the effect of present law, particularly in light of the nature of the matters referenced, which constitute determinations of law that are not ordinarily amenable to mediation.

Section 5 amends s. 120.695, F.S., to remove the discretion of agencies to designate rules for which minor violations would be subject to a notice of noncompliance and the discretion of cabinet officers to opt out of the provisions of the section by keeping licensees regularly advised of the content of governing rules. As a result, every first violation of a rule that does not cause harm or threaten the public health, safety, or welfare could only be addressed by a notice of noncompliance. This may increase litigation over what is or is not a minor violation, while reducing the revenues generated from fines for first violations of many rules.

Sections 6, 7, and 8 amend ss. 420.9072, 420.9075, and 443.091, F.S., respectively, to correct cross-references.

The bill takes effect July 1, 2013.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector might see some positive impact from a reduction of fines for first time violations of many rules. However, the impact upon business costs of any increase in investigations might offset any reduction in fines paid.

C. Government Sector Impact:

The bill eliminates the ability of agencies to collect fines for many first-time rule violations that do not cause harm. A reasonable estimate of this revenue has not been made. The bill may require additional enforcement expenditures in some regulatory areas where penalties imposed for first-time violations actually deter wrongdoing.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:**A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.