

STORAGE NAME: h1479.brc

DATE: March 17, 1999

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
BUSINESS REGULATION AND CONSUMER AFFAIRS
ANALYSIS**

BILL #: HB 1479

RELATING TO: Notices of noncompliance

SPONSOR(S): Representative Brown

COMPANION BILL(S): None.

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) BUSINESS REGULATION AND CONSUMER AFFAIRS
 - (2) GOVERNMENTAL OPERATIONS
 - (3) GOVERNMENTAL RULES AND REGULATIONS
 - (4)
 - (5)
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I. SUMMARY:

This bill:

- 1) Extends the current provisions requiring a state agency to issue a notice of noncompliance as a first response to a violation of a *rule*, making those provisions apply to violations of a *statute*, as well;
- 2) Provides a mechanism to clear the disciplinary record of a person or business, if: (1) The violation occurred two or more years ago; (2) The violation was a minor violation; and (3) There has not been a recurrence of the same or a similar violation. The mechanism to be used to clear the disciplinary records of regulated persons or businesses is to reclassify those violations as "inactive."
- 3) Provides that each state agency shall establish a schedule under which each disciplinary action taken against a person or business shall be cleared from, or remain on, the person's or business's disciplinary record.

The bill's provisions relating to issuing a notice of noncompliance do not apply to the Department of Revenue, criminal law, or the regulation of law enforcement or teachers.

The committee has received no information or input regarding the fiscal effect on state government. There should be no significant fiscal impact on local governments or the private sector.

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

In 1995, s. 120.695, F.S., (the Administrative Procedures Act) was enacted to provide 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. A "notice of noncompliance" is a notification that a violation exists, with information on how to comply. A notice of noncompliance may not be accompanied by a fine or other disciplinary penalty.

That section requires each executive agency to review its regulatory rules, and determine which of these should have a notice of noncompliance issued for a first offense, rather than a fine or other disciplinary penalty.

In order to do this, each department must first identify the rules which can result in a penalty against a person or business if the person or business fails to comply with the rule. Then, each department must determine which rule can be considered "minor," and have a notice of noncompliance issued for a first offense.

The standard used to determine whether to classify the rule as "minor," is whether the violation will not result in economic or physical harm to any person. Each department is asked to designate a notice of noncompliance as the first offense response to any violation of a minor rule, providing there is no reason to believe that the violator knew of the rule and intentionally failed to comply. The departments are to report to the Governor, or cabinet where appropriate, on the review.

In 1997, language similar to that found in s. 120.695, F.S., was placed in s. 455.225, F.S., relating to having the Department of Business Regulation and Consumer Affairs (DBPR) review its regulatory rules, and determine which of these should have a notice of noncompliance issued for a first offense, rather than a fine or other disciplinary penalty.

Presently, most agencies do not make any provision for clearing a person's or business's disciplinary record after a period of years, or for any other reason.

See Comments Section for additional information.

B. EFFECT OF PROPOSED CHANGES:

The bill makes the current provisions requiring state agencies to issue a notice of noncompliance as a first response to a violation of a *rule*, apply to violations of a *statute*, as well. The bill exempts the taxation and criminal law violations from the provisions, thereby adding them to the existing exemptions for law enforcement personnel and teachers.

The bill creates a mechanism to clear the disciplinary record of a person or business, if: (1) The violation occurred two or more years ago; (2) The violation was a minor violation; and (3) There has not been a recurrence of the same or similar violation.

Finally, the bill provides that each state agency shall establish a schedule under which each disciplinary action taken against a person or business shall remain on, or be cleared from, the disciplinary record.

The bill places the provisions relating to clearing minor violations from a person or business's disciplinary record after a period of years, both the administrative procedures act (ch. 120, F.S.) and in the DBPR's regulatory chapter (ch. 455, F.S.).

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. The bill requires state agencies to establish a schedule under which each disciplinary action taken against a person or business shall remain on, or be cleared from, the disciplinary record.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

- a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

N/A

- (2) Who makes the decisions?

N/A

- (3) Are private alternatives permitted?

N/A

- (4) Are families required to participate in a program?

N/A

- (5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Sections 120.695, 120.696, and 455.225, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1. Amends s. 120.695, to expand application of existing notice of noncompliance provisions to apply to statutes as well as rules.

Section 2. Creates s. 120.696, F.S., to provide a mechanism to clear minor violations from the disciplinary records of persons or businesses.

Section 3. Amends s. 455.255, F.S., to provide a mechanism to clear minor violations from the disciplinary records of persons or businesses regulated under the DBPR.

Section 4. Provides that the bill shall take effect July 1, 1999.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

No information on this bill's impact has been provided.

2. Recurring Effects:

See above.

3. Long Run Effects Other Than Normal Growth:

See above.

4. Total Revenues and Expenditures:

See above.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

The bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

The bill does not reduce the authority that counties or municipalities have to raise revenue in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

The bill does not reduce the authority that counties or municipalities have to raise revenue in the aggregate.

V. COMMENTS:

Some proponents of the use of a notice of noncompliance as a first response to a minor violation believe that the existing provisions are being underutilized. While there have been numerous anecdotal reports of under-utilization of these provisions by agencies, it is not possible for staff to comprehensively evaluate in any detail whether these provisions are, in fact, being underutilized.

There are two elements of the current law that could contribute to underutilization:

- 1) The utilization of these provisions is contingent upon the agencies considering violations to be minor. An agency might not designate a particular rule as minor, when an impartial arbiter might judge that the rule was, in fact, minor. There is no mechanism for the person or business subject to the rule to appeal the judgment of the agency not granting the rule "minor" status.
- 2) In theory, all rules merely implement statutes. Therefore, in almost all cases, when someone does something that is a ground for discipline, they have not just violated a rule, they have also violated a statute. While the agencies are bound to respond with a notice of noncompliance to a violation of a

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rule that is minor, there is no provision compelling an agency to respond to a statutory violation with a notice of noncompliance, no matter how minor the corresponding statutory requirement is.

This bill seeks to address both of these elements.

On the issue of clearing minor violations from a person's disciplinary record, the sponsor provided two anecdotal examples. In one instance, a constituent who owned a tavern had added green food coloring to the beer on St. Patrick's Day. The tavern owner was cited for a violation along the lines of "improper adulteration of a food substance." What the constituent did was perfectly innocent, yet without relief such as provided by this bill, the person will always have that disciplinary incident on his disciplinary record.

In another instance, a professional believed a course he took had been approved as meeting continuing education (CE) requirements for his profession. In truth, the course had been approved for a closely allied profession, but not for his profession. When he returned his license renewal card, he was attesting to the fact that he had properly completed all CE requirements. When it was learned that the course he completed had not been approved, the regulatory board charged him with fraud. Again, without relief such as provided by this bill, the person will always have that very serious-sounding disciplinary incident on his disciplinary record.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

VII. SIGNATURES:

COMMITTEE ON BUSINESS REGULATION AND CONSUMER AFFAIRS:

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