

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 Judiciary

BILL: SB 1626

INTRODUCER: Senator Lee

SUBJECT: Administrative Procedures

DATE: March 24, 2014

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	Pre-meeting
2.			GO	
3.			AP	

I. Summary:

SB 1626 makes a number of changes to the Administrative Procedure Act, which relate to a state agency's reliance on unadopted or invalid rules, a state agency's liability for attorney fees and costs, and the provision of notices and information to the public.

The bill strengthens a party's ability to assert an agency's reliance on an unadopted or invalid rule as a defense to an agency action. When the defense is asserted, a DOAH judge (an administrative law judge with the Division of Administrative Hearings) must determine the validity of a rule or unadopted rule. This determination may not be rejected by the agency as is currently authorized.

The Administrative Procedure Act makes agencies liable for attorney fees and costs of others in some circumstances as a result of challenges to proposed rules, existing rules, and unadopted rules. When attorney fees and costs are available, they are limited to \$50,000.

Under the bill, a state agency may be liable for attorney fees and costs in additional circumstances. These circumstances may result, for example, from the agency improperly denying a petition for a declaratory statement, acting contrary to a declaratory statement, or relying on an unadopted or invalid rule in an enforcement action or licensing decision. The existing limit on attorney fees and costs will not apply to attorney fees and costs for litigating the amount and entitlement to these fees and costs.

Lastly, the bill requires the Department of Management Services and state agencies to provide additional notices and information to the public relating to rulemaking activities. For example, the bill requires state agencies using rulemaking workshops to establish a time certain for the workshops and requires the department to publish information on its website describing the status of rulemaking activities.

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

Declaratory Statements

The Administrative Procedure Act provides for the opportunity to request, for notice and opportunity for public input, and for 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.⁸ When issued, a declaratory 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.

Attorney Fees

For purposes of the Equal Access to Justice Act in awarding attorney fees to a small business, an agency action is reasonably justified if it has a reasonable basis in law and fact at the time the agency acted. In such cases, no fees are allowable.

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 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.⁹

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 *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 at 599.

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

⁸ Section 120.565, F.S.

⁹ Section 120.595, F.S.

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.¹⁰

These attorney fee provisions supplement the attorney fee provisions provided by other laws.¹¹

Notice of Rules

Presently, the only notice of adopted rules is the filing with the Department of State. The Department of State publishes such rules in the Florida Administrative Code. However, as a courtesy, the Department of State, once each week, lists newly adopted rules in the Florida Administrative Register, and includes a cumulative list of rules filed for adoption pending legislative ratification.

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.¹² 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.¹³ In addition, a rule may not be filed for adoption until any pending challenge is resolved.¹⁴

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.¹⁵

Proceedings Involving Rule Challenges

The APA presently applies different procedures when proposed rules, existing rules and unadopted rules are challenged by petition, compared to a challenge to the validity of an existing rule, or an unadopted rule defensively in a proceeding initiated by agency action. In addition to the attorney fees awardable to small businesses under the Equal Access to Justice Act, the APA provides attorney fee awards when a party petitions for invalidation of a rule or unadopted rule, but not when the same successful legal case is made in defense of an enforcement action or grant or denial of a permit or license.

The APA does provide that a (DOAH) judge may determine that an agency has attempted to rely on an unadopted rule in proceedings initiated by agency action. However, this is qualified by a

¹⁰ Section 120.595(4)(b), F.S.

¹¹ See, for example, ss. 57.105, 57.111, F.S. These sections are specifically preserved in s. 120.595(6), F.S.

¹² Section 120.56(3), F.S.

¹³ Section 120.56(2), F.S.

¹⁴ Section 120.54(3)(e)2., F.S.

¹⁵ Section 120.56(4), F.S.

provision that an agency may overrule the DOAH determination if clearly erroneous. If the agency rejects the DOAH determination and is later reversed on appeal, the challenger is awarded attorney fees for the entire proceeding.¹⁶ Additionally, in proceedings initiated by agency action, when a DOAH judge determines that a rule constitutes an invalid exercise of delegated legislative authority the agency has full de novo authority to reject or modify such conclusions of law, provided the final order states with particularity the reasons for rejection or modifying such determination.¹⁷

In proceedings initiated by a party challenging a rule or unadopted rule, the DOAH judge enters a final order that cannot be overturned by the agency. The only appeal is to the District Court of Appeals.

Final Orders

An agency has 90 days to render a final order in any proceeding, after the hearing if the agency conducts the hearing, or after the recommended order is submitted to the agency if DOAH conducts the hearing (excepting the rule challenge proceedings described above in which the DOAH judge enters the final order).

Judicial Review

A notice of appeal of an appealable order under the APA must be filed within 30 days after the rendering of the order.¹⁸ An order, however, is rendered when filed with the agency clerk. On occasion, a party may not receive notice of the order in time to meet the 30 day appeal deadline. Under the current statute a party may not seek judicial review of the validity of a rule by appealing its adoption but the statute authorizes an appeal from a final order in a rule challenge.¹⁹

III. Effect of Proposed Changes:

This makes a number of changes to the Administrative Procedure Act, which relate to a state agency's reliance on unadopted or invalid rules, a state agency's liability for attorney fees and costs, and the provision of notices and information to the public.

Rule Challenges

Reliance on Unadopted Rules During Rulemaking (Section 2)

Existing law, ss. 120.56(4)(e) and 120.595(4)(a), F.S., allow a person to challenge an agency statement as an unadopted rule. If the challenger prevails, the agency must "immediately discontinue reliance on the statement and any substantially similar statement until rules addressing the subject are adopted." Similarly, the bill requires an agency to stop using an unadopted rule when it receives a petition to initiate rulemaking relating to an unadopted rule and then proceeds with the rulemaking process.

¹⁶ Section 120.57(1)(e)3., F.S.

¹⁷ Section 120.57(1)(k-l), F.S.

¹⁸ Section 120.68(2)(a), F.S.

¹⁹ Section 120.68(9), F.S.

Rule Challenges; Burdens of Challenger and Agency (Section 4)

Under case law, in a rule challenge, a person challenging a rule or proposed rule generally has the burden of going forward with evidence and the ultimate burden of establishing the basis for the claim.²⁰ Once the challenger satisfies his or her burden, the agency must demonstrate by the greater weight of the evidence that the rule or proposed rule is not an invalid exercise of delegated legislative authority. The bill appears to codify case law defining the respective burdens of the challenger and agency in rule challenge proceedings.

Rule Challenges as a Defense to Agency Action

The bill specifies various ways that a party can assert the invalidity of a rule or unadopted rule as a defense to an agency action. A party may do so by filing a petition for a rule challenge alleging that a rule is an invalid exercise of delegated legislative authority. A party alleging status as a substantially affected person may seek an administrative determination of the invalidity of an existing rule at any time the existing rule at any time during the existence of the rule.

In those circumstances, a DOAH judge must determine the validity of the rule or unadopted rule.

Rule Challenge as a Defense (Section 7)

Under current law, when an agency proposes to take action and there are no disputed factual issues, a person may have a dispute heard by an agency hearing officer. If disputed factual issues exist the dispute generally must be resolved by a DOAH judge, but an agency may reject the judge's conclusions of law in some circumstances.

Under the bill, when no factual disputes exist, a challenge to agency action will be heard by a DOAH judge if the challenger asserts the invalidity of a rule or unadopted rule as a defense to the agency action. The decision of the DOAH judge on the validity of the rule cannot be rejected by the agency. Thus, an agency may not adjudicate the validity of its own rules.

In cases in which an agency's rule or statement is being challenged as a defense and factual disputes exist, the agency must notify the challenger whether it will continue to rely on the rule or unadopted rule in the agency's action. If the agency fails to timely provide the notice, it may not rely on the rule or unadopted rule in the proceeding.

Bifurcation of Challenges to Agency Action Prohibited (Section 4)

The bill prohibits DOAH judge from bifurcating a petition challenging agency action based on an unadopted rule into separate cases—one case for a challenge to the action and one for a challenge to an alleged unadopted rule.

²⁰ *Keen v. Dept. of Bus. and Professional Regulation*, 920 So. 2d 805, 808 (Fla. 5th DCA 2006). See also, *Florida Board of Medicine v. Florida Academy of Cosmetic Surgery, Inc.*, 808 So. 2d 243, 251 (Fla. 1st DCA 2002).

Attorney Fees and Costs

The bill specifies additional circumstances in which a state agency may be liable for the attorney fees and costs and limits the circumstances in which private parties may be liable to a state agency for the same.

Challenges to Unadopted or Invalid Rules as a Defense (Section 9)

Under the bill, if a party successfully defends itself against an agency action by showing that the rule or unadopted rule on which the action was based was not valid, the party is entitled to reasonable attorney fees and costs which may not exceed \$50,000.

Challenges to Proposed Rules (Section 9)

Under existing law, an agency is not liable for attorney fees in a challenge to a proposed rule, if it demonstrates that its actions were substantially justified based on a reasonable basis in law and fact or if special circumstances exist which would make an award unjust. Under the bill, if the agency loses a challenge to a proposed rule, the agency will be able to avoid liability for attorney fees and costs only if special circumstances exist that would make the award unjust.

Prerequisite to Attorney Fees in Rule Challenge Proceedings (Section 9)

Under existing law, if an agency is notified that it may be relying upon an unadopted rule, the agency can avoid liability for pre-notice attorney fees by initiating rulemaking within 30 days after receiving the notice.

As a prerequisite to the entitlement to attorney fees under the bill, a person challenging a proposed rule, unadopted rule, or existing rule must file a “notice of invalidity” with the agency. The notice must be received by the agency head at least 5 days before the challenge is filed against a proposed rule and 30 before a challenge is filed against an unadopted rule or existing rule.

Attorney Fees; Agency Action Not Substantially Justified (Section 1)

The Florida Equal Access to Justice Act, s. 57.111, F.S., requires a DOAH judge to award attorney fees to a prevailing small business party in any action under the Administrative Procedure Act, if a state agency initiated the action and the agency’s action was not substantially justified.

The bill provides specific examples of agency action that is not substantially justified. As a result, a state agency is liable for the attorney fees and costs of a small business if the agency declines to issue a declaratory statement to a business and then takes action against the business based on facts and circumstances similar to those raised in the petition for a declaratory statement. Similarly, the agency is liable if the agency issues a declaratory statement to the business and then acts in contradiction to the declaratory statement.

Attorney Fees; Denial of a Declaratory Statement (Section 5)

The bill provides that a DOAH judge must award reasonable attorney fees to a person whose petition for a declaratory statement is improperly denied by a state agency.

Agency Liability for Fees for Fees (Section 9)

Under the Administrative Procedure Act, attorney fees and costs awarded against an agency are generally limited to \$50,000. Under the bill, attorney fees and costs are available for litigating the entitlement to or an amount of fees and costs. These are not subject to the cap on attorney fees and costs.

Attorney Fee Awards against a Nonprevailing Adverse Party (Section 9)

Under existing law, a DOAH judge may award attorney fees against a nonprevailing adverse party who participated in a proceeding for an improper purpose. An improper purpose could exist if the party lost two or more similar cases against the agency. Under the bill, the party must have lost at least three similar cases against the agency.

Declaratory Statements (Section 5)

Under existing law, a person may petition a state agency for a declaratory statement, which is an explanation of how an agency's statutes, rules, or orders apply to the petitioner's particular circumstances. An agency must issue a declaratory statement or deny the petition within 90 days.

The bill provides that if the petitioner includes in the petition a statement that describes or asserts the petitioner's understanding of how and agency rule, policy, or procedure applies, the agency's response is due within 60 days. Thus, by including a statement describing how a petitioner believes an agency rule, policy, or procedure applies to his or her circumstances, the petitioner may accelerate the agency's response.

Notices and Information to the Public and Interested Persons

Workshops (Section 2)

Existing law allows agencies to use public workshops for the purpose of developing rules. During a workshop, agency personnel must be available to explain the agency's proposed rule and to respond to questions or comments on the proposed rule.

The bill requires an agency to establish a "time certain" for rulemaking workshops, if a state agency begins rulemaking based on a petition to initiate rulemaking from a person regulated by the agency or a person having a substantial interest. However, existing law requires that notice of a workshop be published in the Florida Administrative Register at least 14 days before the workshop.²¹

Florida Administrative Register (Section 3)

The Department of State is currently required to publish the Florida Administrative Register on the Internet. The register must contain a variety of variety of notices relating to agency rulemaking and declaratory statements.

²¹ Section 120.54(3)(a)2. and 3., F.S.

The bill adds to the required contents of the Florida Administrative Register:

- Notices of rule development;
- Rules filed for adoption during the previous 7 days; and
- Rules filed for adoption pending ratification by the Legislature.

Notice of the Proposed Adoption, Amendment, or Repeal of Rules (Section 3)

Existing law requires an agency to provide notice of its intent to adopt, amend, or repeal a rule. The notice must be published in the Florida Administrative Register and mailed to persons named in the proposed rule or who have requested advance notice of agency proceedings.

The bill requires an agency that provides an e-mail alert service to inform licensees of important information to use its alert system to provide notice of:

- Rule development activities;
- Proposed rules; and
- Filing rules for adoption.

The e-mail alerts relating to the rulemaking activities must include links to the proposed or final rules.

Notice to Administrative Procedures Committee (Section 10)

Existing law requires agencies to notify the Administrative Procedures Committee if the decision in a rule challenge proceeding is being appealed.²² The bill requires the committee to be notified in an additional circumstance—an appeal of a decision in an agency action in which the respondent challenged the validity of a rule or unadopted rule as a defense.

Designation of Minor Violations (Section 11)

Existing law contains a requirement that agencies review their rules to identify rules that if violated would be a minor violation.²³ The review was to have been completed by December 1, 1995. If one of these violations occur, agencies are required issue a notice of noncompliance, which may not include a fine or penalty, as a first response to the violation.

The bill requires agencies to again review their rules to identify those that if violated would be a minor violation. Additionally, rules filed for adoption must be accompanied by a certification by the agency head as to whether any part of a rule that if violated would be a minor violation. These rules must be identified on agency websites or disciplinary guidelines adopted as a rule. These procedures do not apply to the Department of Corrections and educational units.

²² Section 120.68(2)(a), F.S.

²³ Section 120.695, F.S.

Mediation (Section 8)

Existing law allows a person to seek to mediate the resolution of an agency-initiated action.²⁴ The bill allows a party that initiates a rule challenge or files a petition for a declaratory statement to seek mediation of the petition as well.

Effective Date (Section 12)

The bill takes effect on July 1, 2014.

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 bill may make additional attorney fees and costs available to persons who challenge agency actions that are based on invalid or unadopted rules.

C. Government Sector Impact:

The bill may make agencies cautious about pursuing enforcement actions by increasing the circumstances in which agencies may be liable for attorney fees.

Agencies may receive reduced amounts of fines from minor rule violations.

²⁴ Section 120.573, F.S.

VI. Technical Deficiencies:

In s. 57.111(3)(e)2, F.S., the Legislature may wish to clarify that an agency is liable for attorney fees under the Equal Access to Justice Act only if the agency *improperly* denies a petition for a declaratory statement.

In s. 120.565(5), F.S., the bill provides that a DOAH judge must award attorney fees to a person whose petition for a declaratory statement is improperly denied by a state agency. Elsewhere in the bill and ch. 120, F.S., a person is entitled to costs in addition to attorney fees. As such, the Legislature may wish to make costs available in this instance as well.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 57.111, 120.54, 120.55, 120.56, 120.565, 120.569, 120.57, 120.573, 120.595, 120.68, and 120.695.

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

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

None.

B. Amendments:

None.