

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 718

INTRODUCER: Senator Lee

SUBJECT: Administrative Procedures

DATE: March 23, 2015

REVISED: _____

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

I. Summary:

SB 718 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. Among the most notable changes, the bill:

- Provides that the decision of an administrative law judge in a challenge to a proposed rule is final agency action that cannot be overturned by an agency.
- Removes the presumption of validity for existing agency rules.
- Expands the circumstances under which a state agency must issue a declaratory statement by eliminating the requirement that a petitioner for a declaratory statement state with particularity the petitioner's set of circumstances.
- Makes a state agency liable for attorney fees and costs when the agency improperly denies a petition for a declaratory statement or loses a challenge to an existing or unadopted rule which is asserted as a defense to agency action.
- Makes a state agency liable for attorney fees and costs in proceedings to determine the entitlement to or amount of fees in related litigation against a prevailing party.
- Requires a person to provide advance notice of the intent to challenge a proposed, existing, or unadopted rule before the person can be entitled to attorney fees and costs in a rule challenge proceeding.

II. Present Situation:

Rulemaking and the Administrative Procedure Act

The Administrative Procedure Act (APA) in ch. 120, F.S., sets forth uniform procedures that agencies must follow when exercising 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 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 authorizes a substantially affected person to request an agency’s opinion as to the applicability of a statute, rule, or order of the agency as it applies to the petitioner’s particular set of circumstances.⁸ When issued, a declaratory statement is the agency’s legal opinion that binds the agency under principles of estoppel. A declaratory statement may “help parties avoid costly administrative litigation, while simultaneously providing useful guidance to others who may find themselves in the same or similar situations.”⁹

A number of grounds exist for an agency to dismiss or deny a petition for a declaratory statement, including:

- The issues raised in the petition are being simultaneously litigated in a judicial or another administrative proceeding.¹⁰
- The petition was filed to challenge another agency decision.¹¹
- The petition seeks approval or disapproval of conduct which has already occurred.¹²

Attorney Fees

The Florida Equal Access to Justice Act is intended to diminish the deterrent effect of seeking review of, or defending against governmental actions.¹³ Under the act, a small business that prevails in a legal action initiated by a state agency is entitled to attorney fees and costs if the actions of the agency were not substantially justified or special circumstances exist which would make the award unjust. An agency action is reasonably justified if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

¹ Section 120.52(16), F.S.; *Florida Dep’t of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

² *Southwest Fla. Water Mgmt. Dist. 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 Fla. Water Mgmt. Dist. v. Save the Manatee Club, Inc.*, 773 So. 2d 594 at 599.

⁷ *Sloban v. Fla. Bd. of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008) (internal citations omitted); *Bd. 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 *1000 Friends of Fla., Inc., v. State Dept. of Cmty. Affairs*, 760 So. 2d 154, 158 (Fla. 1st DCA 2000).

¹⁰ *Fox v. State Bd. of Osteopathic Med. Examiners*, 395 So. 2d 192 (Fla. 1st DCA 1981).

¹¹ *Kahn v. Office of Ins. Reg.*, 881 So. 2d 699 (Fla. 1st DCA 2004).

¹² *Novick v. Dept. of Health, Bd. of Med.*, 816 So. 2d 1237, 1240 (Fla. 5th DCA 2002).

¹³ Section 57.111, F.S.

In addition to the special attorney fee provisions in the Equal Access to Justice Act, the APA authorizes the recovery of attorney fees when:

- A non-prevailing party has participated for an improper purpose;
- An agency's actions are not substantially justified;
- An agency relies upon an unadopted rule and is successfully challenged after 30 days' notice of the need to adopt rules; and
- An agency loses an appeal in a proceeding challenging an unadopted rule.¹⁴

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.¹⁵

The authorization for attorney fees in the Equal Access to Justice Act supplement other statutes authorizing attorney fees.¹⁶

Notice of Rules

Under current law, the Department of Management Services is required to publish the Florida Administrative Register on the Internet.¹⁷ This document must contain:

1. Notices relating to the adoption or repeal of a rule.
2. Notices of public meetings, hearing, and workshops.
3. Notices of requests for authorization to amend or repeal an existing rule or for the adoption of a new uniform rule.
4. Notices of petitions for declaratory statements or administrative determinations.
5. Summaries of objections to rules filed by the Administrative Procedures Committee.
6. Other material required by law or deemed useful by the department.

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.¹⁸ 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.¹⁹ In addition, a rule may not be filed for adoption until any pending challenge is resolved.²⁰

¹⁴ Section 120.595, F.S.

¹⁵ Section 120.595(4)(b), F.S.

¹⁶ See s. 120.595(6), F.S. (providing that a statute authorizing attorney fees in challenges to agency actions does not affect the availability of attorney fees and costs under other statutes including ss. 57.105, and 57.111, F.S.).

¹⁷ Section 120.55, F.S.

¹⁸ Section 120.56(3), F.S.

¹⁹ Section 120.56(2), F.S.

²⁰ Section 120.54(3)(e)2., F.S.

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.²¹

Proceedings Involving Rule Challenges

The APA presently applies different procedures in rule challenges 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 the 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 an administrative law judge with the Division of Administrative Hearings (DOAH) 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 provision that an agency may overrule the DOAH determination if it's 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.²² Additionally, in proceedings initiated by agency action, if 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.²³

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 Appeal.

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.²⁴ An order, however, is rendered when filed with the agency clerk. On occasion, a party might 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

²¹ Section 120.56(4), F.S.

²² Section 120.57(1)(e)3., F.S.

²³ Section 120.57(1)(k-1), F.S.

²⁴ Section 120.68(2)(a), F.S.

by appealing its adoption, but the statute authorizes an appeal from a final order in a rule challenge.²⁵

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.²⁶ 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 challenge under the APA but may be subject to review and revision by the Governor or Governor and Cabinet.²⁷ 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.

Rules Ombudsman

Section 288.7015, F.S., requires the Governor to appoint a rules ombudsman in the Executive Office of the Governor, for considering the impact of agency rules on the state’s citizens and businesses. The rules ombudsman must carry out the duties related to rule adoption procedures with respect to small businesses; review state agency rules that adversely or disproportionately impact businesses, particularly those relating to small and minority businesses; and make recommendations on any existing or proposed rules to alleviate unnecessary or disproportionate adverse effects to business. Each state agency must cooperate fully with the rules ombudsman in identifying such rules, and take the necessary steps to waive, modify, or otherwise minimize such adverse effects of any such rules

III. Effect of Proposed Changes:

This bill 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.

Declaratory Statements; Attorney Fees (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.

²⁵ Section 120.68(9), F.S.

²⁶ 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.”

²⁷ 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.

The bill redefines the term “substantially justified” as used in the act by identifying specific agency actions that are not substantially justified. As a result of the changed definition, a state agency is liable for the attorney fees and costs of a small business if an agency action is:

- Based on a subject that the prevailing small business party previously raised in a petition for a declaratory statement.
- Contrary to its position in a declaratory statement.
- Based on facts and circumstances similar to those raised in a petition for a declaratory statement, which the agency denied.

These changes defining agency actions that are not substantially justified appear likely cause changes in agency conduct. An agency might be more likely to issue a declaratory statement when proper grounds would otherwise exist for an agency to decline to do so. Alternatively, an agency might decline to initiate an enforcement action when grounds would otherwise exist for an enforcement action.

Schedule for Rulemaking Workshops; Unadopted Rule (Section 2)

Under existing s. 120.54(7)(b), F.S., a person may petition an agency to initiate rulemaking with respect to an unadopted rule. If after a public hearing on the unadopted rule, the agency chooses to initiate rulemaking, the statutes do not establish a timeframe or schedule for the rulemaking activities. Under the bill, an agency, within 30 days after the public hearing, must establish a schedule for rulemaking workshops. By operation of existing s. 120.54(2), F.S., an agency will provide the notice required by the bill through a Notice of Rule Development, which will be published in the Florida Administrative Register. The bill also requires an agency that chooses to initiate rulemaking related to an unadopted rule to discontinue reliance on the unadopted rule.

Distribution of Notices (Section 3)

The bill adds additional items to the list of required contents of the Florida Administrative Register, including:

- Notices of Rule Development Workshops.
- A listing of all rules filed for adoption within the previous 7 days.
- A listing of rules pending ratification by the Legislature.

The bill also requires agencies that provide notices by email to interested persons to include within those email messages, notices of rule development workshops and notices of the intent to adopt, amend, or repeal a rule.

Rule Challenges (Section 4)

Burdens of Proof

The bill amends s. 120.56(1), (2) and (4), F.S., relating to petitions challenging the validity of rules, proposed rules and statements defined as rules (“unadopted rules”). The changes clarify the pleading requirements for the petitions. It also clarifies a person who challenges a proposed or adopted rule has the burden of going forward with the evidence.

Presumption of Validity

The bill amends s. 120.56(3), F.S., with respect to challenges to existing rules. Under current law, existing agency rules are generally presumed valid and a challenger has the burden of proving that the rule is an invalid exercise of legislative authority.²⁸ Under the bill, existing rules lose the presumption of validity, and the agency in a rule challenge must prove that the rule is not invalid. Thus, under the bill an agency has the same burden in defending the validity of an existing rule as it has under current law in defending the validity of a proposed rule.

Invalidity Determination

Section 120.56(3), F.S., as amended by the bill, provides that an agency may not rely on an invalidated rule for any purpose. Thus, the determination of the validity of an existing rule by a DOAH judge is final agency action.

Bifurcated Proceedings

Lastly, s. 120.56(4), F.S., as amended by the bill, prohibits a DOAH judge from bifurcating a petition challenging agency action into a challenge to an unadopted rule and a challenge to agency action.

Entitlement to a Declaratory Statement (Section 5)

Particularity Requirement

Under existing law, a petitioner must “state with particularity the petitioner’s set of circumstances” in a petition seeking a declaratory statement of an agency’s opinion as to the application of a rule or statute. There seems to be two purposes of the particularity requirement, according to case law. First, the particularity requirement is intended to prevent an agency from responding to a purely hypothetical question unrelated to the petitioner’s personal situation.²⁹ The second purpose of the particularity requirement seems intended to prevent an agency from using a declaratory statement to define agency policy instead of rulemaking procedures.³⁰ The bill deletes the particularity requirement for declaratory statements.

The bill deletes the requirement that a petition for a declaratory statement state with particularity the petitioner’s set of circumstances. The elimination of this requirement appears likely to cause agencies to issue more declaratory statements. Those statements might also be more broadly worded if the agency does not have specific information needed to tailor the statement to a petitioner’s specific needs. The issuance of broadly-worded declaratory statements might also cause the agency to initiate rulemaking on the substance of the petitions.

²⁸ See *St. Johns River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co.*, 717 So. 2d 72, 76 (Fla. 1st DCA 1998), superseded by statute on other grounds; *Willette v. Air Products*, 700 So. 2d 397, 399 (Fla. 1st DCA 1997); *Injured Workers Ass’n of Fla. v. Dep’t of Labor & Employment Sec.*, 630 So. 2d 1189, 1191 (Fla. 1st DCA 1994) (“Rules are entitled to a presumption of constitutional validity and should be interpreted, if possible, in a manner that preserves their validity.”).

²⁹ *Fla. Dept. of Bus. & Prof’l Reg., Div. of Pari-Mutuel Wagering v. Inv. Corp. of Palm Beach*, 747 So. 2d 374, 383 (Fla. 1999).

³⁰ *Chiles v. Dept. of State, Div. of Elections*, 711 So. 2d 151 (Fla. 1st DCA 1998).

Agency Response Time

Existing law requires agencies to issue a declaratory statement or deny a petition for a declaratory statement within 90 days after the filing of the petition. The bill reduces that time period to 60 days if a petitioner sets forth its understanding of the application of a statute or rule in its petition.

Attorney Fees and Costs

Lastly, the bill entitles a petitioner to its reasonable attorney fees and costs if an agency improperly denies a petition for a declaratory statement and the denial is reversed on appeal.

Time Period for Issuance of Final Order (Section 6)

Under existing law, an agency must issue a final order within 90 days after a DOAH judge issues a recommended order. The bill, however, contemplates that a DOAH judge's decision on a rule challenge is final agency action, reversible only by an appellate court. But the bill, consistent with existing law provides that the DOAH judge's decision with respect to other disputed matters in the same proceeding is a recommended decision. As a result, the agency might not as a practical matter be able to issue a final order until an appellate court rules on the validity of a challenged rule. For those cases, the bill provides that an agency must issue its final order within 10 days after the appellate court issues its mandate.

Rule Challenges in Proceedings Involving Disputed Facts (Section 7)

Section 7 amends s. 120.57, F.S., relating to DOAH hearings of agency-initiated actions involving disputed issues of material fact. The bill incorporates many of the rule challenge provisions of s. 120.56, F.S., allowing the administrative law judge to enter a final order on a challenge to the validity of a rule or to an unadopted rule in all contests before DOAH. This treats a challenge to a rule in defending against or attacking an agency action much as a challenge in an action initiated solely to challenge the rule. Notably, the decision on the rule challenge in the DOAH proceeding is binding on the agency.

The bill allows the agency, within 15 days after notice of the rule challenge in such matters, to waive its reliance on an unadopted rule or a rule alleged to be invalid, and thereby eliminate that aspect of the litigation, without prejudice to the agency reasserting its position in another matter or rule challenge.

Mediation (Section 8)

The bill authorizes a person challenging a rule, proposed rule, or unadopted rule or a person seeking a declaratory statement to request mediation. However, the bill does not appear to limit an agency's discretion to approve or deny a request for mediation.

Attorney Fees (Section 9)

The bill amends s. 120.595, F.S., to make many technical and clarifying changes, but it also increases the circumstances under which an agency may be liable for attorney fees and costs.

Rule Challenge as Defense to Agency Action

The bill makes agencies liable for reasonable attorney fees and costs when a challenge to an existing rule or unadopted rule is successfully asserted as a defense to agency action. Under existing law, attorney fees and costs are available only in a rule challenge proceeding.

Exceptions to Liability

Under existing law, an agency generally is liable for attorney fees and costs if it loses a challenge to a proposed or existing rule. However, the agency is not liable for attorney fees and costs if its actions were substantially justified. The bill eliminates this exception to circumstances in which an agency might otherwise be liable for attorney fees and costs.

Existing law provides an additional exception protecting an agency from liability for attorney fees and costs with respect to an unadopted rule. Specifically, if an agency initiates rulemaking after a challenge to an unadopted rule is initiated, an agency has liability protection if it proves to the DOAH judge that did not know and should not have known that an agency statement was an unadopted rule. The bill eliminates this exception to an agency's liability for attorney fees and costs.

Prerequisite to Attorney Fees and Costs

As a prerequisite to the entitlement to attorney fees and costs in a rule challenge proceeding, the bill requires a person challenging the proposed, existing, or unadopted rule to provide advance notice of the intent to challenge the rule to the agency head. However, the advance notice requirement does not apply to a rule challenge asserted as a defense to an agency action.

Fees for Fees

Existing law generally limits the maximum amount of an agency's liability for attorney fees and costs to \$50,000. The bill authorizes a person to recover attorney fees and costs for litigating the entitlement to or amount of attorney fees to which it is entitled in the underlying litigation against the agency. The additional amounts are not subject to any limits.

Judicial Review (Section 10)

Existing law requires an agency to notify the Administrative Procedures Committee of the appeal of orders from a rule challenge proceeding. The bill requires an agency to report to the committee the appeal of orders relating to the assertion of a rule challenge as a defense to agency action. Section 10 also contains provisions conforming to other provisions of the bill which allow the direct appeal of a decision of a DOAH judge ruling on a rule challenge asserted as a defense to agency action.

Designation of Minor Violation of Rules (Section 11)

Section 11 amends s. 120.695, F.S., to authorize the rules ombudsman in the Executive Office of the Governor to require agencies to designate rules, the violation of which constitute a minor rule violation.

Effective Date (Section 12)

The bill takes effect July 1, 2015.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

This bill does not apply to counties or municipalities. As such, the bill is not subject to the constitutional restrictions on the Legislature to enact mandates.

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:

This bill may require an agency to provide precise guidance either through more precise rules or declaratory to those regulated before the agency may sanction a regulated entity for a rule or statutory violation.

C. Government Sector Impact:

This bill increases the circumstance in which agencies may be liable for attorney fees and costs. The risk of incurring additional attorney fees and costs might deter agencies from engaging in enforcement actions. The bill may also encourage agencies to enact more rules or more precisely define their existing rules and issue more declaratory statements.

VI. Technical Deficiencies:

None.

VII. Related Issues:

As the Administrative Procedure Act has evolved over time through amendments by the Legislature, it has become more complex. This bill seems to add to the complexity of the act. At some point, the Legislature may wish to simplify the structure of the act to ensure that persons regulated by an agency can easily understand their rights to challenge agency actions.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
