

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1225 Administrative Procedures

SPONSOR(S): Adkins

TIED BILLS: **IDEN./SIM. BILLS:** SB 1696

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Rulemaking Oversight & Repeal Subcommittee		Rubottom	Rubottom
2) Government Operations Appropriations Subcommittee			
3) State Affairs Committee			

SUMMARY ANALYSIS

The bill amends five 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 challengers to agencies when the validity of existing rules are challenged
- Shifts part of the burden from challengers to 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 in 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;
- 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.

The bill has an indeterminate fiscal impact on agency revenues.

The bill is effective July 1, 2013.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Current situation

Small business

Florida's Administrative Procedure Act (APA) provides certain accommodations for small businesses¹ but does not provide a definition of "small business". In rulemaking, an agency must consider the impact on small businesses defined for that purpose as employing less than 200 employees and having a net worth less than \$5 million,² but agencies are authorized to define "small business" to include businesses having more than 200 employees. By contrast, Florida's Equal Access to Justice Act provides for attorney fees to be awarded in administrative proceedings to prevailing parties who are small businesses, defined as having not more than 25 employees with a net worth not more than \$2 million.³

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 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.⁴ These attorney fee provisions supplement the attorney fee provisions provided by other laws.⁵

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.⁶ 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.⁷ In addition, a rule may not be filed for adoption until any pending challenge is resolved.⁸

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.⁹

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.¹⁰ The APA does not require mediation in any particular case. Mediation is a process that is most likely to be effective when the parties agree to that form of dispute resolution. Because mediation is only concluded by agreement, rather than the determination of a third party—a judge or arbiter—compelling mediation is not often practical. Without any formal mediation, many administrative disputes are resolved by negotiation prior to, or after the initiation of formal proceedings in the Division of Administrative Hearings.

¹ Sections 120.54, 120.541, and 120.74, F.S.

² Section 120.54(3)(b), F.S., incorporates by reference the definition of "small business" in s. 288.703(6), F.S.

³ Section 57.111, F.S.

⁴ Section 120.595, F.S.

⁵ See, for example, ss. 57.105, 57.111, F.S. These sections are specifically preserved in s. 120.595(6), F.S.

⁶ Section 120.56(3), F.S.

⁷ Section 120.56(2), F.S.

⁸ Section 120.54(3)(e)2., F.S.

⁹ Section 120.56(4), F.S.

¹⁰ Section 120.573, F.S.

Declaratory Statements

The APA 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.¹¹ 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 will typically do so if a live enforcement action is pending with respect to similar facts. Anecdotal evidence indicates that the declaratory statement process in the APA has not proven productive in Florida. By contrast, the Internal Revenue Service and the Florida Department of Revenue each frequently issue binding opinions upon request of taxpayers.

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.¹² 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.¹³ 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.

Effect of the Bill

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 to expand the definition to businesses with 200 or more employees. However, the definition would likely not have any effect on the operation of the APA.

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, to eliminate the defense that the agency did not know and should not have known a statement was an unadopted rule, and eliminate 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 will be awarded even if the agency immediately initiates rulemaking in response to the petition challenging the unadopted rule.

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 would have

¹¹ Section 120.565, F.S.

¹² 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."

¹³ 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.

no substantial 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 would likely reduce the deterrence of many rules not currently designated for treatment as minor violations, would likely increase litigation over what is or is not a minor violation, and likely increase the cost of enforcement to counter-balance the lost deterrence, while reducing the revenues generated from fines for first violations of many rules.

Sections 6-8 are conforming changes to separate statutes which do not add to the effect of the bill.

B. SECTION DIRECTORY:

Section 1 creates a new s.120.52(18), F.S., and renumbers existing subsections (18)-(22), to adopt a definition of "small business" for purposes of the APA.

Section 2 amends s. 120.56(3)(a) and (4)(b), F.S., relating to challenges to existing rules and unadopted rules...

Section 3 amends s. 120.595, F.S., relating to attorney fees.

Section 4 amends s. 120.573, F.S., relating to mediation of disputes.

Section 5 amends s. 120.695(2), F.S., relating to notice of noncompliance and minor violations of rules.

Section 6 makes conforming changes to s. 420.9072, F.S.

Section 7 makes conforming changes to s. 420.9075, F.S.

Section 8 makes conforming changes to s. 443.092, F.S.

Section 9 provides an effective date of July 1, 2013.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill would eliminate the ability of agencies to collect fines for many first-time violations of rules that do not cause harm. A reasonable estimate of this revenue has not been made.

2. Expenditures:

The bill might require additional enforcement expenditures in some regulatory areas where penalties for first-time violations actually deter wrongdoing.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

Local governments are not typically governed by the APA, but some are made subject to it by special law. In such cases, some revenues presently raised by fines for first time violations of rules would be lost.

2. Expenditures:

The bill would be unlikely to impact local government expenditures. Local governments might benefit from a reduction in fines assessed by state agencies, but those governed by the APA might have to increase enforcement expenditures to overcome the loss of deterrence described in A.2 above. Those governed by the APA may also experience a reduction in revenues from fines for first time violations of rules.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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.

D. FISCAL COMMENTS:

The fiscal impacts described above are indeterminate.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

It is unlikely that the fiscal impact on local governments would be significant enough to implicate the provisions of s. 18, Art. VII, Florida Constitution.

2. Other:

B. RULE-MAKING AUTHORITY:

The bill does not alter rulemaking authority except by abolishing the discretion, exempt from the rulemaking provisions of the APA, to designate rules for which first-time violations might be addressed through a notice of noncompliance.

C. DRAFTING ISSUES OR OTHER COMMENTS:

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES