

CHAPTER 87-385

Committee Substitute for Senate Bill No. 608

ADMINISTRATIVE PROCEDURE ACT

A bill to be entitled

An act relating to the Administrative Procedure Act; amending s. 120.52, F.S.; defining the term "invalid exercise of delegated legislative authority"; deleting the requirement that a separate statement of a rule's effect upon small business be submitted to the committee; amending s. 120.545, F.S.; providing clarifying language to create uniform terminology for review of rules; amending s. 120.57, F.S.; providing 15 days for agency request for hearing officer; amending s. 120.59, F.S.; clarifying statutory sections under which administrative hearing or judicial review is available, providing for the recovery of costs by a prevailing party in an administrative proceeding and providing recovery of attorney's fees in certain circumstances; amending s. 120.68, F.S.; requiring agencies to submit copies of certain appeal petitions to the committee; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

FL ST § 120.59

Section 1. Subsection (6) is added to section 120.59, Florida Statutes, to read:

120.59. Orders

<<+(6)(A) IN ANY PROCEEDING PURSUANT TO S. 120.57(1), A PREVAILING PARTY SHALL BE ENTITLED TO RECOVER COSTS FROM THE NONPREVAILING ADVERSE PARTY, AND SHALL ALSO BE ENTITLED TO RECOVER A REASONABLE ATTORNEY FEE, AS PROVIDED HEREIN. THE PROVISIONS OF THIS SUBSECTION SHALL NOT APPLY TO A PREVAILING OR NONPREVAILING PARTY THAT IS AN AGENCY.+>>

<<+(B) THE FINAL ORDER IN A PROCEEDING PURSUANT TO S. 120.57(1) SHALL AWARD COSTS AND A REASONABLE ATTORNEY FEE TO THE PREVAILING PARTY ONLY WHERE THE NONPREVAILING ADVERSE PARTY

HAS BEEN DETERMINED BY THE HEARING OFFICER TO HAVE PARTICIPATED IN THE PROCEEDING FOR AN IMPROPER PURPOSE.+>>  
<<+(C) IN ALL PROCEEDINGS PURSUANT TO S. 120.57(1), THE HEARING OFFICER SHALL DETERMINE WHETHER ANY PARTY, OTHER THAN A PARTY THAT IS AN AGENCY, PARTICIPATED IN THE PROCEEDING FOR AN IMPROPER PURPOSE AS DEFINED IN THIS SUBSECTION. IN MAKING SUCH DETERMINATION, THE HEARING OFFICER SHALL CONSIDER WHETHER THE NONPREVAILING ADVERSE PARTY HAS PARTICIPATED IN TWO OR MORE OTHER SUCH PROCEEDINGS INVOLVING THE SAME NONAGENCY PREVAILING PARTY AND SAME PROJECT AS AN ADVERSE PARTY AND IN WHICH SUCH TWO OR MORE PROCEEDINGS THE NONPREVAILING ADVERSE PARTY DID NOT ESTABLISH EITHER THE FACTUAL OR LEGAL MERITS OF ITS POSITION; AND WHETHER THE FACTUAL OR LEGAL POSITION ASSERTED IN THE INSTANT PROCEEDING WOULD HAVE BEEN COGNIZABLE IN THE PREVIOUS PROCEEDINGS. IN SUCH EVENT, IT SHALL BE REBUTTABLY PRESUMED THAT THE NONPREVAILING ADVERSE PARTY PARTICIPATED IN THE PENDING PROCEEDING FOR AN IMPROPER PURPOSE.+>>

<<+(D) IN ANY PROCEEDING IN WHICH THE HEARING OFFICER DETERMINES THAT A PARTY PARTICIPATED IN THE PROCEEDING FOR AN IMPROPER PURPOSE, THE RECOMMENDED ORDER SHALL SO DESIGNATE AND SHALL RECOMMEND THE AWARD OF COSTS AND ATTORNEY FEES.+>>

<<+(E) FOR THE PURPOSE OF THIS SUBSECTION:+>>

<<+1. "IMPROPER PURPOSE" MEANS PARTICIPATION IN A PROCEEDING PURSUANT TO S. 120.57(1) PRIMARILY TO HARASS OR TO CAUSE UNNECESSARY DELAY OR FOR FRIVOLOUS PURPOSE OR TO NEEDLESSLY INCREASE THE COST OF LICENSING OR SECURING THE APPROVAL OF AN ACTIVITY.+>>

<<+2. "COSTS" SHALL HAVE THE SAME MEANING AS THE COSTS ALLOWED IN CIVIL ACTIONS IN THIS STATE AS PROVIDED IN CHAPTER 57.+>>

<<+3. "NONPREVAILING ADVERSE PARTY" SHALL MEAN A PARTY THAT HAS FAILED TO HAVE SUBSTANTIALLY CHANGED THE OUTCOME OF THE PROPOSED OR FINAL AGENCY ACTION WHICH IS THE SUBJECT OF A PROCEEDING. IN THE EVENT THAT A PROCEEDING RESULTS IN ANY SUBSTANTIAL MODIFICATION OR CONDITION INTENDED TO RESOLVE THE MATTERS RAISED IN A PARTY'S PETITION, IT SHALL BE DETERMINED THAT THE PARTY HAVING RAISED THE ISSUE ADDRESSED IS NOT A "NONPREVAILING ADVERSE PARTY." THE RECOMMENDED ORDER SHALL STATE WHETHER THE CHANGE IS SUBSTANTIAL FOR PURPOSES OF THIS SUBSECTION. IN NO EVENT SHALL THE TERM "NONPREVAILING PARTY" OR "PREVAILING PARTY" BE DEEMED TO INCLUDE ANY PARTY THAT HAS INTERVENED IN A PREVIOUSLY EXISTING PROCEEDING TO SUPPORT THE POSITION OF AN AGENCY.+>>

FL ST § 120.52

Section 2. Subsections (8) through (15) of section 120.52, Florida Statutes, are renumbered as subsections (9) through (16) respectively, and a new subsection (8) is added to said section to read:

120.52. Definitions

As used in this act:

<<+(8) "INVALID EXERCISE OF DELEGATED LEGISLATIVE AUTHORITY" MEANS ACTION WHICH GOES BEYOND THE POWERS, FUNCTIONS, AND DUTIES DELEGATED BY THE LEGISLATURE. A PROPOSED OR EXISTING RULE IS AN INVALID EXERCISE OF DELEGATED LEGISLATIVE AUTHORITY IF ANY ONE OR MORE OF THE FOLLOWING APPLY:+>>

<<+(A) THE AGENCY HAS MATERIALLY FAILED TO FOLLOW THE APPLICABLE RULEMAKING PROCEDURES SET FORTH IN S. 120.54;+>>

<<+(B) THE AGENCY HAS EXCEEDED ITS GRANT OF RULEMAKING AUTHORITY, CITATION TO WHICH IS REQUIRED BY S. 120.54(7);+>>

<<+(C) THE RULE ENLARGES, MODIFIES, OR CONTRAVENES THE SPECIFIC PROVISIONS OF LAW IMPLEMENTED, CITATION TO WHICH IS REQUIRED BY S. 120.54(7);+>>

<<+(D) THE RULE IS VAGUE, FAILS TO ESTABLISH ADEQUATE STANDARDS FOR AGENCY DECISIONS, OR VESTS UNBRIDLED DISCRETION IN THE AGENCY; OR+>>

<<+(E) THE RULE IS ARBITRARY OR CAPRICIOUS.+>>

FL ST § 120.54

Section 3. Subsection (7) and paragraph (a) of subsection (11) of section 120.54, Florida Statutes, 1986 Supplement, are amended to read:

120.54. Rulemaking; adoption procedures

(7) Each rule adopted shall be accompanied by a reference to the specific rulemaking authority pursuant to which the rule was adopted and a reference to the section or subsection of the Florida Statutes or the Laws of Florida being implemented, interpreted, or made specific.

(11)(a) The adopting agency shall file with the committee, at least 21 days prior to the proposed adoption date, a copy of each rule it proposes to adopt; a detailed written statement of the facts and circumstances justifying the proposed rule; a copy of the estimate of economic impact required by subsection (2); a statement of the extent to which the proposed rule establishes standards more restrictive than federal standards or a statement that the proposed rule is no more restrictive than federal standards or that a federal rule on the same subject does not exist; <<-\*\*\*->>and the notice required by

subsection (1). After the final public hearing on the proposed rule, or after the time for requesting a hearing has expired, the adopting agency shall file any changes in the proposed rule and the reasons therefor with the committee or advise the committee that there are no changes. In addition, when any change is made in a proposed rule, other than a technical change, the adopting agency shall provide a detailed statement of such change by certified mail or actual delivery to any person who requests it in writing at the public hearing. The agency shall file the change with the committee, and provide the statement of change to persons requesting it, at least 7 days prior to filing the rule for adoption. Educational units, other than units of the State University System and the Florida School for the Deaf and the Blind, and local units of government with jurisdiction in only one county or part thereof shall not be required to make filings with the committee. This paragraph does not apply to emergency rules adopted pursuant to subsection (9). However, agencies, other than those listed herein, adopting emergency rules shall file a copy of each emergency rule with the committee.

#### FL ST § 120.545

Section 4. Paragraph (a) of subsection (1) of section 120.545, Florida Statutes, is amended to read:

#### 120.545. Committee review of agency rules

(1) As a legislative check on legislatively created authority, the committee shall examine each proposed rule, except for those proposed rules exempted by s. 120.54(11)(a), and its accompanying material, and may examine any existing rule, for the purpose of determining whether:

(a) The rule is <<+AN INVALID EXERCISE OF DELEGATED LEGISLATIVE AUTHORITY+>><<-\*\*\*->>;

#### FL ST § 120.57

Section 5. Paragraph (b) of subsection (1) of section 120.57, Florida Statutes, 1986 Supplement, is amended to read:

#### 120.57. Decisions which affect substantial interests

The provisions of this section apply in all proceedings in which the substantial interests of a party are determined by an agency, unless such proceedings are exempt pursuant to subsection (5). Unless waived by all parties, subsection (1) applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, subsection (2) applies in all other cases.

(1) Formal proceedings.--

(b) In any case to which this subsection is applicable, the following procedures apply:

1. A request for a hearing shall be granted or denied within 15 days of receipt.
2. All parties shall be afforded an opportunity for a hearing after reasonable notice of not less than 14 days; however, the 14-day notice requirement may be waived with the consent of all parties. In a preliminary hearing for the revocation of parole, no less than 7 days' notice shall be given. In a hearing involving a student disciplinary suspension or expulsion conducted by an educational unit, the 14-day notice requirement may be waived by the agency head or the hearing officer without the consent of the parties. The notice shall include:
  - a. A statement of the time, place, and nature of the hearing.
  - b. A statement of the legal authority and jurisdiction under which the hearing is to be held.
  - c. A reference to the particular sections of the statutes and rules involved.
  - d. Except for any hearing before an unemployment compensation appeals referee, a short and plain statement of the matters asserted by the agency and by all parties of record at the time notice is given. If the agency or any party is unable to state the matters in sufficient detail at the time initial notice is given, the notice may be limited to a statement of the issues involved, and thereafter, upon timely written application, a more definite and detailed statement shall be furnished not less than 3 days prior to the date set for the hearing.
3. Except for any proceeding conducted as prescribed in s. 120.54(4) or s. 120.56, a petition or request for a hearing under this section shall be filed with the agency. If the agency elects to request a hearing officer from the division, it shall so notify the division within <<+15+>> <<-\*\*\*->> days of receipt of the petition or request. When the Florida Land and Water Adjudicatory Commission receives a notice of appeal pursuant to s. 380.07, the commission shall notify the division within 60 days of receipt of the notice of appeal if the commission elects to request the assignment of a hearing officer. On the request of any agency, the division shall assign a hearing officer with due regard to the expertise required for the particular matter. The referring agency shall take no further action with respect to the formal proceeding, except as a party litigant, as long as the division has jurisdiction over the formal proceeding. Any party may request the disqualification of the hearing officer by filing an affidavit with the division prior to the taking of evidence at a hearing, stating the grounds with particularity.
4. All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposed findings of facts and orders, to file exceptions to any order or hearing officer's recommended order, and to be represented by counsel. When appropriate, the general public may be given an opportunity to present oral or written communications. If the agency proposes to consider such material, then all parties shall be given an opportunity to cross-examine or challenge or rebut it.
5. All pleadings, motions, or other papers filed in the proceeding must be signed by a party, the party's attorney, or the party's qualified representative. The signature of a party, a party's attorney, or a party's qualified representative constitutes a certificate that he has read the pleading, motion, or other paper and that, to the best of his knowledge,

information, and belief formed after reasonable inquiry, it is not interposed for any improper purposes, such as to harass or to cause unnecessary delay or for frivolous purpose or needless increase in the cost of litigation. If a pleading, motion, or other paper is signed in violation of these requirements, the hearing officer, upon motion or his own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

6. The record in a case governed by this subsection shall consist only of:

- a. All notices, pleadings, motions, and intermediate rulings;
- b. Evidence received or considered;
- c. A statement of matters officially recognized;
- d. Questions and proffers of proof and objections and rulings thereon;
- e. Proposed findings and exceptions;
- f. Any decision, opinion, proposed or recommended order, or report by the officer presiding at the hearing;
- g. All staff memoranda or data submitted to the hearing officer during the hearing or prior to its disposition, after notice of the submission to all parties, except communications by advisory staff as permitted under s. 120.66(1), if such communications are public records;
- h. All matters placed on the record after an ex parte communication pursuant to s. 120.66(2); and
- i. The official transcript.

7. The agency shall accurately and completely preserve all testimony in the proceeding, and, on the request of any party, it shall make a full or partial transcript available at no more than actual cost. In any proceeding before a hearing officer initiated by a consumptive use permit applicant pursuant to subparagraph 13., the applicant shall bear the cost of accurately and completely preserving all testimony and providing full or partial transcripts

to the water management district. At the request of any other party, full or partial transcripts shall be provided at no more than cost.

8. Findings of fact shall be based exclusively on the evidence of record and on matters officially recognized.

9. Except as provided in subparagraph 12., the hearing officer shall complete and submit to the agency and all parties a recommended order consisting of his findings of fact, conclusions of law, interpretation of administrative rules, and recommended penalty, if applicable, and any other information required by law or agency rule to be contained in the final order. The agency shall allow each party at least 10 days in which to submit written exceptions to the recommended order.

10. The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law and interpretation of administrative rules in the recommended order, but may not reject or modify the findings of fact unless the agency first determines from a review of the complete record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of

the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action. When there is an appeal, the court in its discretion may award reasonable attorney's fees and costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion.

11. If the hearing officer assigned to a hearing becomes unavailable, the division shall assign another hearing officer who shall use any existing record and receive any additional evidence or argument, if any, which the new hearing officer finds necessary.

12. A hearing officer who is a member of an agency head may participate in the formulation of the final order of the agency, provided he has completed all his duties as hearing officer.

13. In any application for a license or merger pursuant to title XXXVIII which is referred by the agency to the division for hearing pursuant to this section, the hearing officer shall complete and submit to the agency and to all parties a written report consisting of findings of fact and rulings on evidentiary matters. The agency shall allow each party at least 10 days in which to submit written exceptions to the report.

14. In any application for a consumptive use permit pursuant to part II of chapter 373, the water management district on its own motion may, or, at the request of the applicant for the permit, shall, refer the matter to the division for the appointment of a hearing officer to conduct a hearing under this section.

#### FL ST § 120.59

Section 6. Subsection (4) of section 120.59, Florida Statutes, is amended to read:

#### 120.59. Orders

(4) Parties shall be notified either personally or by mail of any order; and, unless waived, a copy of the final order shall be delivered or mailed to each party or to his attorney of record. Each notice shall inform the recipient of any administrative hearing or judicial review <<+THAT IS AVAILABLE UNDER S. 120.57 OR S. 120.68+>><<-\*\*\*->>, shall indicate the procedure which must be followed to obtain the hearing or judicial review, and shall state the time limits which apply.

#### FL ST § 120.68

Section 7. Subsection (2) of section 120.68, Florida Statutes, is amended to read:

#### 120.68. Judicial review

(2) Except in matters for which judicial review by the Supreme Court is provided by law, all proceedings for review shall be instituted by filing a petition in the district court of

appeal in the appellate district where the agency maintains its headquarters or where a party resides. <<+IF THE APPEAL IS OF AN ORDER RENDERED IN A PROCEEDING INITIATED UNDER S. 120.54(4) OR UNDER S. 120.56, THE AGENCY WHOSE RULE IS BEING CHALLENGED SHALL TRANSMIT A COPY OF THE NOTICE OF APPEAL TO THE COMMITTEE.+>> Review proceedings shall be conducted in accordance with the Florida Appellate Rules.

Section 8. This act shall take effect October 1, 1987.

Approved by the Governor July 14, 1987.

Filed in Office Secretary of State July 14, 1987.