

# Chapter Law 84-173

## House Bill No. 1225

An act relating to the Administrative Procedure Act; amending s. 120.54, F.S., providing that an emergency rule may be renewed during a challenge~ amending s. 120.57, F.S., relating to decisions which affect substantial interest; prohibiting certain agencies from taking further action with respect to formal proceedings, except as a party litigant, under certain circumstances; prohibiting agencies from reducing or increasing recommended penalties, under certain circumstances; authorizing the award of costs and attorney's fees to any prevailing party in appeals of formal administrative hearings; amending s. 120.58, F.S., relating to agency proceedings for a rule or order; authorizing the imposition of certain sanctions; authorizing the court to award to the prevailing party costs and attorney's fees, under certain circumstances; amending s. 120.68, F.S., providing that any order of a hearing officer is immediately reviewable if review of the final agency decision would not provide an adequate remedy; providing for a remand of the case to an agency under certain circumstances; providing an effective date.

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

Section 1. Paragraph (c) of subsection (9) of section 120.54, Florida Statutes, is amended to read:

120.54 Rulemaking: adoption procedures.--

(9)

(c) An emergency rule adopted under this subsection may not be effective for a period longer than 90 days and shall not be renewable, except during the pendency of a challenge to proposed rules addressing the subject of the emergency rules. However, the agency may take identical action by normal rulemaking procedures.

Section 2. Paragraph (b) of subsection (1) of section 120.57, Florida Statutes, 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 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 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 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 10 days of receipt of the petition or request; ~~requesting the assignment of a hearing officer and, with the concurrence of the division, set the time, date, and place of the hearing.~~ 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 proceedings, except as a party litigant as long as the division has jurisdiction over the formal proceedings. Any party may request the disqualification of ~~the any~~ 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. 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 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.

6. 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 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, 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.

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

8. 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.

9. 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 proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept ~~or reduce~~ the recommended penalty in a recommended order, but 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 ~~in~~ the event a court reverses the order of an agency, the court in its discretion may award reasonable attorney's fees and costs to the aggrieved prevailing party if the court finds that the appeal was frivolous, meritless, an abuse of the appellate process or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion.

10. 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.

11. 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.

12. 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.

13. 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.

Section 3. Paragraph (b) of subsection (1) and subsections (2) and (3) of section 120.58, Florida Statutes, are amended to read:

120.58 Agency action; evidence, record and subpoenas.—

(1) In agency proceedings for a rule or order:

(b) An agency or its duly empowered presiding officer or a hearing officer has the power to swear witnesses and take their testimony under oath, to issue subpoenas upon the written request of any party or upon its own motion, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure, including the imposition of sanctions, except contempt. However, no agency or its duly empowered presiding officer or any hearing officer has the authority to issue any subpoena or order directing discovery to any member or employee of the Legislature when the subpoena or order commands the production of documents or materials compels testimony relating to the legislative duties of the member or employee. Any subpoena or order directing discovery directed to a member or an employee of the Legislature shall show on its face that the testimony sought does not relate legislative duties.

(2) Any person subject to a subpoena ~~or order directing discovery~~ may, before compliance and on timely petition, request the agency or hearing officer having jurisdiction of the dispute to invalidate the subpoena ~~or order~~ on the ground that it was not lawfully issued, is unreasonably broad in scope, or requires the production of irrelevant material, but the decision of the agency or hearing officer on any such request shall not be proposed agency action governed by s. 120.57.

(3) A party ~~An agency~~ may seek enforcement of a subpoena, ~~or order directing discovery;~~ or order imposing sanctions issued under the authority of this act by filing petition for enforcement, ~~pursuant to s. 120.69,~~ in the circuit court of the judicial circuit wherein the person failing to comply with the subpoena or order resides. A failure to comply with an order of the court shall result in a finding of contempt of court. However, no person shall be contempt while a ~~the~~ subpoena ~~or order~~ is being challenged under subsection (2). The court may award to the prevailing party all or part of the costs and attorney's fees incurred in obtaining the court order whenever the court determines that such an award should be granted under the Florida Rules of Civil Procedure. ~~In the absence of agency action on the default within 30 days, the party requesting the subpoena or order may bring proceedings in an appropriate court for enforcement of the subpoena or order, and a failure to comply with an order of the court shall result in a finding of contempt of court.~~

Section 4. Subsections (1) and (12) of section 120.68, Florida Statutes, are amended to read:

120.68 Judicial review.—

(1) A party who is adversely affected by final agency action is entitled to judicial review. For purposes of this section, a district school board, whose decision is reviewed under the provisions of s. 231.36 and whose final action is

modified by a superior administrative decision, shall be a party entitled to judicial review of the final action. A preliminary, procedural, or intermediate agency action or ruling, including any order of a hearing officer, is immediately reviewable if review of the final agency decision would not provide an adequate remedy.

(12) The court shall remand the case to the agency it finds the agency's exercise of discretion to be:

(a) Outside the range of discretion delegated to the agency by law:

(b) Inconsistent with an agency rule;

(c) Inconsistent with an officially stated agency policy, or a prior agency practice, if deviation therefrom not explained by the agency: or

(d)~~(e)~~ Otherwise in violation of a constitutional or statutory provision;

but the court shall not substitute its judgment for that of the agency on an issue of discretion.

Section 5. This act shall take effect upon becoming law.

Approved by the Governor June 11, 1984.

Filed in Office of Secretary of State June 12, 1984.