

1999 SUMMARY OF CHANGES IN CHAPTER 120

CHAPTER LAWS: 99-2, 99-8, 99-245, 99-379, 99-397 and 99-398

Chapters 99-2, 99-8, and 99-245, Laws of Florida, corrected cross references to other provisions of Chapter 120 and changed agency names to conform to changes made in 1998 and 1999 legislation.

Chapter 99-379, Laws of Florida, amended §120.52(1), F.S., to remove water control districts from the operation of the APA, clarify that regional water supply authorities are still subject to the Act, and restructure the definition of agency to make it easier to understand. It amended §§120.52(8) and 120.536(1) to reject the "class of powers and duties" analysis that had been adopted by the courts to determine the invalidity of a rule, clarified the statutory standard, and amended subsections 120.536(2) and (3) to allow agencies an opportunity to seek additional statutory authority for rules not meeting the standard. It prohibited the adoption of retroactive rules. It clarified that the burden of proof in a proposed rule challenge is on the agency to prove by a preponderance of the evidence that the rule is not an invalid exercise of delegated legislative authority, and provided that the burden of going forward rests with the petitioner. The law clarified that an agency issuing its final order in a §120.57(1) proceeding may not reject or modify conclusions of law over which it has no substantive jurisdiction, and further provided that an agency must explain any rejection or modification of interpretations of administrative rules or conclusions of law over which it does have substantive jurisdiction. Finally, the law authorized district school boards to implement general powers granted to them under §230.22 notwithstanding the provisions of §120.536(1) and the flush left language in §120.52(8).

Chapter 99-397, Laws of Florida, amended §120.80(15), F.S., to eliminate the requirement that an administrative law judge conduct certain Department of Health hearings and to authorize the department to contract with the Department of Children and Family Services for a hearing officer in these matters.

Chapter 99-398, Laws of Florida, reenacted a paragraph of Chapter 120 to clarify legislative intent that references to other provisions of the Florida Statutes identified in that paragraph referred to those provisions as they had been amended in 1999.

CHAPTER 99-379

Committee Substitute for House Bill No. 107

An act relating to the Administrative Procedure Act; providing legislative intent; amending s. 120.52, F.S.; removing entities described in ch. 298, F.S., relating to water control districts, from the definition of "agency"; redefining the term "agency"; providing additional restrictions with respect to an agency's rulemaking authority; amending s. 120.536, F.S.; providing additional restrictions with respect to an agency's rulemaking authority; requiring agencies to provide the Administrative Procedures Committee with a list of existing rules which exceed such rulemaking authority and providing for legislative consideration of such rules; requiring agencies to initiate proceedings to repeal such rules for which authorizing legislation is not adopted; requiring a report to the Legislature; providing that the committee or a substantially affected person may petition for repeal of such rules after a specified date; restricting challenge of such rules before that date; amending s. 120.54, F.S.; specifying when rules may take effect; restricting adoption of retroactive rules; amending s. 120.56, F.S.; revising an agency's responsibilities in response to a challenge to a proposed rule and specifying the petitioner's responsibility of going forward; amending s. 120.57, F.S., relating to hearings involving disputed issues of material fact; revising an agency's authority with respect to rejection or modification of conclusions of law in its final order; providing for agency statement as to the reasonableness of its substituted finding of law or interpretation of administrative rule; amending s. 120.81, F.S.; providing that district school boards may adopt rules notwithstanding the rulemaking standards found in chapter 120, F.S.; providing an effective date.

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

Section 1. It is the intent of the Legislature that modifications contained in sections 2 and 3 of this act which apply to rulemaking are to clarify the limited authority of agencies to adopt rules in accordance with chapter 96-159, Laws of Florida, and are intended to reject the class of powers and duties analysis. However, it is not the intent of the Legislature to reverse the result of any specific judicial decision.

Section 2. Subsections (1) and (8) of section 120.52, Florida Statutes, 1998 Supplement, are amended to read:

120.52 Definitions.--As used in this act:

(1) "Agency" means:

(a) The Governor in the exercise of all executive powers other than those derived from the constitution.

(b) Each:

1. State officer and state department, and each departmental unit described in s. 20.04,

2. Authority, including a regional water supply authority.

3. Board.

4. Commission, including the Commission on Ethics and the Game and Fresh Water Fish Commission when acting pursuant to statutory authority derived from the Legislature.

5. Regional planning agency,, board,

6. Multicounty special district with a majority of its governing board comprised of nonelected persons,, and authority, including, but not limited to, the Commission on Ethics and the Game and Fresh Water Fish Commission when acting pursuant to statutory authority derived from the Legislature,

7. Educational units,, and those entities

8. Entity described in chapters 163, ~~298~~, 373, 380, and 582 and s. 186.504, ~~except any legal entity or agency created in whole or in part pursuant to chapter 361, part II, an expressway authority pursuant to chapter 348, or any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection.~~

(c) Each other unit of government in the state, including counties and municipalities, to the extent they are expressly made subject to this act by general or special law or existing judicial decisions.

This definition does not include any legal entity or agency created in whole or in part pursuant to chapter 361, part II, an expressway authority pursuant to chapter 348, any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), unless any party to such agreement is otherwise an agency as defined in this subsection, or any multicounty special district with a majority of its governing board comprised

of elected persons; however, this definition shall include a regional water supply authority.

(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 of the following applies:

- (a) The agency has materially failed to follow the applicable rulemaking procedures or requirements set forth in this chapter;
- (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by s. 120.54(3)(a)1.;
- (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(3)(a)1.;
- (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
- (e) The rule is arbitrary or capricious;
- (f) The rule is not supported by competent substantial evidence; or
- (g) The rule imposes regulatory costs on the regulated person, county, or city which could be reduced by the adoption of less costly alternatives that substantially accomplish the statutory objectives.

A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or, interpret the, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific the particular powers and duties conferred by the same statute.

Section 3. Section 120.536, Florida Statutes, is amended to read:

120.536 Rulemaking authority; listing of rules exceeding authority; repeal; challenge.--

(1) A grant of rulemaking authority is necessary but not sufficient to allow an agency to adopt a rule; a specific law to be implemented is also required. An agency may adopt only rules that implement or, interpret the, or make specific the particular powers and duties granted by the enabling statute. No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation and is not arbitrary and capricious or is within the agency's class of powers and duties, nor shall an agency have the authority to implement statutory provisions setting forth general legislative intent or policy. Statutory language granting rulemaking authority or generally describing the powers and functions of an agency shall be construed to extend no further than implementing or interpreting the specific the particular powers and duties conferred by the same statute.

(2)(a) By October 1, 1997, each agency shall provide to the Administrative Procedures Committee a listing of each rule, or portion thereof, adopted by that agency before October 1, 1996, which exceeds the rulemaking authority permitted by this section. For those rules of which only a portion exceeds the rulemaking authority permitted by this section, the agency shall also identify the language of the rule which exceeds this authority. The Administrative Procedures Committee shall combine the lists and provide the cumulative listing to the President of the Senate and the Speaker of the House of Representatives. The Legislature shall, at the 1998 Regular Session, consider whether specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 1999, each agency shall initiate proceedings pursuant to s. 120.54 to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist. By February 1, 1999, the Administrative Procedures Committee shall submit to the President of the Senate and the Speaker of the House of Representatives a report identifying those rules that an agency had previously identified as exceeding the rulemaking authority permitted by this section for which proceedings to repeal the rule have not been initiated. As of July 1, 1999, the Administrative Procedures Committee or any substantially affected person may petition an agency to repeal any rule, or portion thereof, because

it exceeds the rulemaking authority permitted by this section. Not later than 30 days after the date of filing the petition if the agency is headed by an individual, or not later than 45 days if the agency is headed by a collegial body, the agency shall initiate rulemaking proceedings to repeal the rule, or portion thereof, or deny the petition, giving a written statement of its reasons for the denial.

(b) By October 1, 1999, each agency shall provide to the Administrative Procedures Committee a listing of each rule, or portion thereof, adopted by that agency before the effective date of the bill, which exceeds the rulemaking authority permitted by this section. For those rules of which only a portion exceeds the rulemaking authority permitted by this section, the agency shall also identify the language of the rule which exceeds this authority. The Administrative Procedures Committee shall combine the lists and provide the cumulative listing to the President of the Senate and the Speaker of the House of Representatives. The Legislature shall, at the 2000 Regular Session, consider whether specific legislation authorizing the identified rules, or portions thereof, should be enacted. By January 1, 2001, each agency shall initiate proceedings pursuant to s. 120.54 to repeal each rule, or portion thereof, identified as exceeding the rulemaking authority permitted by this section for which authorizing legislation does not exist. By February 1, 2001, the Administrative Procedures Committee shall submit to the President of the Senate and the Speaker of the House of Representatives a report identifying those rules that an agency had previously identified as exceeding the rulemaking authority permitted by this section for which proceedings to repeal the rule have not been initiated. As of July 1, 2001, the Administrative Procedures Committee or any substantially affected person may petition an agency to repeal any rule, or portion thereof, because it exceeds the rulemaking authority permitted by this section. Not later than 30 days after the date of filing the petition if the agency is headed by an individual, or not later than 45 days if the agency is headed by a collegial body, the agency shall initiate rulemaking proceedings to repeal the rule, or portion thereof, or deny the petition, giving a written statement of its reasons for the denial.

(3) All proposed rules or amendments to existing rules filed with the Department of State on or after October 1, 1996, shall be based on rulemaking authority no broader than that permitted by this section. A rule adopted before October 1, 1996, and not included on a list submitted by an agency in accordance with subsection (2) may not be challenged before November 1, 1997, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section. A rule adopted

before October 1, 1996, and included on a list submitted by an agency in accordance with subsection (2) may not be challenged before July 1, 1999, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section. A rule adopted before the effective date of the bill, and included on a list submitted by an agency in accordance with subsection (2)(b) may not be challenged before July 1, 2001, on the grounds that it exceeds the rulemaking authority or law implemented as described by this section.

(4) Nothing in this section shall be construed to change the legal status of a rule that has otherwise been judicially or administratively determined to be invalid.

Section 4. Paragraph (f) of subsection (1) of section 120.54, Florida Statutes, 1998 Supplement, is amended to read:

120.54 Rulemaking.--

(1) GENERAL PROVISIONS APPLICABLE TO ALL RULES OTHER THAN EMERGENCY RULES.--

(f) An agency may adopt rules authorized by law and necessary to the proper implementation of a statute prior to the effective date of the statute, but the rules may not be effective enforced until the statute upon which they are based is effective. An agency may not adopt retroactive rules, including retroactive rules intended to clarify existing law, unless that power is expressly authorized by statute.

Section 5. Paragraph (a) of subsection (2) of section 120.56, Florida Statutes, is amended to read:

120.56 Challenges to rules.--

(2) CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS.--

(a) Any substantially affected person may seek an administrative determination of the invalidity of any proposed rule by filing a petition seeking such a determination with the division within 21 days after the date of publication of the notice required by s. 120.54(3)(a), within 10 days after the final public hearing is held on the proposed rule as provided by s. 120.54(3)(c), within 20 days after the preparation of a statement of estimated regulatory costs required pursuant to s. 120.541, if applicable, or within 20 days after the date of publication of the notice required by s. 120.54(3)(d). The petition shall state with particularity the objections to the proposed rule and the reasons

that the proposed rule is an invalid exercise of delegated legislative authority. The petitioner has the burden of going forward. The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. Any person who is substantially affected by a change in the proposed rule may seek a determination of the validity of such change. Any person not substantially affected by the proposed rule as initially noticed, but who is substantially affected by the rule as a result of a change, may challenge any provision of the rule and is not limited to challenging the change to the proposed rule.

Section 6. Paragraph (l) of subsection (1) of section 120.57, Florida Statutes, 1998 Supplement, is amended to read:

120.57 Additional procedures for particular cases.--

(1) ADDITIONAL PROCEDURES APPLICABLE TO HEARINGS INVOLVING DISPUTED ISSUES OF MATERIAL FACT.--

(l) 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 over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified.

Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire 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.

Section 7. Present paragraphs (a) through (j) of subsection (1) of section 120.81, Florida Statutes, are

redesignated as paragraphs (b) through (k), respectively, and a new paragraph (a) is added to that subsection, to read:

120.81 Exceptions and special requirements; general areas.--

(1) EDUCATIONAL UNITS.--

(a) Notwithstanding s. 120.536(1) and the flush left provisions of s. 120.52(8), district school boards may adopt rules to implement their general powers under s. 230.22.

Section 8. This act shall take effect upon becoming a law.

Approved by the Governor June 18, 1999.

Filed in Office Secretary of State June 18, 1999.