

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1747 CS PCB GO 05-12 Administrative Procedures
SPONSOR(S): Governmental Operations Committee, Kottkamp
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1010

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.: Governmental Operations Committee	6 Y, 0 N	Williamson	Everhart
1) Transportation & Economic Development Appropriations Committee	11 Y, 0 N, w/CS	McAuliffe	Gordon
2) State Administration Council			
3)			
4)			
5)			

SUMMARY ANALYSIS

With regards to the Administrative Procedures Act, the bill:

- Removes the requirements that the Joint Administrative Procedures Committee undertake a systematic review of the Florida Statutes regarding rulemaking authority.
- Places all rulemaking timeframes and deadlines in one section.
- Provides timeframe requirements for the filing of a petition for administrative determination of a proposed rule.
- Clarifies the term "administrative determination."
- Provides that a proposed rule or provision of a proposed rule declared invalid by an administrative law judge will not be adopted, unless reversed on appeal.
- Provides petition requirements are excluded from applying to petitions for administrative hearings in agency enforcement and disciplinary actions against a licensee or other person.
- Provides that the time for filing a petition or request for hearing may be extended under certain circumstances.
- Provides the Public Service Commission must refer administrative hearings to the Division of Administrative Hearings.
- Provides rulemaking authority.
- Requires each agency to file its rule review report with the Joint Administrative Procedures Committee.

The bill requires the Department of State, effective December 31, 2006, to electronically publish the Florida Administrative Weekly (FAW) on an Internet website managed by the department, which will serve as the official Internet website for such the FAW. The website will be free to the public and must allow users to search for notices by type, publication date, rule number, word, subject, or agency; make available all notices published on the website for a period of at least five years; subscribe to an automated e-mail notification of selected notices; and view agency forms incorporated by reference in proposed rules. The department must continue to publish the printed version of the FAW. The bill extends the Department of Environmental Protection Internet Publication Pilot Project from July 1, 2005, to December 31, 2006, when Internet publication of the FAW is required to begin. It also requires the Department of State to make training courses available to assist agencies in the transition to publication on the FAW Internet website.

It is estimated that the FAW Internet website will have a non-recurring cost of \$250,000 to comply with the proposed implementation timeline. The bill appears to have an insignificant fiscal impact to local governments. See "FISCAL IMPACT ON LOCAL GOVERNMENTS" section.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

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FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provide limited government – The bill requires the Department of State (DOS) to publish the Florida Administrative Weekly (FAW) on an internet website free of charge to the public. In addition, DOS is required to continue publishing the FAW in print format.

The bill increases the rulemaking authority of the Administration Commission for the purpose of prescribing the form and substantive provisions of a bond required pursuant to a bid protest.

B. EFFECT OF PROPOSED CHANGES:

Administrative Procedures Act

Background

The Administrative Procedures Act (APA)¹ allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions. The Division of Administrative Hearings (DOAH), which consists of an independent group of administrative law judges, conducts hearings under chapter 120, F.S., when certain agency decisions² are challenged by substantially affected persons.³

Current law provides that a person, who is substantially affected by a rule or proposed rule, may file a petition seeking an administrative determination of the invalidity of a rule or proposed rule on the ground that the rule is an invalid exercise of delegated legislative authority. It also provides a mechanism for a substantially affected person to seek an administrative determination that an agency statement of generally applicable policy should have been adopted as a rule.⁴

A party, who wishes to challenge an agency determination of his or her substantial interests, must file a petition for hearing with the agency. The agency must then request to DOAH, within 15 days, for an administrative hearing. The APA also provides notice and pleading requirements, and the time parameters within which a final order must be completed.⁵

There is a Joint Administrative Procedures Committee (JAPC), within the Legislature, made up of six members; three members of the House of Representatives and three members of the Senate. JAPC undertakes and maintains a systematic and continuous review of the statutes authorizing agencies to adopt rules. It makes recommendations to the appropriate standing committees of the Legislature regarding delegated legislative authority to adopt rules.⁶

Florida Administrative Weekly and Florida Administrative Code

Current law requires DOS to publish rule-making and public meetings notices, and various other materials filed by the state's administrative agencies, in the *Florida Administrative Weekly* (FAW).⁷

¹ Chapter 120, F.S.

² For example, rules and determinations of a party's substantial interest.

³ DOAH proceedings are conducted like nonjury trials and are governed by chapter 120, F.S.

⁴ Section 120.56, F.S.

⁵ Section 120.569, F.S.

⁶ Section 11.60, F.S.

⁷ According to DOS, approximately 600 entities publish notices in the FAW. These entities include state agencies, other units of state and local governments, and nongovernmental entities. Telephone conversation with DOS, March 11, 2005.

DOS contracts with LexisNexis Matthew Bender for publication of the FAW in a printed format.⁸ The FAW is published on Fridays and distributed for free to administrative agencies, courts, libraries, law schools, and legislative offices. The FAW has approximately 610 paid subscribers.⁹ In addition to the paper version, DOS also posts copies of the FAW on its Internet website accessible to the public free of charge.

DOS is also required to publish the Florida Administrative Code (FAC), which contains all rules adopted by agencies, together with references to rulemaking authority and history notes. The FAC must be supplemented at least monthly.¹⁰ DOS also contracts with LexisNexis Matthew Bender for the printing of the FAC.

Current law creates the Publication Revolving Trust Fund, and specifies that all fees and moneys collected by DOS under the Administrative Procedure Act (APA) be deposited in the fund for the purpose of paying for the publication of the FAC and FAW, and for associated costs incurred by DOS in administering APA requirements. Unencumbered balances at the beginning of each fiscal year, which exceed \$300,000, are to be transferred to the General Revenue Fund.¹¹

DOS is authorized to: (a) make subscriptions of the FAW available for a price computed as a pro rata share of 50 percent of the costs related to the publication of the FAW; and (b) charge agencies using the FAW a space rate (line charge) computed to cover a pro rata share of 50 percent of the costs related to publication of the FAW. Subscription fees charged to FAW subscribers are retained by the publisher as compensation for printing the FAW. The DOS does not receive royalties from FAW subscriptions.

Internet Publication Pilot Project

In 2001, the Legislature authorized the Department of Environmental Protection (DEP) and the State Technology Office (STO) to establish an Internet publication pilot project for the purpose of determining the cost-effectiveness of publishing administrative notices on the Internet, rather than in the FAW, and to submit a report containing findings regarding the cost-effectiveness of Internet publication.¹² The report indicated that DEP paid \$44,179 for FAW line charges during calendar year 2001 and would have paid approximately \$32,100 for FAW line charges during calendar year 2002 if Internet publication had not been permitted. Nonrecurring costs to establish Internet publication were \$10,200 to develop the computer software application, and \$20,000 to program the e-mail registration service enhancement. The report indicated that the computer software application may be shared with other agencies at no cost and recommended that the Legislature permit all agencies to elect Internet publication in lieu of publication in the paper version of the FAW, given the potential for substantial agency savings.¹³

⁸ *Report on Internet Noticing of the Florida Administrative Weekly*, Florida Joint Administrative Procedures Committee, October 2003, pp. 2-3.

⁹ *Id.* at 3.

¹⁰ Section 120.55(1)(a), F.S.

¹¹ Section 120.55(5), F.S.

¹² Chapter 2001-278, L.O.F.; s. 120.551, F.S.

¹³ *Joint Report and Recommendations of the Department of Environmental Protection, The State Technology Office, and The Department of State on the Internet Publication Pilot Project under Sec. 120.551, F.S.*, Jan. 31, 2003.

2003 Interim Study on FAW Internet Noticing

During the 2003 Legislative Interim, the Joint Administrative Procedures Committee studied the feasibility of Internet noticing for all state agencies and other entities that advertise in the FAW.¹⁴ In October 2003, the results were published in the "Report on Internet Noticing of the Florida Administrative Weekly." The report recommended that the FAW be published on a centralized website managed by DOS. Further, it was recommended that the space rate charge continue to be collected by DOS to fund its functions related to publication of the FAW and FAC.

Effects of Proposed Changes

Duties of JAPC

The bill requires JAPC to maintain a continuous review of statutes that authorize agencies to adopt rules and to make recommendations to appropriate standing committees. It removes the requirement that the committee "undertake a systematic review" of the statutes. According to JAPC, it is a more efficient use of committee resources to review statutes in the course of the rule review process.

Agency Forms

The bill locates all important rulemaking timeframes and deadlines in one section of the APA for improved accessibility.

Appeal of Administrative Determinations

The bill further provides that the filing of a petition for administrative determination of a proposed rule must toll the 90-day period during which a rule must be filed for adoption until 30 days after rendition of the final order, or until any judicial review of the final order is complete. Unless the decision of the administrative law judge is reversed on appeal, the proposed rule or provision of a proposed rule declared invalid will not be adopted. It clarifies that the term "administrative determination" does not include subsequent judicial review.

Petitions for Administrative Hearings

Requirements regarding the substance of a petition do not apply to petitions for administrative hearings in agency enforcement and disciplinary actions against a licensee or other person. The change has the effect of permitting, in actions concerning agency enforcement or licensee discipline, petitions without allegations of disputed facts or alleged facts. Further, the petition filing deadline is extended if the petitioner has:

- Been misled or lulled into action;
- In some extraordinary way been prevented from asserting his or her rights; or
- Timely asserted his or her rights mistakenly in the wrong forum.

As per JAPC, these changes address concerns expressed in recent judicial decisions and by the administrative law judges and practitioners.

Bid Protest Bonds

The bill provides rulemaking authority to the Administration Commission (the Cabinet serves as the commission) for the purpose of prescribing the form and substantive provisions of a bond required pursuant to a bid protest. According to JAPC, the Administration Commission has already adopted

¹⁴ This study included conducting surveys and consulting with DOS, DEP, STO, and an independent technology expert to determine specific technology requirements and estimates of potential costs.

such form; however, the commission did not have proper rulemaking authority. This change merely puts the commission's rule in compliance with the Florida Statutes.

Current law requires an agency to include in its notice of a decision or intended decision concerning a solicitation, contract award, or exceptional purchase the following statement: "Failure to file a protest within the time prescribed in section 120.57(3), Florida Statutes, shall constitute a waiver of proceedings under chapter 120, Florida Statutes." The bill requires that the notice also state that "failure to post the bond or other security required by law within the time allowed for filing a bond" constitutes a waiver of proceedings under the APA.

Report of Agency Review of Rules

The bill requires each agency to file its report of the agency's formal rule review to JAPC in addition to the President of the Senate and the Speaker of the House of Representatives.

The bill requires DOS, effective December 31, 2006, to electronically publish the FAW on an Internet website managed by the department, which will serve as the official Internet website for such publication. Such website is free to the public and must allow users to:

- Search for notices by type, publication date, rule number, word, subject, or agency.
- Search a database that makes available all notices published on the website for a period of at least five years.
- Subscribe to an automated e-mail notification of selected notices.
- View agency forms incorporated by reference in proposed rules.

Further, the bill requires DOS to continue to publish the printed version of the FAW and to make copies available on an annual subscription basis.

The bill:

- Requires DOS to review agency notices for compliance with format and numbering requirements before publication on the FAW Internet website.
- Extends the DEP Internet Publication Pilot Project from its current termination date of July 1, 2005, to December 31, 2006, when Internet publication of the FAW is required to begin.
- Requires DOS to make training courses available to assist agencies in the transition to publication on the FAW Internet website.

The bill removes current requirements that the annual subscription price and the space rate be computed to cover only costs related to the FAW. Instead the space rate that may be charged is to cover the costs related to the FAW and the FAC, and no exact basis for determining an annual subscription price for the printed FAW is specified. It also amends current law to provide that the trust fund will fund the costs incurred by the DOS in carrying out the APA.

The bill provides that forms created by an agency, which are incorporated by reference into a rule noticed pursuant to s. 120.55(1)(a), F.S., after December 31, 2006, must clearly display the number, title, and effective date of the form and the number of the rule in which the form is incorporated. It requires the FAW to contain: (1) the text of all proposed rules, rather than permitting a reference to that text in a prior edition of the FAW; and (2) a cumulative list of all rules that have been proposed, but not filed for adoption. The bill requires an agency, upon request, to provide copies of its rules with citations to, "the grant of rulemaking authority and the specific law implemented for each rule." It also requires DOS to maintain a permanent record of all notices published in the FAW.

The bill does not preclude publication of FAW materials on an agency's website or by other means.

C. SECTION DIRECTORY:

Section 1 amends s. 11.60, F.S., revising duties of the Administrative Procedures Committee.

Section 2 amends s. 120.54, F.S., relating to rulemaking and rule adoption procedures.

Section 3 amends s. 120.55, F.S., requiring Internet publication of the FAW.

Section 4 amends s. 120.551, F.S., postponing the repeal of the section.

Section 5 amends s. 120.56, F.S., revising provisions relating to withdrawal of challenged rules.

Section 6 amends s. 120.569, F.S., prescribing circumstances under which the time for filing a petition for hearing must be extended.

Section 7 amends s. 120.57, F.S., requiring that additional information be included in notices relating to protests of contract solicitations or awards.

Section 8 amends s. 120.74, F.S., requiring agency reports to be filed with the Administrative Procedures Committee.

Section 9 requires DOS to provide certain assistance to agencies in their transition to publishing on the FAW Internet website.

Section 10 amends s. 120.80, F.S., requiring the Public Service Commission to refer all formal administrative hearings to the Division of Administrative Hearings.

Section 11 provides an effective date of July 1, 2005, unless otherwise expressly provided in the bill.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

It has not been determined how much money agencies will save after the second year that the FAW Internet website is operational.

2. Expenditures:

It is estimated that the FAW Internet website will have a non-recurring cost of \$250,000 to DOS for it to comply with the proposed implementation timeline. Per DOS, the Records Management Trust Fund cash balance and anticipated revenue will be sufficient to support this project.¹⁵

DOS indicates that it will continue to charge 99 cents per line to agencies using the FAW from now through the second year that the FAW Internet website is operational. DOS also states that these revenues will be used to fund all costs associated with the Law, Code, and Administrative Weekly section within the Division of Library and Information Services.¹⁶

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

¹⁵ Department of State, analysis of SB 1010, February 18, 2005, at 1.

¹⁶ *Id.*

None. This bill does not create, modify, amend, or eliminate a local revenue source.

2. Expenditures:

Per DOS, local governments' advertising on the FAW Internet website would pay the current space rate charge of \$.99 until implementation of the new services was complete.¹⁷

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Currently, DOS publishes the FAW on its Internet website. The website is accessible by the public free of charge, but cannot be searched by topic. The bill provides for a free, fully searchable FAW Internet website, the ability for users to have selected notices e-mailed to users, and the ability for users to access forms incorporated by reference in rules. Accordingly, the bill will provide the public with greater access to the FAW and with advanced search capabilities.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Pursuant to Art. VII, s. 18 of the Florida Constitution, the Legislature may not pass a law requiring a county or municipality to spend funds unless an appropriation of sufficient funding is provided. Any requirement to pay associated with this bill, however, is anticipated to have an insignificant fiscal impact (less than \$1.7 million) given that only \$500,266 was collected from all agencies for space rate charges in FY '02-'03. Further, only a small percentage of this amount would have been charged to counties and municipalities. Thus, the bill appears to be exempt from the constitutional mandate funding requirements.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill provides rulemaking authority to the Administration Commission for the purpose of prescribing the form and substantive provisions of a bond required pursuant to a bid protest.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES

On March 16, 2005, the Governmental Operations Committee adopted an amendment to PCB GO 05-12 and reported the PCB favorably with one amendment. The amendment requires the Department of State to continue publishing the print version of the Florida Administrative Weekly.

On April 12, 2005, the Transportation and Economic Development Committee adopted one amendment to this bill requiring the Public Service Commission to refer all formal administrative hearings to the Division of Administrative Hearings.

¹⁷ *Id.*