

Section Reporter

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More APA: The 2005 Amendments

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Author's Note: Governor Bush vetoed this bill on June 22, after this article was slated for publication.

During the 2005 Regular Session, the Legislature enacted several changes to the Administrative Procedure Act (APA). Here's a brief summary of some of the changes.

Expands Internet Noticing to All Agencies. Initially, the principal purpose of the bill was to provide for "internet noticing" for all agencies. Most readers know that, several years ago, the Legislature created a pilot project by which DEP published its official notices on its web site, rather in the Florida Administrative Weekly. Section 4 of CS/CS/CS/SB 1010 expands this pilot project to all state agencies. The bill also provides for e-mail notification and for electronic commenting on proposed rules.

Provides for Equitable Tolling. Several recent appellate decisions, in dicta, have suggested that the doctrine of equitable tolling may be applied to extend the administrative time limit in cases where the petitioner "has been misled or lulled into inaction, has in some extraordinary way been prevent from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum."^[1] However, two commentators have questioned the application of equitable principles in light of the Legislature's clear expression that untimely petitions for hearing may not be considered.^[2] Section 7 of CS/CS/CS/SB 1010 revises Section 120.569(2)(c) to make clear that the time for filing a petition will be extended in these circumstances.

Limits Required Contents of Petition in Enforcement and Disciplinary Cases. Judge Cope of the Third District recommended that the Legislature amend the provisions in the APA governing the sufficiency of a petition when the administrative action is initiated by the filing of an administrative complaint by the agency.^[3] In particular, Judge Cope has suggested that it should be sufficient for the respondent to submit a document that sets forth those paragraphs of the administrative complaint that are admitted, denied, or as to which the respondent is without knowledge, along the lines allowed by Florida Rule of Civil Procedure 1.110(c). A similar approach arguably is reflected in the Uniform Rules of Procedure

(which expressly apply in administrative proceedings). However, some have wondered whether these rules are authorized by the APA. Section 3 of CS/CS/CS/SB 1010 revises Section 120.54(5)4 to make it clear that these detailed pleading requirements do not apply to persons requesting hearings in response to agency enforcement or disciplinary cases brought by an agency.

Provides Clear "Point of Entry" for Declaratory Statements. Section 3 of CS/CS/CS/SB 1010 also revises Section 120.54(5)(b)5 to require the Uniform Rules regarding petitions for declaratory statement to require that these rules describe the contents of the notices that must be published in the Florida Administrative Weekly, including any applicable time limit for the filing of petitions for leave to intervene or petitions for administrative hearing by persons whose substantial interests may be affected.

Clarifies Agency Obligation to Rule on Exceptions. In 2003, the Legislature eliminated the need to rule on exceptions that do not clearly identify the disputed portions of the recommended order, that do not identify the legal basis for the exception, or that do not include specific citations to the record. This legislative change was designed to address those court decisions that had applied a model rule of procedure to require the agency to explicitly rule on each exception, including exceptions that were subordinate, cumulative, immaterial, or unnecessary.^[4] However, the APA contains no express requirement that the agency explicitly rule on each exception, and the cited model rule has now been repealed. Section 8 of CS/CS/CS/SB 1010 revises Section 120.57(1)(k) to expressly include this requirement.

Really Requires Agencies to Provide Final Orders to DOAH. In those cases where DOAH conducts the final hearing, the APA requires the agency to provide a copy of its final order to DOAH within 15 days after the order is filed with the agency clerk. Apparently, not all agencies have complied with this longstanding requirement. Section 8 of CS/CS/CS/SB 1010 also revises Section 120.57(1)(m) to make the final order in such cases effective only upon filing with DOAH.

Requires Agencies and DOAH to Identify Types of Disputes Amenable to Summary Hearings. One of the frequently-heard

complaints about the APA is that it has become too complex or complicated for resolving the “garden variety” dispute. Another complaint is that the administrative hearing process has become too time-consuming and expensive. In 1996, the Legislature amended the APA and established the summary hearing process, which is now codified in s. 120.574. The summary hearing process is designed to facilitate a more rapid and less complex resolution of disputes and, in particular, to streamline the hearing process when discovery is not required. It appears the process has been little used, no doubt because it requires the agency to agree that the ALJ (rather than the agency) will issue the final order. It has been suggested that the Legislature should require that certain types of cases be conducted pursuant to the summary hearing process. In an effort to identify those cases, Sections 9 and 10 of CS/CS/CS/SB 1010 amend the APA to require each agency and DOAH to identify the types of disputes in which the agency is involved that would be amenable to the summary hearing process.

Clarifies What “Notice” Must Be Published Following the Final Public Hearing on the Proposed Rule. Section 120.54(3)(d)1 requires that an agency file and publish certain notices after the final public hearing on a proposed rule, depending on whether the rule has been changed from the rule as previously filed with the committee. If the rule has not been changed or contains only technical changes, the adopting agency must file a notice to that effect with the committee at least seven days prior to filing the rule for adoption. On the other hand, if a change other than a technical change is made in a proposed rule, the adopting agency must provide a copy of the notice “of change” to certain persons and must file the notice with the committee, along with the reasons for such change, at least 21 days prior to filing the rule for adoption. The adopting agency also is required to publish “the notice” in the Florida Administrative Weekly at least 21 days prior to filing the rule for adoption. Unfortunately, it is not altogether clear whether only the notice of change must be published in the Weekly, or whether the agency also must publish notice that there has been no change. Section 3 of CS/CS/CS/SB 1010 revises this paragraph to clarify that only the notice “of change” must be published.

Clarifies Who is a “Small Business Party” Under FEAJA. Although not located within the APA itself, the Florida Equal Access to Justice Act authorizes an award of attorney’s fees and costs to a prevailing “small business party” in any adjudicatory proceeding or administrative proceeding pursuant to Chapter 120 initiated by a state agency, unless the actions of the agency

were substantially justified or special circumstances exist that would make the award unjust.[5] The appellate courts had split on whether an individual is a “small business party” eligible for attorneys fees under s. 57.111,[6] and the Florida Supreme Court recently held that it is not.[7] Section 2 of CS/CS/CS/SB 1010 revises Section 57.111(3)(d) to make clear that a small business party includes an “individual” and “only other persons” whose net worth does not exceed \$2 million.

As of this writing, CS/CS/CS/SB 1010 has not yet been presented to the Governor, and he has not yet had an opportunity to determine whether to veto the bill. In addition, several more controversial changes were not approved; look for these to be considered in 2006.[8]

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[1] E.g., *Machules v. Department of Administration*, 523 So. 2d 1132 (Fla. 1988); *Appel v. Florida Department of State, Division of Licensing*, 734 So. 2d 1180 (Fla. 2d DCA. 1999); *Cann*, 813 So. 2d at 239; *Patz*, 864 So. 2d at 80-81 n.3

[2] *Ross Stafford Burnaman, Equitable Tolling in Florida Administrative Proceedings*, 74 Fla. B.J. 60 (Feb. 2000); *John S. Yudin, Equitable Tolling in Administrative Proceedings: Where is the Authority?*, XXIV *Administrative Law Section Newsletter* 3 (September 2002).

[3] *Brookwood Extended Care Center of Homestead, LLP v. Agency for Health Care Administration*, 870 So.2d 834 (Fla. 3d DCA 2003); see also *Samuel J. Morley, Brookwood Extended Care Center of Homestead, LLP v. Agency for Health Care Administration, Responding to Administrative Complaints (or How Not To)*, XXV *Administrative Law Section Newsletter* 1 (December 2003).

[4] E.g., *Iturralde v. Department of Professional Regulation*, 44 So.2d 1315 (Fla. 1st DCA 1996). In so holding, the court cited Model Rule 28-5.405(3), which was adopted by the Department of Professional Regulation in Rule 21M-18.04. The cited rule expressly required the final order to include an explicit ruling on each exception or proposed finding of fact, as well as a brief statement of grounds for denying the exception or proposed finding of fact.

[5] Section 57.111, F.S. (2004).

[6] *Florida Real Estate Comm’n v. Shealy*, 647 So.2d 151 (Fla. 1st DCA 1994) (requiring that a licensee hold a professional license in the same capacity in which he practices a profession); *Albert v. Dep’t of Health, Board of Dentistry*, 763 So.2d 1130 (Fla. 4th DCA 1999) (an individual licensee is not automatically disqualified from recovering attorney’s fees under FEAJA simply by forming a corporation for her professional practice).

[7] *Daniels v. Department of Health*, 898 So.2d 61 (Fla. 2005). This case involves a petition to review a per curiam affirmance of a DOAH order denying Daniels’ amended petition for attorney’s fees based on the ALJ’s finding that she is an individual, not a “small business party” as defined by section 57.111(3)(d), F.S. 868 So. 2d 551 (Fla. 3d DCA 2004).

[8] For a discussion of some of these changes, see *Lawrence E. Sellers, Jr., More APA: What Might the 2005 Legislative Session Bring?*, 26 *Admin. L. Section Newsletter* (March 2005).