

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** PCS for HB 1537 Administrative procedures of the Department of the Lottery  
**SPONSOR(S):** Governmental Affairs Policy Committee  
**TIED BILLS:** **IDEN./SIM. BILLS:**

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
Orig. Comm.:	Governmental Affairs Policy Committee		Williamson	Williamson
1)				
2)				
3)				
4)				
5)				

**SUMMARY ANALYSIS**

In 1987, the Legislature established the Department of the Lottery (department) for the purpose of operating the state lottery so as to maximize revenues in a manner consonant with the dignity of the state and the welfare of its citizens. The Legislature recognized that the operation of the lottery was a unique activity for state government and that structures and procedures appropriate to the performance of other governmental functions were not necessarily appropriate to the operation of a state lottery. As such, the Legislature granted the department authorities not typically afforded other agencies. This allowed the department to respond as quickly as possible to changing market conditions and to maximize additional funding for education. In addition, this broad range of authority allowed the department to establish itself and the games it promotes and to address any immediate issues or concerns; however, that was over 20 years ago and the department is now fully operational.

The bill revises and tightens the grant of rulemaking authority provided to the Department of the Lottery by:

- Providing that it must adopt rules governing the operation of games offered by the department.
- Removing its authority to adopt by rule a code of ethics for its officers and employees. In addition, the bill no longer exempts personnel actions from chapter 120, F.S.
- Removing its authority to perform any of the functions of the Department of Management Services under certain chapters. As such, the department no longer has the authority to adopt rules creating different processes from those authorized under such chapters.
- Removing the general grant of emergency rulemaking authority afforded the department. It maintains a specific grant of emergency rulemaking authority for the purpose of implementing instant ticket games.

The bill also removes three exceptions from s. 120.57(3), F.S., (relating to bid protests) afforded the department but not granted other administrative agencies. As a result, bid protest standards should be applied consistently among all administrative agencies.

Finally, the bill requires the department to repeal all rules in existence on July 1, 2010, that were adopted in a manner no longer authorized by this act. The intent is to ensure the department repeals emergency rules related to topics like procurement and leasing of facilities, while retaining rules specific to instant ticket games.

The Department of the Lottery could incur expenditures associated with the promulgation of new rules.

## HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

##### Executive Agency Authority

Agencies are “creatures of statute” that have only those powers that the Legislature delegates to them<sup>1</sup> and can only perform as authorized by the Legislature.<sup>2</sup> Administrative agencies may not expand their authority beyond that provided in a statutory grant or amend such provision.<sup>3</sup> They have no inherent<sup>4</sup> or common law powers.<sup>5</sup> When an agency acts outside the scope of its delegated authority, it acts illegally.<sup>6</sup> Statutory delegations probably cannot express every permissible act required to perform a function; however, authority is *implied* because the Legislature intended performance when delegating the duty.<sup>7</sup> Implied powers, however, must be necessary, may not be extended beyond the fair inferences of specific cases,<sup>8</sup> and may not be “in violation of law or public policy.”<sup>9</sup> Florida case law has long restricted implied agency powers.<sup>10</sup> “If any doubt exists as to whether a particular power has been statutorily granted, such doubt must be resolved against the employment of that power.”<sup>11</sup>

##### The Administrative Procedure Act<sup>12</sup>

The Administrative Procedure Act (APA) “presumptively governs the exercise of all authority statutorily vested in the executive branch of state government,”<sup>13</sup> and allows persons substantially affected by the preliminary decisions of administrative agencies to challenge those decisions.<sup>14</sup>

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<sup>1</sup> *Ocampo v. Department of Health*, 806 So.2d 633 (1st DCA 2002).

<sup>2</sup> *Ocampo* at 634.

<sup>3</sup> *Department of Environmental Regulation v. Falls Chase Special Taxing District*, 424 So.2d 787 (1st DCA 1984); *Seitz v. Duval County School Board*, 366 So.2d 119 (1st DCA 1979); *Department of Transportation v. James*, 403 So.2d 1066 (4th DCA 1981).

<sup>4</sup> *East Central Regional Wastewater Facilities Operation Board v. City of West Palm Beach*, 659 So.2d 402, 20 F.L.W. D1772 (4th DCA 1995); *Grove Isle, Ltd. v. Department of Environmental Regulation*, 454 So.2d 571 (1st DCA 1984).

<sup>5</sup> *Florida Indus. Commission ex rel. Special Disability Fund v. National Trucking Co.*, 107 So.2d 397 (1st DCA 1958); *State ex rel. Greenberg v. Florida State Bd. of Dentistry*, 297 So.2d 628 (1st DCA 1974), cert. dismissed, 300 So.2d 900 (Fla. 1974).

<sup>6</sup> *Lee v. Division of Florida Land Sales and Condominiums*, 474 So.2d 282 (5th DCA).

<sup>7</sup> Am. Jur. 2d, *Public Officers and Employees*, s. 232.

<sup>8</sup> *White v. Crandon*, 116 Fla. 162, 156 So. 303 (1934); see also, AGO 079-47.

<sup>9</sup> Fla. Jur. 2d, *Civil Servants and Other Public Officers and Employees*, s. 63, citing *In re Advisory Opinion to the Governor*, 60 So.2d 285 (Fla. 1952); *Peters v. Hansen*, 157 So.2d 103 (2nd DCA 1963).

<sup>10</sup> *Edgerton v. International Company*, 89 So.2d 488 (Fla. 1956); *State ex rel. Greenberg v. Florida State Board of Dentistry*, 297 So.2d 628 (1st DCA 1974); *Gardinier, Inc. v. Florida Dept. of Pollution Control*, 300 So.2d 75 (1st DCA 1974).

<sup>11</sup> Op. Atty. Gen 85-66, quoting from *State v. Atlantic Coast Line R. Co.*, 47 So. 969 (Fla. 1908).

<sup>12</sup> The Administrative Procedure Act is codified at chapter 120, F.S.

For purposes of the APA, the term “agency” is defined as each:

- State officer and state department, and each departmental unit described in s. 20.04, F.S.
- Regional water supply authority.
- Board and commission, including the Commission on Ethics and the Fish and Wildlife Conservation Commission when acting pursuant to statutory authority derived from the Legislature.
- Regional planning agency.
- Multicounty special district with a majority of its governing board comprised of nonelected persons.
- Educational unit.
- Entity described in chapters 163 (Intergovernmental Programs), 373 (Water Resources), 380 (Land and Water Management), and 582 (Soil and Water Conservation), F.S., and s. 186.504 (regional planning councils), F.S.
- Other units 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.<sup>15</sup>

The definition also includes the Governor in the exercise of all executive powers other than those derived from the State Constitution. It expressly includes a regional water supply authority.<sup>16</sup>

#### APA: Rulemaking

The APA provides general provisions applicable to all rules,<sup>17</sup> other than emergency rules.<sup>18</sup> Rulemaking is not a matter of agency discretion.<sup>19</sup> A grant of rulemaking authority<sup>20</sup> is necessary but not sufficient to allow an agency to adopt a rule. A specific law to be implemented also is required.<sup>21</sup>

The APA also provides a process for adopting “emergency rules.” If an agency finds that an immediate danger to the public health, safety, or welfare requires emergency action then the agency may adopt any rule necessitated by the immediate danger.<sup>22</sup> An emergency rule is not effective for a period longer

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<sup>13</sup> *Gopman v. Department of Education*, 908 So.2d 1118, 1120 (Fla. 1st DCA 2005).

<sup>14</sup> Judge Linda M. Rigot, *Administrative Law: A Meaningful Alternative to Circuit Court Litigation*, The Florida Bar Journal, Jan. 2001, at 14.

<sup>15</sup> Section 120.52(1), F.S.

<sup>16</sup> The definition of agency expressly excludes any legal entity or agency created in whole or in part pursuant to chapter 361, F.S., part II (Joint Electric Power Supply Projects); any metropolitan planning organization created under s. 339.175, F.S., or any separate legal or administrative agency of which a metropolitan planning organization is a member; an expressway authority pursuant to chapter 348, F.S.; any legal or administrative entity created by an interlocal agreement pursuant to s. 163.01(7), F.S., unless any party to such agreement is otherwise an agency as defined in the section; or any multicounty special district with a majority of its governing board comprised of elected persons.

<sup>17</sup> Section 120.52(16), F.S., defines “rule” to mean each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include: internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum; legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action; or the preparation or modification of:

- Agency budgets.
- Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.
- Contractual provisions reached as a result of collective bargaining.
- Memoranda issued by the Executive Office of the Governor relating to information resources management.

<sup>18</sup> Section 120.54(1), F.S.

<sup>19</sup> Section 120.54(1)(a), F.S.

<sup>20</sup> Section 120.52(17), F.S., defines “rulemaking authority” to mean statutory language that explicitly authorizes or requires an agency to adopt, develop, establish, or otherwise create any statement coming within the definition of the term “rule.”

<sup>21</sup> Section 120.536(1), F.S.

<sup>22</sup> Section 120.54(4)(a), F.S.

than 90 days. In addition, it is not renewable, except during the pendency of a challenge to proposed rules addressing the subject of the emergency rule.<sup>23</sup>

### APA: Bid Protests

Chapter 287, F.S., governs agency<sup>24</sup> procurement of commodities and contractual services. The Department of Management Services is statutorily designated as the central procurement authority for executive agencies.

Bid protests are conducted in accordance with the APA. Current law provides detailed provisions relating to bid protests.<sup>25</sup> It requires that the public be notified of agency actions regarding protests<sup>26</sup> and that a 72-hour window of opportunity be provided for affected entities to file a notice of intent to protest.<sup>27</sup> Upon receipt of such notice, the agency typically is required to stop the procurement process until the protest is resolved.<sup>28</sup> If the protest is not resolved informally, it must be referred to the Division of Administrative Hearings if there are disputed issues of material fact or to an agency hearing officer if there are no disputes over material facts.<sup>29</sup>

### Department of the Lottery

In 1987, the Legislature enacted chapter 87-65, L.O.F.,<sup>30</sup> to implement a voter-approved constitutional amendment<sup>31</sup> allowing the State of Florida to operate a lottery. The Department of the Lottery (department) was established for the purpose of operating the state lottery “so as to maximize revenues in a manner consonant with the dignity of the state and the welfare of its citizens.”<sup>32</sup>

In 1987, the Legislature recognized that the operation of the lottery was a unique activity for state government and that structures and procedures appropriate to the performance of other governmental functions were not necessarily appropriate to the operation of a state lottery.<sup>33</sup> As such, the Legislature granted the department authorities not typically afforded other agencies. This allowed the department to respond as quickly as possible to changing market conditions and to maximize additional funding for education.<sup>34</sup> In addition, this broad range of authority allowed the department to establish itself and the games it promotes and to address any immediate issues or concerns; however, that was over 20 years ago and the department is now fully operational.

### Department of the Lottery: Rulemaking Authority

As part of its powers and duties,<sup>35</sup> the Legislature provided the department with multiple grants of rulemaking authority, including a general grant for emergency rules. The department may:

- Adopt rules governing the establishment and operation of the state lottery.<sup>36</sup>

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<sup>23</sup> Section 120.54(4)(c), F.S.

<sup>24</sup> Section 287.012(1), F.S., defines “agency” to mean any of the various state officers, departments, boards, commissions, divisions, bureaus, and councils and any other unit of organization, however designated, of the executive branch of state government. “Agency” does not include the university and college boards of trustees or the state universities and colleges.

<sup>25</sup> See s. 120.57(3), F.S.

<sup>26</sup> Section 120.57(3)(a), F.S.

<sup>27</sup> Section 120.57(3)(b), F.S.

<sup>28</sup> Section 120.57(3)(c), F.S.

<sup>29</sup> Section 120.57(3)(d), F.S.

<sup>30</sup> Codified as chapter 24, F.S.

<sup>31</sup> Section 15, Art. X of the State Constitution.

<sup>32</sup> Section 24.104, F.S.

<sup>33</sup> Section 24.102(2)(b), F.S.

<sup>34</sup> See s. 24.109(1), F.S.

<sup>35</sup> See s. 24.105, F.S.

<sup>36</sup> Pursuant to s. 24.105(9), F.S., such rules include:

- The type of lottery games to be conducted with certain exceptions.
- The sales price of tickets; the number and sizes of prizes.
- The method of selecting winning tickets. However, if a lottery game involves a drawing, the drawing shall be public and witnessed by an accountant employed by an independent certified public accounting firm. The equipment used in the drawing shall be inspected before and after the drawing.
- The manner of payment of prizes to holders of winning tickets.
- The frequency of drawings or selections of winning tickets.

- Determine by rule information relating to the operation of the lottery that is confidential and exempt from public records requirements.<sup>37 38</sup>
- Perform any of the functions of the Department of Management Services under chapter 255,<sup>39</sup> chapter 273,<sup>40</sup> chapter 281,<sup>41</sup> chapter 283,<sup>42</sup> or chapter 287,<sup>43</sup> F.S. The department must find, by rule, that compliance with any such chapter would impair or impede the effective or efficient operation of the lottery.<sup>44</sup>
- Adopt by rule a code of ethics for officers and employees of the department that supplements the standards of conduct for public officers and employees.<sup>45</sup>

The Legislature also authorized the department to, at any time, adopt emergency rules; however, the department is not required to make a finding that an immediate danger to the public health, safety, or welfare requires emergency action. In addition, emergency rules adopted by the department do not expire unless replaced by other emergency rules or by rules adopted under the nonemergency rulemaking procedures of the APA.<sup>46</sup>

In the last five years, the department has adopted 404 emergency rules.<sup>47</sup> Most of the emergency rules pertain to instant ticket games offered by the department; however it has adopted by emergency rule provisions relating to Powerball, Lotto, retailer bonus commissions for certain games, retailer accountability, retailer responsibility, retailer contracts, a code of ethics for non-reporting individuals and non-procurement employees, a code of ethics for reporting individuals and procurement employees, overtime compensation, procurement of commodities and contractual services, and facility leases.

In the last five years, the department has used the nonemergency rulemaking process on five occasions.<sup>48</sup> According to the department, nonemergency rulemaking was chosen in those five instances because “non-emergency, or so-called ‘permanent’ rules were being amended . . .”<sup>49</sup>

#### Department of the Lottery: Bid Protests

Current law specifies that the procurement provisions of s. 120.57(3), F.S., apply to the department’s contracting process with three exceptions:

- A *formal* written protest of a department action that is subject to protest must be filed within 72 hours after receipt of notice of agency action;<sup>50</sup> whereas, the timeframe for a formal written protest of other agency actions is set at 10 days.<sup>51</sup>

- The number and type of locations at which tickets may be purchased.
- The method to be used in selling tickets.
- The manner and amount of compensation of retailers.
- Such other matters necessary or desirable for the efficient or economical operation of the lottery or for the convenience of the public.

<sup>37</sup> Section 24.105(12)(a), F.S.

<sup>38</sup> As of 1993, the department no longer has the authority to adopt by rule information that should be made confidential and exempt from public records requirements. Section 24(c), Art. I of the State Constitution, vests that authority in the Legislature only; however, s. 24(d) grandfathers in all exemptions in effect on July 1, 1993. As such, the protections codified in rule 53-1.005, F.A.C., confidential information, remains confidential and exempt so long as the protections were in place on or before July 1, 1993.

<sup>39</sup> Chapter 255, F.S., relates to public property and publicly owned buildings.

<sup>40</sup> Chapter 273, F.S., relates to state-owned tangible personal property.

<sup>41</sup> Chapter 281, F.S., relates to safety and security services.

<sup>42</sup> Chapter 283, F.S., relates to public printing.

<sup>43</sup> Chapter 287, F.S., relates to procurement of personal property and services.

<sup>44</sup> Section 24.105(13), F.S.

<sup>45</sup> Section 24.105(20), F.S.

<sup>46</sup> Section 24.109(1), F.S.

<sup>47</sup> The department adopted 97 emergency rules in 2005, 63 in 2006, 76 in 2007, 89 in 2008, 74 in 2009, and five for the first two months of 2010.

<sup>48</sup> E-mail from Ken Hart, General Counsel, Department of the Lottery, November 12, 2009 (on file with the Governmental Affairs Policy Committee).

<sup>49</sup> E-mail from Ken Hart, General Counsel, Department of the Lottery, November 16, 2009 (on file with the Governmental Affairs Policy Committee).

<sup>50</sup> Section 24.109(2)(a), F.S.

- The department is afforded a higher standard of review for protests of procurements. Bid decisions are reviewed by an administrative law judge; however, such judge may not substitute his or her procurement decision for the agency's procurement decision.<sup>52</sup>
- The department may proceed with a bid, solicitation, or contract award process notwithstanding the filing of a notice of intent to protest. Such procedure is permitted when the secretary of the department sets forth in writing "particular facts and circumstances which require the continuance of the bid solicitation process or the contract award process" in order to avoid a "substantial loss of funding to the state or to avoid substantial disruption of the timetable for any scheduled lottery game."<sup>53</sup>

### **Effect of Bill**

The bill revises and tightens the grant of rulemaking authority provided to the Department of the Lottery.

The bill removes the authority of the department to adopt by rule a code of ethics for its officers and employees. In addition, it no longer exempts personnel actions from chapter 120, F.S.

The bill removes the authority of the department to perform any of the functions of the Department of Management Services under chapters 255, 273, 281, 283, or 287, F.S. As such, the department no longer has the authority to adopt rules creating different processes from those authorized under such chapters.

The bill requires the department to adopt rules governing the operation of games offered by the department. The department may adopt emergency rules for the purpose of implementing instant ticket games. Such rules remain in effect until expiration of the specific instant ticket game which is the subject of the emergency rule. The bill, however, removes the general grant of emergency rulemaking authority afforded the department.

The bill also removes the three exceptions from s. 120.57(3), F.S., afforded the department but not granted other administrative agencies. As a result, bid protest standards should be applied consistently among all administrative agencies.

Finally, the bill requires the department to repeal all rules in existence on July 1, 2010, that were adopted in a manner no longer authorized by this act. The intent is to ensure the department repeals emergency rules related to topics like procurement and leasing of facilities, while retaining rules specific to instant ticket games.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 24.105, F.S., to revise the rulemaking authority granted the Department of the Lottery.

Section 2 repeals s. 24.109, F.S., relating to administrative procedure.

Section 3 requires the department to repeal certain rules in existence as of July 1, 2010.

Section 4 provides an effective date of July 1, 2010.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

<sup>51</sup> See s. 120.57(3)(b), F.S.

<sup>52</sup> Section 24.109(2)(b), F.S.

<sup>53</sup> Section 24.109(2)(c), F.S.

1. Revenues:

None.

2. Expenditures:

The Department of the Lottery could incur expenditures associated with the promulgation of new rules.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill revises and narrows the grant of rulemaking authority provided by the Legislature to the Department of the Lottery. It eliminates the department's general grant of emergency rulemaking authority and provides that the department may only adopt emergency rules for the purpose of implementing instant ticket games. In addition, the bill requires the department to repeal all rules in existence on July 1, 2010, that were adopted in a manner no longer authorized by this act.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

Not applicable.