

STORAGE NAME: h1109b.go
DATE: April 16, 1997

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
GOVERNMENTAL OPERATIONS
BILL ANALYSIS & ECONOMIC IMPACT STATEMENT**

BILL #: HB 1109
RELATING TO: Public Officers & Employees
SPONSOR(S): Representative Edwards
STATUTE(S) AFFECTED: Amends s. 112.3173
COMPANION BILL(S): SB 1500(I)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) GOVERNMENTAL OPERATIONS YEAS 4 NAYS 0
- (2) CRIME & PUNISHMENT
- (3) GENERAL GOVERNMENT APPROPRIATIONS
- (4)
- (5)

I. SUMMARY:

HB 1109 expands the forfeiture provisions in s. 112.3173(3), F.S. If, pursuant to a Chapter 120 hearing, a public officer or employee is found by clear and convincing evidence to have committed a specified offense prior to retirement, then his or her public retirement or pension rights and benefits must be forfeited. Furthermore, any public officer or employee whose office or employment is terminated by reason of his or her admitted commission, aid, or abetment of a specified offense, must also forfeit all public retirement or pension rights and benefits. However, under both circumstances the contributions made by the public officer or employee must be returned.

This bill expands the term "specified offense" to include several sexual offenses. Pursuant to HB 1109, specified offenses include the use or attempted use by a public officer or employee of his or her official position to commit any felony violation of chs. 794 (sexual battery), 800 (lewdness or indecent exposure), or 827 (child abuse), F.S. Additionally, this bill includes the commission of "any felony involving a breach of the public trust" as a specified offense.

This bill has fiscal impact on state and local governments (see Fiscal Analysis & Economic Impact Statement).

II. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Article II, Section 8(d), Florida Constitution, provides that “[a]ny public officer or employee who is convicted of a felony involving a breach of the public trust shall be subject to forfeiture of rights and privileges under a public retirement system or pension plan in such manner as may be provided by law.”

Section 112.3173(1), F.S., states that the Legislature intended to implement Art. II, Sec. 8(d), Florida Constitution, by enacting s. 112.3173, F.S.

Section 112.3173(3), F.S., provides that any public officer or employee who is convicted of a specified offense committed prior to retirement, or whose office or employment is terminated by reason of the officer’s admitted commission, aid, or abetment of a specified offense, shall forfeit all rights and benefits under any public retirement systems to which he or she is a member. However, any accumulated contributions by the officer or employee will be returned and will not be forfeited.

Section 112.3173(2)(c), F.S., defines a “public officer or employee” as an officer or employee of any public body, political subdivision, or public instrumentality within the state. Section 112.3173(2)(e), F.S., defines the “specified offenses”, which will trigger forfeiture, to mean:

- Committing, aiding, or abetting of an embezzlement of public funds;
 - Committing, aiding, or abetting of any theft by the public officer or employee from his or her employer;
 - Bribery in connection with the public officer or employee’s employment;
 - Any felony specified in ch. 838, except for ss. 838.15 and 838.16, F.S.;
- Chapter 838 includes the following:
- Corruption by threat against a public servant;
 - Bribery in athletic contests;
 - Commercial bribe receiving; and
 - Commercial bribing.
- Committing an impeachable offense; or
 - Committing any “felony where the public officer or employee who, willfully and with intent to defraud the public or a public agency for which the public officer or employee acts or in which he or she is employed of the right to receive the faithful performance of his or her duty as a public officer or employee, realizes or obtains, or attempts to realize or obtain a profit, gain, or advantage for himself or herself or for some other person through use or attempted use of the power, rights, privileges, duties, or position of his or her public office or employment position.”

Although the above list may on its face appear to include offenses other than felony offenses, the intent of the current law, as directed by Art. II, Sec. 8(d), Florida Constitution, only includes felony convictions involving a breach of public trust. Section 112.3173(2)(e), F.S., does not specifically list any sexual crimes which, if committed by a public officer or employee, would trigger the forfeiture of retirement or pension rights or benefits.

Section 112.3173(4), F.S., provides for certain notice procedures whereby the Commission on Ethics must be informed of proceedings against a public officer or employer. The Commission on Ethics must then notify the governing body of the retirement system of which the public officer or employer is a member.

Section 112.3173(5)(a), F.S., provides that the official or board responsible for paying public retirement benefits to the officer or employee must give notice and hold a hearing pursuant to ch. 120, F.S., whenever that official or board receives notice that the public officer or employee's retirement benefits are required to be forfeited. If the official or board determines that the benefits are required to be forfeited, an order must be issued accordingly. Section 112.3173(5)(b), F.S., further provides that such an order is appealable to the district court of appeal. When such an order is issued, s. 112.3173(5)(c), F.S., provides that the payment of benefits must be automatically stayed pending an appeal of a felony conviction. If the conviction is reversed, the benefits will not be forfeited. Upon affirmation of the conviction, the benefits will remain forfeited. Section 112.3173(5)(d), F.S., provides that a public officer or employee must pay back his or her retirement benefits to the retirement system if the benefits become forfeited, and if he or she has received benefits in excess of his or her contributions to the system.

In 1996, the Gulf County sheriff was convicted in Federal district court of seven misdemeanor civil rights violations because he had forced inmates to perform sex acts (see memorandum "Forfeiture of Pension Benefits by Public Officers and Employees who Commit Rape, Aggravated child abuse, and Other Felonies Involving a Breach of the Public Trust," Florida Office of the Attorney General, Department of Legal Affairs, March 21, 1997). The former sheriff is now serving a 51 month sentence in federal prison (*Id.*). In the near future, the former sheriff will begin to draw retirement benefits because his offenses did not fall within the categories of "specified offenses" which would trigger a forfeiture of his benefits pursuant to s. 112.3173, F.S. (*Id.*).

B. EFFECT OF PROPOSED CHANGES:

HB 1109 provides that public officers and employees who abuse their public trust "and are found to have committed a specified felony offense, **whether criminally convicted or not,**" must forfeit their rights and benefits under any public retirement system or pension plan. This expands the current provisions in s. 112.3173, F.S., which gives effect to Art. II, Sec. 8(d), Florida Constitution, which requires retirement forfeiture only for those public officers and employees who are convicted of a felony involving a breach of public trust.

This bill expands the term "specified offense" to include several sexual offenses. Pursuant to HB 1109, specified offenses would include the use or attempted use by a public officer or employee of his or her official position to commit any felony violation of chs. 794 (sexual battery), 800 (lewdness or indecent exposure), or 827 (child abuse), F.S. Additionally, this bill would include the commission of "any felony involving a breach of the public trust" as a specified offense. Section 112.312, F.S., defines "breaching the public trust" broadly as any violation of Art. II, Sec. 8, Florida Constitution, or Part III of ch. 112, F.S. Additionally, a breach of public trust includes a violation of any provision in the Constitution or Part III of ch. 112, F.S., which establishes a standard of ethical conduct, a disclosure requirement, or a prohibition applicable to

public officers or employees in order to avoid conflicts between public duties and private interests.

HB 1109 also expands the forfeiture provisions in s. 112.3173(3), F.S., so that any officer or employee who, by clear and convincing evidence, is found **in a ch. 120 administrative hearing** to have committed a specified offense prior to retirement, must forfeit all public retirement or pension rights and benefits, except that his or her accumulated contributions will be returned.

Proponents of this bill urge that its provisions will require forfeiture of retirement benefits of errant public officers, such as the former Gulf County sheriff, who utilize their positions to commit certain sexual offenses (*Id.*). It must be noted, however, that even if the provisions in HB 1109 were current law, the former Gulf County sheriff's retirement benefits would still not have been forfeited because he had not committed one of the specified felonies. He was convicted under federal law of a misdemeanor violation of another person's civil rights, for which there is no counterpart under Florida law.

Proponents believe that public officers and employees should forfeit their retirement benefits if found to have committed a specified offense by an administrative law judge in an administrative proceeding pursuant to a clear and convincing standard of proof. This is a significantly lesser standard of proof than is currently required to determine guilt in a felony proceeding, which is "beyond a reasonable doubt". Furthermore, the rules of procedure in an administrative forum are significantly different from those in a criminal proceeding (*Id.*).

Opponents of this bill criticize it for two reasons. First, this bill places members of state and local retirement and pension boards in the position of adjudicating the guilt of public officers or employees with respect to retirement and/or pension benefits forfeiture. Opponents feel that administrative boards and officers should not take the place of judges and juries in determining whether public officers or employees have committed a criminal offense (phone conversation with A.J. McMullian, Division of Retirement, April 2, 1997). Also, opponents state that this bill creates an adverse fiscal impact on certain governmental bodies (see Fiscal Analysis & Economic Impact Statement).

Finally, HB 1109 provides that payment of retirement benefits will be stayed, only when a final order of forfeiture is entered as a result of a criminal felony conviction and when an appeal of the felony is pending. If an order of forfeiture is entered as a result of an administrative hearing wherein a public officer or employee is found to have committed a specified offense that officer or employee's retirement benefit payments will not be stayed pending appeal.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Yes. By expanding the category of "specified offenses," and by expanding the forfeiture provision to include administrative findings that the officer or employee committed a specified offense, this bill appears to increase the possibility that more forfeitures will occur. This increase will in turn increase the workload of the Commission on Ethics, which receives notice of forfeitures, and any public retirement or pension boards or officials who are required to hold administrative hearings pursuant to this bill.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

Yes. Currently, a public officer or employee may continue to draw certain retirement benefits if the officer or employee is not convicted of a specified offense. This bill would cause certain non-felony convicted public officers or employees to forfeit their rights and benefits under any public retirement system of which they are a member. This bill also expands the categories of offenses which would trigger this forfeiture.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

No.

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. SECTION-BY-SECTION ANALYSIS:

Section 1 -- Amends s. 112.3173, F.S.; provides that a public officer or employee forfeits his or her retirement benefits if he or she commits a specified offense, whether criminally convicted or not; expands the definition of "specified offense" to include certain sexual offenses and any felony involving a breach of the public trust; provides that any public officer or employee who is found by clear and convincing evidence in an administrative hearing to have committed a specified offense must forfeit his or her retirement benefits, except for his or her contributions; provides that, when a final forfeiture order is issued because of a conviction of a specified offense, payments of retirement benefits must be stayed pending an appeal of the felony conviction; provides that if the conviction is reversed, no retirement benefits will be forfeited.

Section 2 -- Provides an effective date of October 1, 1997.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

This bill would probably increase the forfeiture of certain retirement benefits, although the number of increased forfeitures is not determinable. Florida Retirement System benefits not disbursed pursuant to such increased forfeitures would remain in the Florida Retirement System Trust Fund. Trust Fund monies can only be spent as appropriated by the Legislature.

The Division of Retirement states that this bill "will add a large administrative and legal workload for the Division and will be costly to administer for the FRS." The Division of Retirement further states that it "would require one Senior Attorney position and one-half of an Administrative Secretary position to handle the additional workload ... The following costs include benefits, and expense and OCO packages":

	<u>Sr. Attorney</u>	<u>1/2 Admin. Sec.</u>	<u>Total</u>
1997 - 1998	\$71,403	\$19,498	\$90,901
1998 - 1999	\$68,371	\$15,306	\$83,677
1999 - 2000	\$70,275	\$15,650	\$85,925

See Florida Division of Retirement Legislative Bill Analysis - 1997 Bill # 1109, DRAFT.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

4. Total Revenues and Expenditures:

Indeterminate (see Recurring Effects above).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

Indeterminate. This bill would increase the forfeiture of certain retirement benefits, which benefits would revert back to certain retirement systems or pension plans. Some funds would revert to local pension plans or retirement systems, such as municipal police officers' retirement trust fund boards established pursuant to ch. 185, F.S. Also, the amount of local funds expended in notice and forfeiture procedures, such as holding additional administrative hearings, would increase. Because the exact number of public officers and employees who will commit specified offenses in the future is unascertainable, the recurring fiscal effect of this bill is indeterminate.

3. Long Run Effects Other Than Normal Growth:

Indeterminate.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not directly require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

The committee adopted one "strike everything" amendment. The amendment removed several provisions contained in the original bill including the following:

- ⊗ legislative intent statement that retirement benefits should be forfeited by public officers or employees who are found to have committed a specified felony **whether criminally convicted or not**;
- ⊗ expansion of s. 112.3173(3), F.S., forfeiture provision to forfeit the retirement benefits of public officers or employees who are found **in ch. 120 administrative hearings** to have committed a specified offense;
- ⊗ expansion of the definition of "specified offense" to include the committing of **any felony involving breach of the public trust**.

The amendment simply expands the definition of "specified offense" for purposes of retirement forfeiture to the use (removing attempted use) by a public officer or employee of his or her official position to commit certain sexual felonies. Additionally, the amendment restricts the scope of the original provision that included "the committing of any felony involving breach of the public trust" as triggering forfeiture. Instead, the amendment provides that forfeiture will be triggered by a commission of a felony by a public officer or employee that involves the use of his or her official position or any public property or resource that he or she holds in official trust to secure an illegal privilege, benefit, or exemption for himself, herself, or others.

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VII. SIGNATURES:

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