

STORAGE NAME: h3161.go

DATE: January 13, 1998

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
GOVERNMENTAL OPERATIONS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 3161

RELATING TO: Law Enforcement & Corrections Officers

SPONSOR(S): Representative MacKenzie

COMPANION BILL(S): SB 346(s), HB 1595(c), HB 3143(c)

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

- (1) LAW ENFORCEMENT AND PUBLIC SAFETY YEAS 7 NAYS 0
 - (2) GOVERNMENTAL OPERATIONS
 - (3)
 - (4)
 - (5)
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I. SUMMARY:

House Bill 3161 provides that law enforcement or correctional officers under investigation by the employing agency, who are interrogated, shall be given a recording of that interrogation session no later than the end of the next business day. Law enforcement and correctional officers would have the right to review their personnel files at any reasonable time, and attach a statement in response to *any* material contained in the personnel file. Moreover, they must be sent a copy of any "derogatory" material placed in the file.

This bill authorizes law enforcement officers, correctional officers, or correctional probation officers, who have resigned due to their appointment or election to office, to continue to participate in any training and educational programs approved by the Criminal Justice Standards and Training Commission (Commission) of the Florida Department of Law Enforcement. It is intended that the person elected or appointed to office who holds active certification as an officer, could retain their certification without violating the constitutional prohibition against dual office-holding, and without such office-holding period being considered a break in service for purposes of certification.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Currently, section 112.532(1), F.S., enumerates certain rights of law enforcement and correctional officers who are being investigated by their employing agency, and who may, as a result, be subject to disciplinary action or dismissal. These rights require any interrogation to be conducted at a reasonable time, in an appropriate location, and that the officer must be informed of the nature of the investigation and the identity of the complainants. The statute also describes the circumstances where representation by counsel is appropriate, and requires that any interrogation sessions be recorded. The form of recording currently used is usually audio tape recording. There is, however, no specific requirement that the interrogation be recorded on audio tape (note: In fact, Blacks Law Dictionary defines the verb "record" in such a way as to refer to "writing, printing, inscription, or the like"). Neither is there a requirement that the officer being interrogated be given a copy of such recording.

Section 112.533, F.S., provides for the receipt and processing of complaints against law enforcement or correctional officers. The law enforcement agency must put into operation a system for the receipt, investigation, and determination of complaints received. Information obtained pursuant to an investigation by the agency must remain confidential until the agency concludes the investigation, and decides whether or not to file charges. This statutory section currently makes no reference to the officers' personnel files or what materials may be contained within these files. Chapter 943, F.S., establishes minimum qualifications, training requirements, and standards for law enforcement, correctional, and correctional probation officers employed by criminal justice agencies in Florida.

Section 943.135, F.S., provides that the Criminal Justice Standard and Training Commission shall by rule adopt a program that requires all officers, as a condition of continuing employment, to receive periodic Commission-approved continuing training and education. Section 943.1395, F.S., provides the certification requirements for reemployment, breaks in employment and inactive status.

The Commission administers the applicable provisions of Chapter 943, F.S., [ss. 943.085 - 943.257, F.S.], and is responsible for: establishing uniform standards for the training and employment of officers; establishing and maintaining officer training program curricula; preparing and administering officer certification examinations; certifying officers for employment or appointment; and revoking the certification of, or otherwise disciplining, officers.

The Florida Department of Law Enforcement (FDLE) serves as staff to the Commission.

The Commission has developed a basic recruit training program for each criminal justice discipline. The Commission has established, by rule, the minimum number of hours of instruction and the types of courses required for each basic recruit training program. Individual employing agencies may require applicants to complete a training program that requires additional hours of instruction.

Article II, section 5(a), Florida Constitution, provides:

No person holding any office of emolument under any foreign government, or civil office of emolument under the United States or any other state, shall hold any office of honor or of emolument under the government of this state.

No person shall hold at the same time more than one office under the government and the counties and municipalities therein, except that a notary public or military officer may hold another office, and any officer may be a member of a constitution revision commission, taxation and budget reform commission, constitutional convention, or statutory body having only advisory powers.

This constitutional provision prohibits a person from simultaneously holding more than one "office" under the government of the state and the counties and municipalities. Even though the terms "office" or "officer" are not defined, it is well established that a full-time, part-time, auxiliary or certified reserve police officer is an "officer" for purposes of Article II, section 5(a), Florida Constitution. (Attorney General Opinion 77-63. *And see*, Op. Atty. Gen. Fla. 86-105 [1986], concluding that auxiliary police officers who did not have the authority to make arrests but who were certified, carried firearms, and assisted regular police officers in carrying out their duties were "officers." *Compare*, Op. Atty. Gen. Fla. 89-10 [1989], concluding that an administrative law enforcement position, having no law enforcement certification requirements or arrest powers and not authorized to independently exercise the sovereign powers of the state, was not an office but an employment for purposes of dual office-holding.)

The Florida Constitution contains several exceptions to its prohibition against dual office-holding. The constitutional provision expressly states that a notary public or military officer may hold another office. In addition any officer may be a member of a constitutional revision commission or constitutional convention. (See, Art. XI, s. 2, Fla. Const., providing for the establishment of a constitutional revision commission every 20 years; and Art. XI, s. 4, Fla. Const., reserving to the people the power to call a convention to consider a revision of the entire Constitution.)

Statutory bodies having only advisory powers are also exempted from the constitutional dual office-holding prohibition. It is this exception that has been the subject of interpretation both by the courts and by the Attorney General's Office.

There are consequences of a public officer accepting a second office in violation of the constitutional dual office-holding prohibition. The Supreme Court of Florida in a 1970 decision set forth the general rule that "[t]he acceptance of an incompatible office by one already holding office operates as a resignation of the first." *Holley v. Adams*, 238 So.2d 401, 407 (Fla. 1970).

The Commission, within the Department of Law Enforcement, is charged with the responsibility of establishing uniform minimum standards for the employment and training of all officers in the various criminal justice disciplines pursuant to s. 943.12, F.S. The Commission is further responsible for the issuance and revocation of certificates for persons qualified for employment or appointed as an officer (s. 943.1395, F.S.).

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No person may be employed as a full-time, part-time, or auxiliary officer in any criminal justice discipline until he has obtained such a certificate of compliance (s. 943.1395, F.S.). If any officer fails to meet the training requirements of continued employment and the rules and regulations of the Commission, such officer's authority to act and function as an officer is limited and his power to arrest is no greater than that of a private citizen. See, AGO's 73-398 and 73-14.

B. EFFECT OF PROPOSED CHANGES:

House Bill 3161 amends section 112.532, F.S., requiring that a copy of any recording of a formal interrogation session with a law enforcement officer or correctional officer must be given to the interrogated officer no later than the end of the next business day following the interrogation. There may be significant problems arising should the agency not be able to locate an officer, or otherwise be unable to *give* them a copy of a recording within the prescribed time allotted, since the burden of delivery rests completely with the agency.

(An adopted amendment to House Bill 3161 amends section 112.532, F.S., requiring that a copy of any recording of a formal interrogation session with a law enforcement officer or correctional officer must be given to the interrogated officer no later than 72 hours, excluding holidays and weekends, following the interrogation.)

HB 3161 also creates a new subsection in section 112.533, F.S., providing a law enforcement or correctional officer the right to review his or her official personnel file at any reasonable time, and to attach a statement in response to *any* material that is placed in the file. Further, an officer must be sent a copy of any "*derogatory*" material that is placed in his or her file. One concern related to this provision is that a definition of the term "derogatory", in the context of HB 3161 is not clear. This lack of clarity may require staff efforts attempting to investigate and appropriately respond to issues raised about items which may be considered "derogatory".

HB 3161 amends section 943.135, F.S., authorizing any law enforcement officer, correctional officer, or correctional probation officer holding active certification from the Commission, who has resigned due to the constitutional dual office-holding prohibition, to retain active certification by participating in continuing training and education approved by the Commission. The officer's law enforcement certification could then remain valid during the tenure of their elected or appointed office.

For an officer to qualify for this special status, the following must apply:

- ▶ The officer's resignation must be for the sole purpose of serving in an office to which he has been elected or appointed;
- ▶ The officer must have been employed or associated with an agency authorized by ch. 943, F.S., relating to the Florida Department of Law Enforcement;
- ▶ The officer was not subject to an internal investigation or employment action to discipline or dismiss by the agency;

- ▶ The officer was not subject to a state or federal criminal investigation or prosecution; and
- ▶ The officer was not subject to an investigation or action against his certification by the Commission.

The officer would have to become associated or sponsored by a law enforcement agency for the *sole* purpose of continuing the training requirements. However, such association is not intended to be considered "employment", thus avoiding the constitutional prohibition against dual office-holding. This section, however, uses language which may be interpreted by agencies such as the Wage & Hour Division of the Department of Labor as *creating* an employer-employee relationship.

The legislation sets forth duties and responsibilities for the employing agency which receives the officer's resignation for the purpose of avoiding the dual office-holding prohibition, the person seeking benefit of this certification maintenance provision, and the sponsoring (associated) agency which allows the person to continue the educational and training requirements necessary to maintain certification. The Commission, then, would be able to monitor the person's continued eligibility to maintain this special certification status.

The period of time a person maintains this special certification status in elected or appointed office will not be considered to be a break in service for purposes of maintaining active certification by the Commission.

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?

No.

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

Yes, in that certain law enforcement officers would be permitted to associate with a qualifying agency for the purpose of continuing their training & education in order to retain their credentials as certified officers.

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?

No.

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

Possibly. Officers choosing to associate with an agency for the purpose of maintaining their certification might be required to take required training at their own expense.

4. Individual Freedom:

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

Yes, to the extent this bill allows persons who are elected to office to maintain their certification as law enforcement officers.

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

No.

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?

N/A

- 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. STATUTE(S) AFFECTED:

Sections 112.532, 112.533, and 943.135, F.S.

E. SECTION-BY-SECTION RESEARCH:

Section 1. Amends section 112.532, F.S., requiring a copy of a recording of a formal interrogation of a law enforcement officer or correctional officer to be *given* to the interrogated officer no later than the end of the next business day. (Note: An amendment is traveling with this bill which modifies the time provision to no later than 72 hours, excluding holidays and weekends, following the interrogation. See "AMENDMENTS..." section.)

Section 2. Renumbers subsection (3) as subsection (4), and adds a new subsection (3) in section 112.533, F.S., providing a law enforcement or correctional officer the right to review his or her personnel file at any reasonable time and to attach a statement in response to *any* material that is placed in the file. Moreover, the agency must send to an officer, a copy of any "derogatory" material placed in his or her personnel file.

Section 3. Amends subsection (4) of section 943.135, F.S., deleting obsolete language; providing that law enforcement officers who resign due to the officers' appointment or election to public office, may maintain active certification as law enforcement officers, while holding public office, by associating with an agency for the purpose of securing the appropriate training and education.

Section 4. Provides an effective date of upon becoming law.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

In addition to administrative expenses associated with the certification process, there would be a fiscal impact on the sponsoring law enforcement agency if the agency absorbs the costs associated with officers' continuing training and education programs. However, the legislation does not prohibit the sponsoring agency from requiring the officer to pay these costs.

3. Long Run Effects Other Than Normal Growth:

Based on the current language which may be construed as establishing an employer-employee relationship, it is possible that state agencies may be subject to litigation pursuant to the Fair Labor Standards Act of 1938 (as amended). The actual impact is difficult to estimate.

4. Total Revenues and Expenditures:

Unknown.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

There may be some fiscal impact associated with costs necessary to determine what information in officers' personnel files are "derogatory", and in sending that material to such officers; in getting copies of recorded interrogation sessions to interrogated officers within the prescribed time, and with officers' responses to *any* items included in their files.

It is likely that there will be a fiscal impact on the sponsoring law enforcement agency choosing to provide certification training and education. Also there may be administrative costs associated with the training and certification processes. However, the legislation provides that the sponsoring agency *may require* the officer to pay for the continuing training or education costs.

3. Long Run Effects Other Than Normal Growth:

Based on the current language which may be construed as establishing an employer-employee relationship, it is possible that local agencies may be subject to claims and/or litigation pursuant to the Fair Labor Standards Act of 1938 (as amended).

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:

The legislation specifies only that the sponsoring agency *may* require the individual to be responsible for the costs of the continuing training and education programs, suggesting the norm to be agency absorption of such costs.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not 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 counties or municipalities 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.

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V. COMMENTS:

There are a number of potential problems related to this bill. Especially see SUMMARY, EFFECT OF PROPOSED CHANGES and FISCAL IMPACT (State & Local Governments).

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On January 6, 1998, the Law Enforcement and Public Safety Committee adopted an amendment to HB 3161, providing that a copy of the recording of any interrogation session must be given to the interrogated officer "no later than 72 hours, excluding holidays and weekends, following said interrogation."

VII. SIGNATURES:

COMMITTEE ON LAW ENFORCEMENT AND PUBLIC SAFETY:

Prepared by:

Legislative Research Director:

Kurt E. Ahrendt

Kurt E. Ahrendt

AS REVISED BY THE COMMITTEE ON GOVERNMENTAL OPERATIONS:

Prepared by:

Legislative Research Director:

Russell J. Cyphers, Jr.

Jimmy O. Helms