

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 451 Law Enforcement Fair Defense Act
SPONSOR(S): Negron
TIED BILLS: None **IDEN./SIM. BILLS:** SB 226

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Public Safety & Crime Prevention</u>	_____	<u>Cole</u>	<u>De La Paz</u>
2) <u>Public Safety Appropriations (Sub)</u>	_____	_____	_____
3) <u>Appropriations</u>	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

SUMMARY ANALYSIS

Currently, employing agencies of law enforcement officers who are sued or criminally prosecuted for actions arising from the performance of the officer's official duties have the option of paying for legal representation. The agency may pay for legal representation for the accused officer when either the plaintiff dismisses the suit or an officer is found not guilty of the offense.

HB 451 broadens the option of an agency to pay its officer's reasonable attorney's fees to include "costs" when in a civil or criminal action the plaintiff dismisses his/her suit against the officer, or the officer is found to be not liable or not guilty. This bill mandates that an employing agency provide for reasonable legal representation and costs for any law enforcement officer "in any criminal or civil action commenced against a law enforcement officer in any court provided that the officer's actions that gave rise to the charges" meets listed criteria and the civil suit or criminal charges "are dismissed", the officer is found not liable, or the officer is "found not guilty." The agency will not have to pay if the actions of the officer constituted a material departure from the employing agency's written policies and procedures or generally recognized criminal justice standards.

HB 451 provides that if the agency determines that specific criteria for providing legal representation are not satisfied the officer may either select from a list of attorneys provided by the agency or choose his or her own attorney. In this instance, only fees and costs in connection with criminal prosecutions may be sought. Payment of reasonable attorney's fees is accomplished under the bill by a particular process.

Because of the mandatory language of the bill, it could entail increased state and local government spending. (See Applicability of Municipal/County Mandates provision.)

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|------------------------------|--|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. Lower taxes? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a “no” above, please explain:

The bill mandates that state and local law enforcement agencies pay attorney fees for officers acquitted or whose criminal cases have been dismissed.

B. EFFECT OF PROPOSED CHANGES:

Currently, employing agencies of law enforcement officers who are sued or criminally prosecuted for actions arising from the performance of the officer’s official duties have the option of paying for legal representations. The agency may pay for legal representation for the accused officer when either the plaintiff dismisses the suit in a civil action or an officer is found not guilty of the offense in a criminal prosecution. Under current law, an agency has the *option* under s. 111.065, F.S., to cover the costs of a criminal defense for a law enforcement officer, but these costs are payable from the agency’s own funds. The State self-insurance fund cannot cover the cost of any criminal defense.¹

The majority of employing agencies do not provide for the legal defense of an officer who is charged criminally. However, a law enforcement officer that has been charged criminally may request union representation, assuming the officer is a member and the union provides representation in a criminal action as part of its benefits. One law enforcement union does provide such representation to its members – which number at approximately 30,000 – as a membership benefit, if the alleged criminal conduct occurred in the line of duty.

The Florida Legislative Committee on Intergovernmental Relations conducted a FAXNET Survey of law enforcement agencies regarding the number and costs of civil and criminal actions brought against full-time law enforcement officers employed in the fiscal year ending September 30, 2001. The surveys were sent to approximately 400 municipalities and 67 counties with the following results:

1. *Municipalities (115 responded-28 percent)*
 - 83 reported no civil or criminal actions against full-time law enforcement officers for FY ending September 30, 2001.
 - 30 municipalities responded that they had civil actions against full-time law enforcement officers for FY ending September 30, 2001,
 - 2 municipalities responded that they also had criminal actions against full-time law enforcement officers for FY ending September 30, 2001 (City of St. Petersburg and the City of Daytona Beach).

Many municipalities with actions taken against their law enforcement officers were covered in full or by deductible insurance policies.

¹ Section 284.31, F.S., specifies the scope and types of coverage for the Insurance Risk Management Trust Fund and these do not include criminal charges.

2. *Counties (12 counties-18 percent)*
- 6 counties reported that they had no civil or criminal actions against full-time law enforcement officers for FY ending September 30, 2001.
 - 5 counties responded that they had civil actions against full-time law enforcement officers for FY ending September 30, 2001.
 - 1 county (Hillsborough) also had criminal actions against full-time law enforcement officers for FY ending September 30, 2001.

As was the case with municipalities, the majority of counties with actions taken against their law enforcement officers were covered in full or by deductible insurance policies. HB 451 broadens the option of an agency to pay its officer's reasonable attorney's fees to include "costs" when in a civil or criminal action the plaintiff dismisses his/her suit against the officer, or the officer is found to be not liable or not guilty.

The bill mandates that an employing agency provide for reasonable legal representation and costs for any law enforcement officer "in any criminal or civil action commenced against a law enforcement officer in any court provided that the officer's actions that gave rise to the civil suit or criminal charges" meets listed criteria and the charges "are dismissed", the officer is not held liable, or the officer is "found not guilty." The agency will not have to pay if the actions of the officer constituted a material departure from the employing agency's written policies and procedures or generally recognized criminal justice standards.

HB 451 provides that if the agency determines that specific criteria for providing legal representation are not satisfied, the officer may either select from a list of attorneys provided by the agency, or choose his or her own attorney. In this instance, only fees and costs in connection with criminal prosecutions may be sought.

Payment of reasonable attorney's fees is accomplished under the bill by the following process: 1) The law enforcement officer requesting payment of attorneys fees and costs would submit an application to the court having jurisdiction over the prosecution. The application would include an itemization statement from an attorney or expert witness appearing on behalf of the law enforcement officer, stating actual time expended and the rate of at which fees and expenses were computed. 2) The employing agency has the right to respond to the application for attorneys fees and costs, after which the court makes the determination as to reasonable attorney's fees and costs based on prevailing market rates and whether the officer's actions constituted a material departure from the employing agency's written policies and procedures. The bill also provides that no fee multiplier or lodestar provision may be used in any criminal defense.² Finally, HB 451 caps attorney's fees under this process at \$100,000.

C. SECTION DIRECTORY:

Section 1. Providing a popular name for the act as "Law Enforcement Fair Defense Act."

Section 2. Amends S. 111.065 relating to civil or criminal actions against law enforcement officers.

Section 3. Amends S. 633.175 relating to the definition of law enforcement officer.

Section 4. Provides an effective date.

² Black's Law Dictionary defines "Lodestar Rule" as: "In determining amount of statutorily authorized attorney's fees, "lodestar" is equal to number of hours reasonably expended multiplied by prevailing hourly rate in community for similar work and is then adjusted to reflect other factors such as contingent nature of suit and quality of representation."

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

See Fiscal Comments

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See Fiscal Comments

2. Expenditures:

See Fiscal Comments

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

The employing agency of the state, municipality or any political subdivisions of a law enforcement officer will now incur the additional costs of providing and paying for the criminal defense of a broader category of law enforcement officers whose actions meet the criteria of the bill. Because the State Risk Management Trust Fund does not provide coverage for criminal actions, these attorney's fees and costs would have to be paid out of general revenue dollars.

Budgeting for attorney's fees and costs that may or may not be incurred during the next budget period may be difficult at best since agencies cannot reasonably set aside funds for such contingencies due to their unpredictability, and the extent of fees and costs will vary.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

To the extent that political subdivisions including cities and counties (through the sheriff's department) are obligated to pay the legal costs and reasonable attorney's fees for certain civil and criminal actions brought against law enforcement officers, the bill could constitute a mandate as defined in Article VII, Section 18(a) of the Florida Constitution for which no funding source is provided to such political subdivisions:

No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the Legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the Legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989 ...and the

law requiring such expenditure is approved by two-thirds of the membership of each house of the Legislature...

For purposes of legislative application of Article VII, Section 18 of the Florida Constitution, the term "insignificant" has been defined as a matter of legislative policy as an amount not greater than the average statewide population for the applicable fiscal year times ten cents. Based on the 2000 census, a bill that would have a statewide fiscal impact on counties and municipalities in aggregate or in excess of \$1,598,238 would be characterized as a mandate. While the terms of the bill limit the exposure of the employing agencies payment of attorney's fees and costs to no more than \$100,000 per action, 16 lawsuits involving \$100,000 in attorney's fees and costs per case, would reach the mandate threshold.

2. Other:

None

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

Under the bill, the situation could arise where a criminal action may be dismissed because the state cannot meet its high burden of proof beyond a reasonable doubt, or the officer is found not guilty after trial, but there remains an agency action to discipline or fire the officer on the same conduct because the agency is proceeding in good faith to prove its case using the lower standard of proof for such actions. In such instances, the employing agency would be put in the position of paying the officer's attorney to defend the criminal action while the agency is still seeking to proceed with disciplinary action against the officer.

It is unclear whether an officer who wishes to hire and pay for his own attorney would be prevented from doing so by the mandatory language of the bill, which provides that in a criminal case the law enforcement agency "shall" pay attorney's fees. Under the bill, if the agency is unable to pay for legal representation, the bill mandates that the agency either provide a list of attorneys from which the law enforcement officer may choose, and which the agency agrees to retain. Given that the agency is not obligated to pay for representation unless and until the charges have been dismissed or the officer has been acquitted, the bill could limit lawyers the accused officer may choose from at a time when it has not been definitively determined that the agency will actually pay for the attorney.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES