

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

- | | | | |
|--------------------------------------|---|-----------------------------|---|
| 1. Reduce government? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" 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 checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. Empower families? | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |

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

B. EFFECT OF PROPOSED CHANGES:

Screening Requirements

Current law provides two levels of screening for employees of state agencies in chapter 435 of the Florida Statutes. Under s. 435.03, F.S. Level 1 screenings are less restrictive though they entail background checks in the form of employment history checks, and statewide and local criminal history checks. Persons at this screening level must not have been convicted of or pled to certain offenses such as murder or prostitution. Section 435.04, F.S. provides that Level 2 screenings are more intensive, requiring state a federal criminal background checks, as well as fingerprint submission by the applicant to the Florida Department of Law Enforcement. The list of disqualifying offenses is also longer for level 2 screenings. Section 985.407(4), F.S. requires the Department of Juvenile Justice to require Level 1 screening (the least restrictive screening of the two) for personnel in delinquency facilities, services, and programs.

Notwithstanding these screening requirements, current law provides that departments may grant an exemption to employees who would otherwise be disqualified. Under s. 435.07, F.S., exemptions may be granted for felonies committed more than three years ago, any misdemeanor, delinquent acts, or acts of domestic violence. However, s. 435.04(3), F.S. provides that the Department of Juvenile Justice is prohibited from granting an exemption for an offense occurring within the last seven years. Also, several agencies such as the Department of Education, the Department of Children and Families, and the Department of Juvenile Justice have statutes which mandate that employees must be of “good moral character,” although ch. 435, F.S. has neither a current definition of that term nor guidelines for its application.

The Florida Supreme Court in Florida Board of Bar Examiners, Re: G.W.L., 364 So.2d 454 (Fla.1978) defined good moral character as: "... acts and conduct which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness, and respect for the rights of others and for the laws of the state and nation." 363 [364] So.2d at pg. 458. Generally, good moral character is required in statutes regulating licensure of various professions and occupations including foster homes (s. 409.175(5)(a)(5), F.S.), contractors (s. 489.511(2)(a), F.S.), certified public accountants (s. 473.306(2)(a), F.S.), surveyors and mappers (s. 472.103(5)(a), F.S.), engineers (s. 471.013, F.S.), and teachers (s. 1012.56(2)(e), F.S.).¹ Department of Children and Families and Department of Juvenile Justice employees and program providers contracted with those departments are required to be of good moral character. See ss. 984.01, 985.01(2), 985.406(3)(a), F.S.

¹ Section 472.013(5)(a), F.S. defines “good moral character” as “a personal history of honesty, fairness, and respect for the rights of others.”

In the past few years several high profile cases have highlighted issues surrounding the qualifications and screening processes of state agencies, and whose agents and employees interact with children. In addition to the 2002 Rilya Wilson case which involved the disappearance of girl under the supervision of the Florida Department of Children and Families, the Department of Juvenile Justice has come under increased scrutiny recently. Following the death last summer of Omar Paisley, a youth being held in a detention center in Miami who died of a burst appendix while in State custody, the incident was investigated by a grand jury and also by a House Select Committee on Juvenile Detention Facilities. During the course of these investigations, it was revealed that 350 of the 2000 detention workers hired by the Department of Juvenile Justice had arrest records.² In the Final Report of the Miami-Dade Grand Jury Report filed January 27, 2004, the panel wrote: "In the course of our investigation, we were disturbed to learn of the many Department of Juvenile Justice employees with sordid criminal histories. We felt strongly that individuals charged with caring for and rehabilitating our children should not have a history of engaging in destructive criminal activity or serious, pending criminal cases."³

HB 713 w/CS increases the screening level of Department of Juvenile Justice employees from a Level 1 to a Level 2. In addition, the bill prevents the Department of Juvenile Justice from granting an exemption from the screening requirements for any employee found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to three or more specified offenses, irrespective when the offenses were disposed. The bill requires that DJJ conduct Level 2 screenings annually.

HB 713 w/CS also provides a section which elaborates on the statutory requirement of "good moral character." The statute creates a new section of ch. 435, F.S. which provides that "[a]ny record concerning the arrest of a person who is required to be of good moral character as a condition of initial or continued employment, licensure, or other business with the state, or any agency or political subdivision thereof shall be considered in determining whether such person satisfies the requirement notwithstanding the disposition of the arrest." The bill amends specific sections of statutes which address employment by the Department of Children and Families and the Department of Juvenile Justice. These provisions state that a person may be disqualified or denied an exemption from disqualification if the person "fails to satisfy the requirement of good moral character as evidenced by criminal history information documenting multiple arrests or convictions." The bill specifically requires that all DJJ employees be of good moral character.

Incorporation by Reference

Current law allows for one section of statute to reference another. This is commonly done to prevent the repetition of a particular text. There are two kinds of references. A "specific reference" incorporates the language of the statute referenced and becomes a part of the new statute even if the referenced statute is later altered or repealed. The law presumes that the legislature intends to incorporate the text of the current law as it existed when the reference was created. In a law review article entitled "Statutory Cross References – The "Loose Cannon" of Statutory Construction," Earnest Means explained,

"From a very early time, it has been generally agreed that the legal effect of a specific statutory cross reference is to incorporate the language of the referenced statute into the adopting statute as though set out verbatim, and that in the absence of express legislative intent to the contrary, the legislature intends that that the incorporation by reference shall not be affected by a subsequent change to the referenced law – even its repeal. In other words, each referenced provision has two separate existences – as

² Article by Carol Miller, December 4, 2003, "350 Workers at Department of Juvenile Justice Have Rap Sheets" Miami Herald.

³ Final Report of the Miami-Dade Grand Jury Report filed January 27, 2004, p. 34

substantive provision and as an incorporation by reference – and neither is thereafter affected by anything that happens to the other.”⁴

The second type of referenced statute is a “general reference.” The general reference differs from the specific reference in that it presumes that the referenced section may be amended in the future and any such changes are permitted to be incorporated into the meaning of the adopting statute. Again Means explained in his article that “when the reference is not to a specific statute, but to the law in general as it applies to a specified subject, the reference takes the law as it exists at the time the law is applied. Thus in cases of general references, the incorporation does include subsequent changes to the referenced law.”⁵

Currently, at least six other provisions of statutes provide statutory intent which allow for references to that statute to be construed as a general reference under the doctrine of incorporation by reference. For example, the statutes which deal with the punishments for offenses contain clauses which allow for any reference to them to constitute a general reference. See ss. 775.082, 775.083, 775.084, F.S. This means that any time the legislature amends a criminal offense, these punishment statutes do not have to be reenacted within the text of a bill, because it is understood that their text or interpretation may change in the future. Similarly, statutes which deal with court costs or which provide for the sealing or expungement of court records also contain clauses which state they are general references. See ss. 938.31, 943.058 and 943.059, respectively.

HB 713 w/CS would create a new section of ch. 435, F.S. which would allow for any references to that chapter or any section or subdivision within the chapter to constitute a general reference under the doctrine of incorporation by reference. This would mean that any future bill containing cross references to this chapter would not need to reenact the referenced statute, and that any changes to the screening requirements or exemptions provided in ch. 435, F.S. would not need to reenact adopting statutes containing cross references to ch. 435, F.S.

C. SECTION DIRECTORY:

Section 1. creates a section of ch. 435 which permits references to the chapter to constitute a general reference.

Section 2. creates a new definition of good moral character for the purposes of employee screening.

Section 3. restricts the ability of the Department of Juvenile Justice to remove a disqualification from the employee screening standards.

Sections 4, 5 and 6. amend s. 984.01, 985.01, 985.407, F.S. respectively and elaborate on the “good moral character” requirement determination,.

Section 7., 8., 9., and 10. reenact ss. 400.953, 943.0585, and 943.059, 985.407 F.S., respectively, for the purpose of incorporation by reference.

Section 11. provides an effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

⁴ Means, Earnest “Statutory Cross References – The “Loose Cannon” of Statutory Construction,” Florida State University Law Review, Vol. 9, p. 3 (1981)

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A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

Because the bill raises the employment screening standards utilized by state agencies and their contracted service providers, qualified employees may be more difficult to obtain. This could lead to a rise in prospective employee salaries to attract qualified applicants for positions with the Department of Juvenile Justice, the Department of Education, and the Department of Children and Families, among others. The bill also requires that these screenings occur annually.

The Department of Juvenile Justice does not anticipate a fiscal impact.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable.

2. Other:

In its analysis, the Department of Juvenile Justice indicated that one objection which could be raised is that the bill would violate due process if applied to current employees of the affected state entities or programs contracted with them. "Imposing permanent disqualification upon individuals with three or more disqualifying offenses will introduce an irrebuttable presumption, in that all such persons will be unable to access the exemption process. This will likely be challenged on due process grounds as set out in Fewquay v. Page, 682 F.Supp. 1195 (S.D.Fla. 1987). However, it should survive such a challenge given that it is clearly reasonable to preclude such persons from having direct contact with clients." Because s. 435.03, F.S. requires background screening as "a condition of employment and continued employment," there may be some current employees who qualified for employment or agency exemption from disqualification who would no longer be able to continue employment. Under the fifth amendment as applied to states by the fourteenth amendment to the United States Constitution, individuals have a procedural due process right in public employment. The courts have determined that procedural due process requires, at a minimum, notice and the right to be heard.

Mullane v. Central Hanover Bank & Trust, 339 U.S. 306 (1950). Fewquay v. Page, 682 F.Supp. 1195 (S.D.Fla. 1987) involved a state statute which mandated any convicted felon in the employ of HRS be discharged. Fewquay had been convicted of two felonies previously and was discharged per the statute. The United States Court, Southern District found that such a statute which did not afford any right of appeal or legal challenge constituted a violation of procedural due process under the fifth amendment. The court wrote,

“Florida Statute 110.1127(3)(a)(1) contains a permanently irrebuttable presumption that all persons who have ever been convicted of one or more certain enumerated felonies, no matter how long ago, no matter how rehabilitated the individual, can never, under any circumstances, be placed in a position of special trust or responsibility within HRS. In the context in which this blanket condemnation is operable, the statute is rendered defective. It may be, as the State insists, that most convicted felons are not fit to occupy positions of special trust or responsibility within HRS. But all convicted felons are not in this category. This statute wholly rejects fundamental concepts germane to our system such as penitence, rehabilitation and motive to do well. Indeed, the statute discourages such concepts. Clearly, this somewhat Draconian legislation was an anxious legislative response to the rash of child care abuse problems which came to light a number of months ago. As is often the case where well-intentioned legislation is not carefully considered, the constitutional rights of some may be abridged. Such is the case here. Plaintiff, apparently a very good employee, had under the original statute in question, no opportunity to retain his position, a clear property right, by hearing, petition or other procedure which would have permitted his employer to retain him. Some are wholly suited, even uniquely qualified, for these positions.”

What the court failed to consider here, however, is whether the legislature’s goals of the criminal justice system include “penitence, rehabilitation and motive to do well.” Under s. 775.012, F.S. (which has remained unchanged since 1977) the general purposes of the criminal code are clearly stated. They are to:

- “(1) To proscribe conduct that improperly causes or threatens substantial harm to individual or public interest.
- (2) To give fair warning to the people of the state in understandable language of the nature of the conduct proscribed and of the sentences authorized upon conviction.
- (3) To define clearly the material elements constituting an offense and the accompanying state of mind or criminal intent required for that offense.
- (4) To differentiate on reasonable grounds between serious and minor offenses and to establish appropriate disposition for each.
- (5) To safeguard conduct that is without fault or legitimate state interest from being condemned as criminal.
- (6) To ensure the public safety by deterring the commission of offenses and providing for the opportunity for rehabilitation of those convicted and for their confinement when required in the interests of public protection.”

Nowhere did the legislature indicate that the purpose the criminal code is to entail “penitence, rehabilitation and motive to do well.” It is unclear where the court in Fewquay derived these “fundamental concepts.”

Notwithstanding this point, HB 711 w/CS is different in that it is narrower in scope than the statute at issue in Fewquay. It does not contain a blanket prohibition against all felons holding employment, but rather those who have at least three times been convicted of an enumerated felony, or have multiple offenses which indicate a lack of good moral character.

In addition, United States Supreme Court opinions, while providing that public employees have a property interest in their jobs, still weigh the employee's interest in the retaining his position against the government's interest in firing an unsuitable person. Arnett v. Kennedy, 416 U.S. 134 (1974). Arguably, an individual falling under the scope of the statute and required to be dismissed would have the ability to challenge his or her dismissal through the administrative appeals process provided in chapter 120, F.S. Moreover, a court would likely conclude that the state would have a rational basis for concluding that such individuals are not suitable for positions which entail care or custody of children. See also Florida Public Employees Council 79, AFSCME v. DCF, 745 So.2d 487 (Fla. 1999). (Constitutional challengers to screening requirements in ch. 435, F.S. must exhaust available administrative remedies with respect to an as-applied constitutional challenge.)

Finally, the notice and opportunity to respond provisions do not apply to "at-will employees." Arnett v. Kennedy, 416 U.S. 134 (1974). Under s. 110.604, F.S. employees who are selected exempt service serve at the pleasure of their agency heads and are subject to dismissal at the discretion of the agency head. These positions would thus constitute "at-will" employment. For employees designated "career service," under s. 110.227, an employee who has completed a one year probationary period may only be fired "for cause." One of the reasons listed as cause for termination is "violation of the provisions of law." Because an employee under the statute could no longer qualify under the screening process provided in ch. 435, F.S., this could constitute a violation of a provision of law which would be cause for termination.

B. RULE-MAKING AUTHORITY:

None

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill prevents DJJ or DCF from granting an exemption from disqualification from employment or denial of employment if the person fails to satisfy the requirement of good moral character as evidenced by a criminal history documenting "multiple arrests or convictions." Because a number of arrests is not specified, it would be left to the agencies to determine the precise number which would trigger a failure of good moral character. The Department of Juvenile Justice noted in its analysis, "This provision would automatically allow disqualification of an individual based on a criminal history showing several arrests (there is no definition of "multiple" provided, so the department would have to make that determination if this bill passed)." It may be wise to specify a number of arrest or conviction, whether three or fifty, instead of leaving to the agency to determine what would constitute "multiple" arrests or convictions. In addition, the bill also does not require that an agency disqualify an individual if a criminal history indicates a failure of good moral character, but merely provides that such evidence "may" be considered.

Most significantly, as noted previously, "good moral character" is a term which applies to the licensure of many professions. The bill creates a new section which applies to any "person who is required to be of good moral character as a condition of initial or continued employment, licensure, or other business with the state, or any agency or political subdivision thereof." Although clearly a person's arrest record would figure into this determination even without the section of the bill, it is not currently mandated in any other section of statutes, and the bill could have an impact much broader impact than simply increasing the level of screening for employees in positions of care or custody of children.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 3, 2004, the Committee on Public Safety & Crime Prevention adopted three amendments and voted favorably a committee substitute for HB 713. Amendment 1 mandated that arrest records be considered as evidence of good moral character, instead of utilizing the permissive language previously in the bill. Amendment 2 required the Department of Juvenile Justice to conduct Level 2 screenings

annually, instead of every five years as current department rules require. Amendment 3 requires that all Department of Juvenile Justice employees be of good moral character. Although personnel in program providers to DJJ were required under s. 985.01(2), F.S. to be of good moral character, nowhere in current law do other employees fall under a similar requirement.