

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1143 Licensing of Health Care Practitioners

**SPONSOR(S):** Health & Human Services Quality Subcommittee; Costello and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 594

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Quality Subcommittee	11 Y, 2 N, As CS	Mathieson	Calamas
2) Criminal Justice Subcommittee		Krol	Cunningham
3) Health & Human Services Committee			

### SUMMARY ANALYSIS

House Bill 1143 amends s. 456.074, F.S., providing authority for the Department of Health to enter an emergency order that removes the ability to prescribe controlled substances for a Medical Doctor, Osteopathic Physician, Podiatrist or Dentist who has:

- Committed, is arrested for, or is under criminal investigation or prosecution for, a violation of ch. 782, F.S., relating to homicide;
- Been arrested for, or is under criminal investigation or prosecution for, any act that relates to the importation, manufacture, distribution possession, transfer, sale, improper use, or prescribing of controlled substances, as defined by ch. 893, F.S., relating to substance abuse and prevention;
- Violated any federal law relating to possession, transfer, sale, or prescribing of controlled substances as defined in ch. 893, F.S., or 21 U.S.C. ss. 801-970, relating to controlled substances.

The bill amends s. 903.046, F.S., requiring a judge to consider, at a bail determination, whether suspension or restriction of a licensed health care practitioner's license is necessary to protect the community against unreasonable danger.

The bill does not appear to have a fiscal impact.

The bill provides an effective date of July 1, 2012.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Boards

The Department of Health (DOH), Division of Medical Quality Assurance (MQA), regulates health care practitioners to ensure the health, safety, and welfare of the public. Currently, MQA supports licensure and disciplinary activities for 43 professions and 37 types of facilities/establishments, and works with 22 boards and 6 councils.

A board is a statutorily created entity that is authorized to exercise regulatory or rulemaking functions within the MQA.<sup>1</sup> Boards are responsible for approving or denying applications for licensure and making disciplinary decisions on whether a practitioner practices within the authority of their practice act. Practice acts refer to the legal authority in state statute that grants a profession the authority to provide services to the public. The range of disciplinary actions taken by a board includes citations, suspensions, reprimands, probations, and revocations.

##### License Disciplinary Actions

Sections 456.072, 456.073 and 456.074 F.S., provide authority for a board to take disciplinary action against a licensee. These actions include:

- Refusal to certify, or to certify with restrictions, an application for a license;
- Suspension or permanent revocation of a license;
- Restriction of a practice or a license;
- Administration of a fine not to exceed \$10,000 per occurrence;
- Issuance of a reprimand or letter of concern;
- Imposition of probationary conditions on the licensee;
- Corrective action;
- Imposition of an administrative fines for violations of patient rights;
- Refund of fees billed and collect from the patient or a third party on behalf of the patient; and
- Remedial education.<sup>2</sup>

The board can take action for any legally sufficient, written and signed complaint that is filed before it. S.456.073(1), F.S., provides that a complaint is legally sufficient if it contains the ultimate facts that show a violation of ch. 456, F.S., the relevant practice act or any rule adopted by DOH or the relevant board. DOH has the authority to investigate a complaint, even if the original complainant withdraws or the complainant is anonymous.<sup>3</sup> Further, DOH may initiate an investigation if it has reasonable cause to believe that a licensee has violated a Florida statute, or a rule of either the board or DOH.

The subject of an investigation has 20 days to respond in writing to the complaint or document after service.<sup>4</sup> Whatever is submitted is considered by the probable cause panel of the respective board.<sup>5</sup> The right to respond does not preclude the State Surgeon General from issuing a summary emergency order, if it is necessary to protect the public.<sup>6</sup>

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<sup>1</sup> S. 456.001, F.S.

<sup>2</sup> S. 456.072(2)

<sup>3</sup> S. 456.073(1), F.S.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

DOH has 6 months to complete an investigation and submit it to the appropriate probable cause panel.<sup>7</sup> A determination as to probable cause is made by a majority vote of the panel.<sup>8</sup> The panel may request additional investigative information from DOH, and this must be done within 15 days of receiving the investigative report from the department or agency.<sup>9</sup> The panel has 30 days from receiving the final investigative report to make a determination of probable cause.<sup>10</sup> The Surgeon General may grant extensions of these time limits.<sup>11</sup> If the panel does not make a determination within the statutory timeframe, DOH is directed to do so within 10 days of the expiration of the time limit.<sup>12</sup>

DOH is directed to follow the determination of the probable cause panel, and if probable cause exists is directed to file a formal complaint against the subject, and prosecute pursuant to ch. 120, F.S.<sup>13</sup> DOH may decide not to prosecute if probable cause has been found improvidently, and refer the issue back to the appropriate board, which may then choose to file a formal complaint and prosecute pursuant to ch. 120, F.S.<sup>14</sup> Referrals to the Division of Administrative Hearings, must occur within 1 year of filing the complaint.<sup>15</sup> Chapter 120, F.S., provides the practitioner with the right to appeal the action.

DOH is further directed to notify the person who filed the complaint, and if probable cause is not found, provide them with an opportunity 60 days from the determination, to bring additional information to the department.<sup>16</sup>

### Emergency Orders

Section 120.60(6), F.S. provides DOH with broad authority to take disciplinary action in the case of immediate serious danger to the public health, safety or welfare. A license may be suspended, restricted, or limited on an emergency basis if:

- The procedure provides at least the same procedural protection as is given by other statutes, the state Constitution or the U.S. Constitution;
- The action is necessary to protect the public interest under the emergency procedure;
- There are specific facts that outline the finding of an immediate danger to public health, safety, or welfare and reasons for concluding the process was fair under the circumstances.

Section 456.074, F.S., provides DOH with separate authority from s. 120.60(6), F.S., to issue an emergency order suspending the license of certain health care practitioners under very specific circumstances. This **must** occur when:

- A medical doctor, doctor of osteopathy, chiropractor, podiatrist, naturopath, optometrist, nurse, pharmacist, dentist or hypnotist pleads guilty to, is convicted or found guilty of, or who enters a plea of nolo contendere to, regardless of adjudication to:
  - A felony under:
    - Ch. 409, F.S., social and economic assistance;
    - Ch. 817, F.S., fraudulent practices;
    - Ch. 893, F.S., drug abuse prevention or control;
    - 21 U.S.C. ss 801-970, controlled substances; or
    - 42 U.S.C. ss1395-1396, Medicaid and Medicare.
  - A misdemeanor or felony under:
    - 18 U.S.C. s. 669, ss. 285-287, s. 371, s. 1001, s. 1035, s. 1341, s. 1343, s. 1347, s. 1349, or s. 1518, crimes; or
    - 42 U.S.C. ss. 1320a-7b, Medicaid.

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<sup>7</sup> S. 456.073(2), F.S.

<sup>8</sup> S. 456.073(4), F.S.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> S. 456.073(9)(c), F.S.

DOH has discretionary authority pursuant s. 456.074, F.S., to issue an emergency order suspending or restricting the license of certain health care practitioners when:

- The board has found a physician or osteopathic physician in violation of s. 458.331(1)(t), F.S., or s. 459.015(1)(x), F.S., relating to medical malpractice, in regard to three or more patients and there is probable cause to find additional violations of these sections.
- A healthcare practitioner, as defined in s. 456.001(4), F.S., tests positive for a pre-employment or employer ordered drug test, when the practitioner does not have a lawful prescription and legitimate medical reason for using such a drug.
- A healthcare practitioner has defaulted on state or federally guaranteed student loans.<sup>17</sup>

While Florida law does not specify the interaction between these two sections, courts have interpreted s. 456.074, F.S., to operate independently of s. 120.60(6), F.S. Courts appear to interpret s. 456.074(1), F.S., in a way that is analogous to strict liability, such that the due process requirements of 120.60(6), F.S., including proof of immediate danger to public safety, do not apply. Courts that have interpreted s. 456.074, F.S., have applied subsection (1), which mandates the emergency suspension, as leaving DOH with no discretion.<sup>18</sup> Subsection (3) of s. 456.074, F.S., for example, provides DOH with discretion as to an emergency suspension, and judicial interpretation of discretionary authority in this context is unclear.

Following the issuance of an emergency suspension, the person has an immediate right of appeal.<sup>19</sup> An emergency suspension order is effective until it is overturned by an appellate court, vacated by the Surgeon General or superseded by a final order. DOH is required to initiate non-emergency administrative proceedings within 20 days of the emergency suspension.<sup>20</sup> DOH issued 326 emergency suspensions in FY 2010-11.<sup>21</sup>

To ensure compliance with such orders, each board has promulgated rules based on authority delegated by the Legislature.<sup>22</sup> If a practitioner does not comply with the order, a petition can be made to the circuit court to enforce the order.<sup>23</sup>

### Bail

Pretrial release is an alternative to incarceration that allows an accused to be released from detention whilst they await disposition of the criminal charges. Article I, s. 24 of the Florida Constitution provides that unless a person is charged with a capital offense or one punishable by life and “the proof of guilt is evident or the presumption great,” every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. Further, there is a presumption in favor of release on nonmonetary conditions for any accused who is granted pre-trial release unless they are charged with a dangerous crime.<sup>24</sup>

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<sup>17</sup> S. 456.074, F.S.

<sup>18</sup> See *Mendelsohn v. Department of Health*, 68 So.3d 965 (Fla 1st DCA, 2011) (DOH could not issue emergency suspension because petitioner did not commit enumerated violation of s. 456.074(1), F.S.); *Bethencourt-Miranda v. Department of Health*, 910 So.2d 927, (Fla 1st DCA, 2005) (No findings were necessary for an emergency suspension for violation of 21 U.S.C. s. 846);

<sup>19</sup> S. 120.569(n)(2), F.S.

<sup>20</sup> Rule 28-106.501, F.A.C. This rule implements the authority delegated to DOH in s. 120.60(6)(a), F.S., which directs the agency must provide for at least the same procedural protection as is given by other state statutes, the state constitution, and the federal constitution.

<sup>21</sup> DOH analysis for HB 1143 (2012). On file with Health and Human Services Quality Subcommittee staff.

<sup>22</sup> For Medical Doctors, the Board of Medicine has promulgated rules 64B8-8, F.A.C., pursuant to s. 458.331, F.S. For Osteopathic Physicians, the Board of Osteopathic Medicine has promulgated rules 64B15-19, F.A.C., pursuant to s. 456.072, F.S. For Podiatrists, the Board of Podiatric Medicine has promulgated rules 64B18-14, F.A.C., pursuant to s. 461.013, F.S. For Dentists, the Board of Dentistry has promulgated rules 64B5-13, F.A.C., pursuant to s. 466.028, F.S.

<sup>23</sup> *Id.*

<sup>24</sup> Dangerous crimes are described in s. 907.041(4)(a), F.S., and include offenses such as arson, aggravated assault, aggravated battery, child abuse, elder abuse, abuse of a disabled adult, kidnapping, homicide, manslaughter, sexual battery or other sex offenses, robbery, carjacking, stalking, terrorism and domestic violence.

Pretrial release is granted by a court in one of three ways; release on own recognizance, supervised pretrial release, or a bond.<sup>25</sup> Bail is a form pretrial release that requires an accused to pay a set sum of money to the court. If the accused released on bail fails to appear before the court at the appointed place and time, the bail is forfeited.

Section 903.046, F.S., provides that the purpose of a bail determination in criminal proceedings is to ensure the appearance of the criminal defendant at subsequent proceedings and to protect the community against unreasonable danger from the person. In the determination of whether to release a criminal defendant on bail or other conditions, the judge must consider:

- The nature and circumstances of the offense charged;
- The weight of the evidence against the defendant;
- Family ties, length of residence in the community, employment history, financial resources and mental condition;
- The defendant's past and present conduct;
- The nature and probability of danger that the defendant poses to the community, including intimidation and danger to victims;
- The course of funds used for bail, or to secure the bond;
- Whether the defendant is on release for another pending matter;
- The street value of the drug or controlled substance, if applicable to the case;
- Whether there is probable cause to believe the defendant committed a new crime whilst on pretrial release;
- Whether the crime charged is a violation of ch. 874, F.S., (relating to sexual battery); and
- Any other relevant factor.<sup>26</sup>

### **Effect of Proposed Changes**

House Bill 1143 amends s. 456.074, F.S., providing discretionary authority for the Department of Health, to enter an emergency order that removes the ability to prescribe controlled substances for a healthcare practitioner licensed under ch. 458, F.S., ch. 459, F.S., ch 461, F.S., or ch. 466. F.S., who has:

- Committed, been arrested for, or is under criminal investigation or prosecution for, an act which is a violation of ch. 782. F.S. (homicide);
- Been arrested or is under criminal investigation or prosecution for any act that relates to the importation,<sup>27</sup> manufacture,<sup>28</sup> distribution,<sup>29</sup> possession,<sup>30</sup> transfer, sale,<sup>31</sup> improper use, or prescribing of controlled substances,<sup>32</sup> as defined by ch. 893, F.S.; or
- Violated any federal law relating to possession, transfer, sale, or prescribing of a controlled substance as defined in ch. 893, F.S., or 21. U.S.C. ss. 801-970.

Once the emergency order has been issued, the practitioner has the right to appeal the decision, pursuant to s. 120.569(n)(2), F.S. The bill provides DOH with discretionary authority to issue an emergency suspension order based on the enumerated criteria. It is not clear how this discretionary authority will be interpreted by the courts.

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<sup>25</sup> Bail is the security, such as a bond posted by a defendant to a trial court to secure their release from detention to appear in court at a future date. Black's Law Dictionary (9<sup>th</sup> Ed. 2009). S. 903.011(1), F.S., provides that bail and bond include any and all forms of pretrial release as used in ch. 903, F.S.

<sup>26</sup> S. 903.046, F.S.

<sup>27</sup> Chapter 893, F.S., makes a distinction between importation and trafficking, based on volume for controlled substances that are brought into the state. *See* s. 893.135, F.S.

<sup>28</sup> S. 893.13(1)(a), F.S. provides that except as authorized by this chapter and ch. 499, F.S., it is unlawful for any person to sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance.

<sup>29</sup> Means to deliver, other than by administering or dispensing, a controlled substance. S. 893.02(8), F.S.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Means any substance named or described in Schedules I-V of s. 893.03, F.S. Laws controlling the manufacture, distribution, preparation, dispensing, or administration of such substances are drug abuse laws. S. 893.02(4), F.S.

The bill provides that a judge, when determining criteria for bail, shall determine whether the suspension of a license or a restriction on the ability to practice a licensed profession is necessary to protect the community against unreasonable danger. This provision applies to every profession regulated by the MQA, pursuant to the definition of "profession" s. 456.001, F.S. This provision does not give the judge the ability to suspend or restrict the license, only determine whether such an action is necessary to protect the community.

**B. SECTION DIRECTORY:**

- Section 1:** Amends s. 456.074, F.S., relating to certain healthcare practitioners; immediate suspension or restriction of license.
- Section 2:** Amends s. 903.046, F.S., relating to purpose of and criteria for bail determination.
- Section 3:** Provides an effective date.

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

**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:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to spend funds or take action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

DOH has sufficient rulemaking authority in s. 456.074, F.S., to implement the provisions of the bill.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

Lines 31-34 direct a judge to determine whether the suspension or restriction of a license during bail hearing is necessary to protect the community against unreasonable danger. However, the language does not expressly authorize the judge to suspend or restrict, merely determine this as a component of bail.

The bill provides discretionary authority for DOH to enter an emergency order that removes the ability to prescribe controlled substances for a healthcare practitioner who has violated any federal law relating to possession, transfer, sale, or prescribing of a controlled substance. It is unclear whether the term "violated" is intended to refer to an arrest or a conviction.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On January 17, 2012, the Health & Human Services Quality subcommittee adopted a strike-all amendment to HB 1143. The amendment:

- Deleted the bill's provision authorizing DOH to issue an emergency order suspending a health care practitioner's license, replacing it with a provision authorizing DOH to issue an emergency order restricting certain health care practitioners from prescribing controlled substances under certain circumstances.
- If the health care practitioner has:
  - Committed, is arrested for, or is under investigation or prosecution for a violation of ch. 782, F.S., (homicide);
  - Been arrested for, or is under investigation or prosecution for any act that relates to the importation, manufacture, distribution possession, transfer, sale, improper use or prescribing controlled substances, as defined by ch. 893, F.S., relating to substance abuse and prevention;
  - Violated any federal law relating to possession, transfer, sale or prescribing of controlled substances as defined in ch. 893, F.S., or 21 U.S.C. ss. 801-970 relating to controlled substances.

This bill was reported favorably as a Committee Substitute. This analysis reflects the Committee Substitute.