

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Governmental Oversight and Accountability Committee

BILL: CS/SB 594

INTRODUCER: Health Regulation Committee and Senator Storms

SUBJECT: Suspension or Restriction of License/Health Care Practitioners

DATE: February 19, 2012 **REVISED:** _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Callaghan	Stovall	HR	Fav/CS
2.	Seay	Roberts	GO	Pre-meeting
3.	_____	_____	BC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE..... Statement of Substantial Changes

B. AMENDMENTS..... Technical amendments were recommended

Amendments were recommended

Significant amendments were recommended

I. Summary:

This bill authorizes the Department of Health (DOH) to issue an emergency order restricting the license of certain health care practitioners who have:

- Committed, been arrested for, or criminally prosecuted for, homicide;
- Been arrested or criminally prosecuted for acts related to the importation, manufacture, distribution, possession, transfer, sale, or prescribing of controlled substances; or
- Violated a provision under 21 U.S.C. ss. 801-971, relating to the possession, transfer, sale, or prescribing of controlled substances.

The bill requires DOH to initiate administrative proceedings pursuant to ch. 120, F.S., for an emergency order issued to restrict the license of certain health care practitioners who commit the above-listed acts. The bill also requires a judge, when determining whether to release a defendant on bail or other conditions, and what the bail or conditions of release may be, to consider whether the suspension of a license or the restriction on the ability to practice a profession licensed by DOH's Division of Medical Quality Assurance (MQA) is necessary to protect the community against unreasonable danger from the criminal defendant.

This bill substantially amends sections 456.074 and 903.046 of the Florida Statutes.

II. Present Situation:

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. Boards are responsible for approving or denying applications for licensure and are involved in disciplinary hearings. The range of disciplinary actions taken by boards includes citations, suspensions, reprimands, probations, and revocations.

Boards

A board is a statutorily created entity that is authorized to exercise regulatory or rulemaking functions within the MQA.¹ 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.²

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.³ 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 the department.

¹ Section 456.001, F.S.

² Section 456.072(2)

³ Section 456.074(1), F.S.

The subject of an investigation has 20 days to respond in writing to the complaint or document after service.⁴ Whatever is submitted is considered by the probable cause panel of the respective board.⁵ 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.⁶

DOH has 6 months to complete an investigation and submit it to the appropriate probable cause panel.⁷ A determination as to probable cause is made by a majority vote of the panel.⁸ 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.⁹ The panel has 30 days from receiving the final investigative report to make a determination of probable cause.¹⁰ The Surgeon General may grant extensions of these time limits.¹¹ 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.¹²

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.¹³ 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.¹⁴ Referrals to the Division of Administrative Hearings (DOAH), must occur within 1 year of filing the complaint.¹⁵ 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.¹⁶

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:

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Section 456.074(2), F.S.

⁸ Section 456.074(4), F.S.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Section 456.073(9)(c), F.S.

- 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. ss. 1395-1396, 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.

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.¹⁷

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 s. 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, leaving DOH with no discretion.¹⁸ Subsection (3) of

¹⁷ S. 456.074, F.S.

¹⁸ 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);

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.¹⁹ 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. The department is required to initiate non-emergency administrative proceedings within 20 days of the emergency suspension.²⁰ DOH issued 326 emergency suspensions in FY 2010-11.²¹

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 to this, the Legislature has determined that the 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.²²

Pretrial release is granted by a court in one of three ways; release on own recognizance, supervised pretrial release, or a bond.²³ Bail as a form pretrial release, 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 section directs the judge to 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;

¹⁹ S. 120.569(n)(2), F.S.

²⁰ Rule 28-106.501, F.A.C.

²¹ DOH analysis for SB 594 (2012) (on file with the Senate Health Regulation Committee).

²² Dangerous crimes are described in s. 907.041(4)(a), F.S., including 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.

²³ 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 (9th 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.

- 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.; and
- Any other relevant factor.²⁴

III. Effect of Proposed Changes:

Section 1 amends s. 456.074, F.S., to authorize the DOH to issue an emergency order restricting the license of an allopathic or osteopathic physician, podiatrist, or dentist,²⁵ from prescribing controlled substances if the practitioner has:

- Committed, is arrested for, or is criminally prosecuted for, homicide;
- Been arrested or criminally prosecuted for any act directly related to the importation, manufacture, distribution, possession, transfer, sale, or prescribing of controlled substances; or
- Violated a provision of 21 U.S.C. ss. 801-971, relating to the possession, transfer, sale, or prescribing of controlled substances.

This section requires the DOH to initiate administrative proceedings pursuant to ch. 120, F.S., for an emergency order issued to restrict the license of certain health care practitioners who commit the above-listed acts.

Section 2 amends s. 903.046, F.S., to require a judge, when determining whether to release a defendant on bail or other conditions and what the bail or conditions of release may be, to consider whether the suspension of a license or the restriction on the ability to practice a profession licensed by the DOH, MQA is necessary to protect the community against unreasonable danger from the criminal defendant.

Section 3 provides an effective date of July 1, 2012.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

²⁴ S. 903.046, F.S.

²⁵ The bill refers to health care practitioners licensed under ch. 458, ch. 459, ch. 461, or ch. 466, F.S. Currently, only the physicians licensed under these chapters are authorized under Florida law to prescribe controlled substances.

C. Trust Funds Restrictions:

None.

V. **Fiscal Impact Statement:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

DOH may incur costs associated with issuing additional emergency orders restricting certain health care practitioners' licenses and costs associated with the attendant administrative proceedings.

VI. **Technical Deficiencies:**

None.

VII. **Related Issues:**

Lines 97-100 of the CS appear to give a judge authority to suspend or restrict a health care practitioner license in order to allow the release of a criminal defendant on bail or on other pretrial release conditions. According to s. 456.074, F.S., DOH is the only entity that has the authority to issue an emergency order suspending a health care practitioner's license.

VIII. **Additional Information:**

A. **Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Health Regulation – January 25, 2012:

The CS is different from the bill in that it:

- Narrows the scope of practitioners to whom, and the grounds for which, emergency orders may be issued by DOH.
- Requires DOH to initiate administrative proceedings under ch. 120, F.S., if such an emergency order is issued.
- Requires a judge in a criminal case to determine whether the suspension or restriction of a license is necessary to protect the community when determining whether the practitioner defendant should be released on bail or pretrial release.
- Deletes the provisions in the bill related to access to patients' records.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
