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DATE: February 18, 2002

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
LOCAL GOVERNMENT & VETERANS AFFAIRS
ANALYSIS**

BILL #: HB 575

RELATING TO: Actions Against Law Enforcement Officers

SPONSOR(S): Representative Rubio

TIED BILL(S):

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

- (1) LOCAL GOVERNMENT & VETERANS AFFAIRS (SGC)
- (2) CRIMINAL JUSTICE APPROPRIATIONS (FRC)
- (3) SMARTER GOVERNMENT COUNCIL
- (4)
- (5)

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

This bill amends general law, by adding a section providing that the employing agency of a law enforcement officer (Officer(s)) must pay the legal costs and reasonable attorney's fees for a civil or criminal action commenced against an Officer, under certain circumstances. This provision of the bill, as introduced, appears to apply only to counties.

Many entities have expressed concern over provisions of the bill, as introduced:

The Sponsor has proposed a strike-all amendment to address concerns raised by the Florida Sheriff's Association, the League of Cities, the Association of Counties, the International Union of Police Associations, and the Police Benevolent Association. Additionally, the strike-all places further restrictions, including a \$100,000 cap, on the determination and award of attorney's fees and costs awarded pursuant to this bill. (Please see: Section VI. "AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES")

The bill, as introduced, could constitute a mandate as defined in Article VII, Section 18(a) of the Florida Constitution. This concern is alleviated by the financial restrictions included in the Sponsor's proposed strike-all amendment. (Please see: Section VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES: Alleviation of the Mandate Issue)

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> * |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

1. This bill amends general law, by adding a section providing that the employing agency of a law enforcement officer must pay the legal costs and reasonable attorney's fees for a civil or criminal action commenced against an law enforcement officer (Officer(s)) who is employed by a political subdivision of the state, under certain circumstances.

* Although this bill does not directly authorize an increase in taxes, it is possible that taxes could increase as a result of requiring employing agencies to pay the legal expenses of Officers.

B. PRESENT SITUATION:

Section 111.065, Florida Statutes, provides that the employing agency of certain law enforcement officers (Officer(s)) **may** pay the legal costs and reasonable attorney's fees for any Officer charged civilly or criminally, for actions taken by an Officer in the scope of duty, and:

- (1) The Plaintiff requests dismissal of the suit; or
- (2) The Officer is found to be not liable or not guilty.

Officer is defined in section 111.065, Florida Statutes, as "any person employed full time by any municipality or the state or any political subdivision thereof or any deputy sheriff whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of the state."

Thus, section 111.065, Florida Statutes, leaves up to the discretion of the employing agency the issue of whether to reimburse its Officers for legal fees incurred in defending themselves against criminal and civil charges that arose in the scope of duty.

Statistical Data

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 Officers during the fiscal year ending September 20, 2001. The surveys were faxed to approximately 400 municipalities and 67 counties.

Of the 400 municipalities, 115 municipalities responded to the survey:

83 municipalities reported that they had no civil or criminal actions against full-time Officers during the last fiscal year;

30 municipalities reported that they had civil actions against full-time Officers during the last fiscal year; and

2 municipalities reported that they had criminal actions against full-time Officers during the last fiscal year.

Of the 67 counties, 12 counties responded to the survey:

6 counties reported that they had no civil or criminal actions against full-time Officers during the last fiscal year;

5 counties reported that they had civil actions against full-time Officers during the last fiscal year; and

1 county reported that it had a criminal action against full-time Officers during the last fiscal year.

According to the results of the FAXNET Survey and other research conducted, the vast majority of law enforcement agencies and sheriffs provide their Officers with legal defense, or reimburse their Officers for all, or part, of the costs that Officers incur in defending themselves against civil charges that arose in the course of duty. The employing agencies typically accomplish this through the use of insurance policies.

According to the results of the FAXNET Survey and other research conducted, there are comparatively very few Officers charged criminally for actions that arise in the course of duty. However, with the exception of some sheriffs, the vast majority of employing agencies typically do not provide legal defense, or reimburse their Officers for any part of the costs that Officers incur in defending themselves against criminal charges that arise in the course of duty.

The Law Enforcement Union Role

Some law enforcement unions have filled this void by providing their members with legal defense for both criminal and civil actions that arise in the scope of duty. According to the Executive Director of the Police Benevolent Association (PBA), the PBA is one such union that provides this service to their members. A statement of this policy on the PBA's website provides that:

"As a member of the Florida PBA, one of the primary benefits of membership is legal assistance. Florida PBA has a team of five 'in-house' attorneys and over 40 law firms to provide you with the best legal services available to Florida's law enforcement officers. These services are provided as part of your membership, and there is NO cost to you [including]."

Legal Defense: Civil Suits/ Criminal Actions

"If you are sued civilly, subject to a grand jury investigation, or criminal action for an incident arising out of and within the scope of your law enforcement duties, the Florida PBA will provide an attorney to represent you and cover the costs of defending the case against you."

[Other types of legal representation are provided by the PBA and listed on the website, but are not applicable to this analysis, and have been omitted from this list.]

While some unions provide this service to their members, others, such as the Fraternal Order of Police (FOP), and the International Union of Police Associations (IUPA), do not. Further, many

Officers do not belong to unions, and while these Officers are often covered by their employer for civil actions brought against them, they are not covered if they are charged criminally. This situation has been criticized as being unfair.

C. EFFECT OF PROPOSED CHANGES:

The bill amends the definition of "law enforcement officer" (Officer(s)) located in section 111.065, Florida Statutes, to reference the definition of officer in section 943.10(14), Florida Statutes. However, this definition conflicts with the bill, as the bill purports to apply only to full-time Officers, while section 943.10(14), Florida Statutes, includes part-time and auxiliary officers within its definition.

The bill changes one of the prerequisites that must be met before an employing agency has the option of paying for an Officer's attorney fees and costs. The bill changes the provision from "the plaintiff requests dismissal of the suit", to "the civil or criminal action [against the officer] is dismissed or not prosecuted".

This bill amends section 111.065, Florida Statutes, by adding section (3), which provides that:

(3) The employing agency shall pay the legal costs and reasonable attorney's fees for a civil or criminal action commenced against an Officer who is employed by a political subdivision of the state, if the action:

- (a). Was dismissed, or not prosecuted, or the Officer is found not guilty, or not liable;
- (b). Arose out of the performance of the Officer's official duties; and
- (c).
 - 1. Occurred in response to what the officer reasonably believed was an emergency;
 - 2. Was necessary to protect the officer or others from imminent death or bodily harm; or
 - 3. Occurred in the course of the Officer's fresh pursuit, apprehension, or attempted apprehension of a suspect whom the Officer reasonably believes has perpetrated, or attempted to perpetrate, a forcible felony, or the offense of escape.

Concerns Raised Regarding the Bill as Introduced

The intent behind implementing mandatory section (3) into section 111.065, Florida Statutes, appears to be aimed at providing a uniform system of reimbursement for the legal defense costs incurred by Officers who are adjudicated as being unjustly charged civilly or criminally, for actions undertaken by Officers in the scope of duty, during "emergency situations". However, numerous flaws in the structure of section (3) prevent it from achieving this result.

- 1. The mandatory provision of the bill, located in section (3) appears to apply only to counties and their subdivisions.**

Typically, a political subdivision of the state, as defined in section 1.01(8), Florida Statutes, includes: counties, cities, towns, villages, . . . and all other districts in the state. However, in section (1) of this bill the general definition of an Officer is stated as,

" . . . any officer defined in section 943.10(14) who is employed full time by **any municipality or the state or any political subdivision thereof.**"

Section (3) of the bill provides that the mandatory provision applies **only** to,

“ . . . political subdivisions of the state.”

Thus, by employing a tripartite definition of Officer in section (1), and employing only one segment of that definition in section (3), it appears that the mandatory provision in section (3) of the bill applies only to counties, and subdivisions of counties, to the implicit exclusion of the state, municipalities, and any subdivision of the state, or a municipality.

Further, employing agencies have expressed concern that:

- They retain no control over an Officer's selection of an attorney, or the cost of litigation.
- The scope of situations in which the bill applies is too broad. Currently the mandatory provision of the bill applies to any action that is dismissed, not prosecuted, or an Officer is found to be not liable or not guilty. It has been suggested that this may lead to an employing agency being required to pay the legal expenses of an Officer who was guilty, but "got off on a technicality".
- The bill could result in an employing agency being liable for the legal expenses of an Officer who was acting within the scope of duty, but in violation of an important department policy that may have prevented the incident.
- The bill does not prohibit reimbursing the unions for the funds spent in defending its members.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Provides that this act may be cited as the "Law Enforcement Fair Defense Act".

Section 2:

(1) Amends section 111.065, Florida Statutes, to change the definition of the term "law enforcement officer" (Officer) for the purposes of section (1) of the bill. Provides that the definition means any officer defined in section 943.10(14), Florida Statutes, who is employed full time by any municipality, or the state, or any political subdivision thereof.

(2) Reenacts a provision providing that the employing agency of an Officer has the option to pay the legal fees and reasonable attorney's fees for an Officer who is charged with a civil or criminal action in any court, provided that the action arose out of the performance of the Officer's official duties, and the action was dismissed, or not prosecuted, or the Officer is found not guilty, or not liable.

(3) Provides that the employing agency shall pay the legal costs and reasonable attorney's fees for a civil or criminal action commenced against an Officer who is employed by a political subdivision of the state, if the action:

- (a). Was dismissed, or not prosecuted, or the Officer is found not guilty, or not liable;
- (b). Arose out of the performance of the Officer's official duties; and
- (c).
 1. Occurred in response to what the officer reasonably believed was an emergency;
 2. Was necessary to protect the officer or others from imminent death or bodily harm; or

3. Occurred in the course of the Officer's fresh pursuit, apprehension, or attempted apprehension of a suspect whom the Officer reasonably believes has perpetrated, or attempted to perpetrate, a forcible felony, or the offense of escape.

Section 3: Provides that this act takes effect upon becoming a law.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

The mandatory provision of the bill does not apply to the state; therefore the bill will not have a fiscal impact on the state.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

It appears that the mandatory provision of the bill does not apply to municipalities or their subdivisions; therefore the bill will not have a fiscal impact on municipalities or their subdivisions.

The mandatory provision of the bill does apply to counties and their subdivisions; therefore the bill will have an indeterminate impact on counties and their subdivisions.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

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

A. APPLICABILITY OF THE MANDATES PROVISION:

Under the terms of the bill, political subdivisions of the state (counties and their subdivisions, possibly municipalities and their subdivisions), would be required to pay the legal costs and reasonable attorney's fees for certain civil and criminal actions brought against Officers. As the bill does not provide these political subdivisions with a funding source, the bill could constitute a mandate as defined in Article VII, Section 18(a) of the Florida Constitution.

For the 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 excess of \$1,598,238 in one fiscal year would be characterized as a mandate.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

None

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

None

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

Please see Section: "IV.CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:"

B. RULE-MAKING AUTHORITY:

None

C. OTHER COMMENTS:

The bill, as introduced, is opposed by the Florida Sheriffs Association, the League of Cities, the Association of Counties, and the International Union of Police Associations.

The PBA supports the bill, as introduced.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

Strike-All Amendment

The Sponsor has proposed a strike-all amendment to address concerns raised by the Florida Sheriff's Association, the League of Cities, the Association of Counties, the International Union of Police Associations, and the PBA.

The strike all amendment does the following:

The amendment provides that the definition of "law enforcement officer" means any law enforcement officer, corrections officer, or correctional probation officer as defined in sections 943.10 (1), (2), and (3), Florida Statutes, who is employed full time by any municipality, or the state, or any political subdivision thereof. These references are to the statutory definitions of "law enforcement officer", "correctional officer", and "correctional probation officer" located in sections 943.10 (1), (2), and (3), Florida Statutes, respectively.

It does not make substantive amendments to the existing permissive provision of section 111.065, Florida Statutes. It renumbers the provision as section (1), and revises the language of the provision to provide for consistency throughout the act.

It renumbers the mandatory provision as section (2).

It provides that the mandatory provision in the bill applies uniformly to municipalities, the state, and any subdivisions thereof.

The amendment restricts the scope of situations in which the mandatory provision applies by limiting the application of the provision only to criminal charges brought against an Officer, and providing that the employing agency will be required to pay the Officer's reasonable attorney's fees and costs, only if:

- (a) The law enforcement officer is found not guilty of the charged offense, or any other lesser or included offense that is substantially related to the charged offense; or
- (b) The charges are dismissed; and:
- (c) The officer's actions that gave rise to the charges:
 - 1. Arose in the course and scope of the law enforcement officer's duties; and
 - 2. Were not acts of omission or commission which constituted a material departure from the employing agency's written policies and procedures, or generally recognized criminal justice standards, should no written policies or procedures exist; and
 - a. Occurred in response to what the officer reasonably believed was an emergency; or
 - b. Occurred when the officer reasonably believed his or her action was necessary to protect the officer or others from imminent death, or bodily harm; or
 - c. Occurred in the course of the officer's fresh pursuit, apprehension, or attempted apprehension of a suspect whom the officer reasonably believes has perpetrated, or attempted to perpetrate, a forcible felony, or the offense of escape.

It amends the bill to give the employing agencies a greater degree of control over an Officer's selection of an attorney, and the cost of litigation. It provides that for the purposes of the mandatory provision of the act, legal representation will be provided by the employing agency by:

Providing that the employing agency will fulfill its obligations under the mandatory provision of the act by providing the Officer with an attorney, or if the employing agency cannot provide an attorney, by:

- (a) Providing a list of attorneys from which the Officer may select, or
- (b) By paying the Officer's reasonable attorney's fees and cost through a more restrictive procedure that includes the placement of a \$100,000 limit on the attorney fees and costs that may be awarded, and
- (c) Including a provision that no lodestar or fee multiplier provision may be used in any criminal prosecution defended pursuant to this section.

Although this bill is not supported by all entities involved, it is agreed by all entities that the financial impact of the bill's mandatory provision will be reduced greatly by restricting the mandatory provision as provided for in this strike-all amendment.

Decreased Financial Impact as a Result of the Strike-All Provisions

According to information provided by the Executive Director of the PBA, the PBA represents approximately 30,000 law enforcement officers in the state of Florida. This represents about 50 percent

of all officers in the state. The PBA currently provides legal defense services to all its members for civil, as well as criminal actions filed against them. The PBA estimates that it spends approximately \$800,000 annually to defend these actions. The Executive Director stated that only 1/4 of the cases that the PBA defends would be included under the provisions of this strike-all amendment.

Thus, if the PBA represents 50% of all law enforcement officers in the state, and only 1/4 of the cases that it defends would be included under the provisions of this strike-all amendment, it could be assumed that this bill could have a total annual financial impact of \$400,000. This \$400,000 impact, if accurate, would be assumed between the state, counties, municipalities, and subdivisions thereof.

Alleviation of the Mandate Issue

Although it is still possible that the bill could constitute a mandate as defined in Article VII, Section 18(a) of the Florida Constitution, this concern is alleviated by the financial restrictions included in the Sponsor's proposed strike-all amendment.

The terms of the bill limit the exposure of the employing agencies payment of attorney's fees to no more than \$100,000 per action. Thus, the mandate threshold would be reached if 16 lawsuits were brought in one fiscal year against a single county or municipality, each involving the maximum \$100,000 in attorney's fees per case. However, according to the results of the FAXNET Survey and other research conducted, there are comparatively very few Officers charged criminally for actions that arise in the course and scope of duty. During the fiscal year ending September 20, 2001, one county and two municipalities reported that one criminal action was brought against Officers employed by them. Other research indicated that the City of Miami Beach reported that three of its Officers were charged criminally in 1999, but none in 2000, or 2001. The City of Miami Beach reported the largest amount of officers charged criminally, at three.

In light of this research it appears unlikely that 16 lawsuits, each involving the maximum \$100,000 limit will be brought against a single county or municipality during one fiscal year. Thus, the strike-all amendment appears to alleviate the concern that the bill could constitute a mandate as defined in Article VII Section 18(a) of the Florida Constitution.

The State Self Insurance Fund

The amendment subjects the state to the bill's mandatory provisions. As the State of Florida is self-insured, these attorney fees and costs would have to be paid out of general revenue dollars.

However, because the State Risk Management Trust Fund does not cover the defense of criminal claims, there is no mechanism for paying the attorney fees and costs out of the state self-insurance fund. Accordingly, in order to pay the attorney's fees and costs as required by this strike-all amendment, an employing agency would likely need to obtain a specific appropriation from the Legislature.

VII. SIGNATURES:

COMMITTEE ON LOCAL GOVERNMENT & VETERANS AFFAIRS:

Prepared by:

Staff Director:

Alex Abdo

Joan Highsmith-Smith