

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 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 type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

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

This bill increases government by adding additional duties and requirements of agencies.

B. EFFECT OF PROPOSED CHANGES:

Background

Screening Requirements

Agencies such as the Department of Education, the Department of Children and Families, and the Department of Juvenile Justice require background screening of employees and other individuals. In 1995, the Legislature codified standards related to such screenings by the creating chapter 435, F.S. Two levels of background screening are provided:

- A Level 1 screening entails a background check in the form of an employment history check, and statewide and local criminal history checks. At this screening level, the person must not have been convicted of or pled guilty to certain enumerated offenses.
- A Level 2 screening is more comprehensive than a Level 1 screening. This level requires fingerprint-based state and federal criminal records checks. The enumerated list of disqualifying offenses contains more offenses than the list in Level 1.

A department may grant an exemption to an employee who would otherwise be disqualified from employment for felonies committed more than three years ago, misdemeanors, 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.

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." *Id.*, at 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 employees of program providers contracted with those departments, are required to be of good moral character. See ss. 984.01, 985.01(2), and 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 contractors whose agents and employees interact with children. In addition to the 2002 Rilya Wilson case, which involved the disappearance of the 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. During the course of the Paisley investigation, it was discovered 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

The FDLE has created a continuous fingerprint scan system, known as Livescan, that maintains a record of the fingerprint pattern of an individual, monitors Florida criminal justice agency arrest records, and gives an employing agency notification of an individual’s arrest within 72 hours.

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 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 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

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

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

⁵ *Id.*

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, and 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, F.S.

Effect of Bill

Background Screening

HB 713 w/CS increases the screening level of Department of Juvenile Justice employees from Level 1 to 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 who entered a plea of nolo contendere or guilty to three or more specified offenses⁶ that occurred on three different occasions, irrespective of when the offenses were disposed.

This bill with CS further requires DJJ employees, and employees of DJJ contractors, to input their fingerprints into the continuous fingerprint scan system maintained by FDLE. The annual fee is limited to \$10 per person per year.

HB 713 w/CS also creates a definition of "good moral character" applicable to all laws requiring a person to be of good moral character. The bill provides that "Any 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

The bill with CS creates a new section of ch. 435, F.S., which allows 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. Any future bill containing cross references to this chapter will not need to reenact the referenced statute, and any changes to the screening requirements or exemptions provided in ch. 435, F.S., will not need to reenact adopting statutes containing cross references to ch. 435, F.S.

C. SECTION DIRECTORY:

Section 1 creates s. 435.015, F.S., to provide that references to the chapter constitute a general reference.

⁶ There are 44 specified offenses listed in s. 435.04(2), F.S.

Section 2 creates s. 435.025, F.S., to create a definition of good moral character for the purposes of employee screening.

Section 3 amends s. 435.04, F.S., to restrict the Department of Juvenile Justice's ability to remove a disqualification from employee screening standards.

Sections 4, 5, and 6 amend s. 984.01, 985.01, 985.407, F.S., respectively, to elaborate on the "good moral character" requirement determination. Section 5 also requires DJJ employees and contractors to utilize continuous fingerprint scanning.

Section 7, 8, 9, 10 and 11 reenact ss. 400.215, 400.953, 943.0585, 943.059, 985.407, and 985.05, F.S., respectively, for the purpose of incorporation by reference.

Section 11 provides an effective date of upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None. This bill does not affect a state revenue source.

2. Expenditures:

The Department of Juvenile Justice employs approximately 5,100 individuals. To utilize the FDLE Livescan system, DJJ must pay for inputting and maintenance. For inputting, DJJ can use the machines of the Department of Children and Families at a cost to DJJ of \$90,000 annually.⁷ Maintenance is estimated at \$8 per employee per year. The recurring costs of this bill are estimated to be:

DCF contract for use of equipment	\$90,000
DJJ employees	40,800
DJJ contractor employees	<u>48,000</u>
Total estimated recurring cost	\$178,800

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None. This bill does not affect a local government revenue source.

2. Expenditures:

None. This bill does not require a local government expenditure.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The private contractors employed by DJJ employ approximately 5,500 individuals. They currently incur a cost of \$32 to conduct a Level II screening at the time of employment.

At the estimated \$8 annual maintenance fee per person per year, this bill appears to require private contractors employed by DJJ to expend approximately \$44,000 annually for use of the Livescan

⁷ The Department of Children and Families owns compatible scanning equipment for its own use, and has agreed to let DJJ employees and contractors access the equipment at a cost of \$90,000 annually.

system.⁸ It is likely that this increased cost will be reflected in future negotiated rates charged by the private contractors.

D. FISCAL COMMENTS:

This bill with CS changes statutes to require that the initial screening required of DJJ employees, and employees of DJJ contractors, is increased from Level 1 to Level 2. This does not have a fiscal impact because DJJ policy currently requires Level 2 screening.

Not addressed by the fiscal analysis provided by DJJ is the indeterminate but negative fiscal impact that results from any restriction on the employment of certain persons. Basic economics dictates that a decrease in supply will generally result in an increase in price. To effectively compete against private sector employers for prospective employees who meet the increased "good moral character" required by this bill, all of the affected state agencies, and their contractors, will likely have to increase salaries in excess of that currently offered.

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 that 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 had 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,

⁸ Information from meeting with Mark P. Fontaine, Director of the Florida Juvenile Justice Association, April 8, 2004.

“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.”

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 are “at-will” employees. Persons in the “Career Service” who have completed a one year probationary period may only be fired “for cause.” One of the reasons listed as cause 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:

This bill provides for rulemaking authority by FDLE to set the price to DJJ and its contractors for use of the continuous scanning system, which fee is limited to \$10 per person per year.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The term “good moral character” applies to the licensure of many professions. The bill creates a new section of chapter 435, F.S., 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.” The bill could impact more professions and individuals than those DJJ staff who are 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.

On March 15, 2004, the Committee on The Future of Florida's Families amended HB 713 with CS to define "good moral character", and incorporate that definition throughout the bill. The bill with CS was then reported favorably with a committee substitute.

On April 14, 2004, the Committee on State Administration adopted 5 amendments to this bill. The amendments:

Amendment 1 removes the requirement that DJJ and its contractors perform an annual records check. See amendment #3.

The bill provides that DJJ cannot employ someone who has committed 3 disqualifying criminal offenses. Amendment 2 provides that the 3 offenses must have occurred at separate times.

Amendment 3 requires DJJ and its contractors to utilize the FDLE continuous fingerprint scan system.

Amendment 4 requires DJJ to utilize Level 2 screening, as required by the Interstate Compact on Juveniles.

Amendment 5 reenacts s. 400.215, F.S.

The bill was then reported favorably with a committee substitute.