HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 553 Violations of the Florida Election Code
SPONSOR(S): Eisnaugle
TIED BILLS: **IDEN./SIM. BILLS:** SB 330

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 0 N	McDonald	Williamson
2) Rulemaking & Regulation Subcommittee	11 Y, 3 N	Miller	Rubottom
3) State Affairs Committee			

SUMMARY ANALYSIS

The bill provides that it is a violation of the Florida Election Code for a candidate, in any election, to directly or indirectly falsely represent past or current service in the military. A civil penalty of up to $5,000 may be assessed for each violation by the Florida Elections Commission or an administrative law judge for the Division of Administrative Hearings, as appropriate. Assessed civil penalties are deposited in the General Revenue Fund.

The bill also provides that anyone may file a complaint with the Florida Elections Commission alleging such violation.

The Florida Elections Commission and the Division of Administrative Hearings are required to provide expedited hearings in such cases coming before them.

The fiscal impact on state government is minimal.

The bill takes effect July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

Florida Law
Currently, the Florida Election Code does not govern false representations made by a candidate concerning the candidate's own background. It does, however, prohibit a candidate from knowingly making false or malicious statements or causing such statements to be made about an opposing candidate in an election.

An aggrieved candidate may file a complaint with the Florida Elections Commission (Commission) pursuant to s. 106.25, F.S. The offense is punishable by an administrative fine of up to $5,000 to be deposited in the General Revenue Fund.[1] The respondent has 30 days after the filing of formal allegations to choose a hearing before the Commission, otherwise a hearing is conducted by an administrative law judge appointed by the Division of Administrative Hearings (DOAH).[2] The statute provides final order authority to both the Commission and the administrative law judge in their respective proceedings but DOAH presently lacks any authority to impose a fine or other sanctions in proceedings under this section.[3] The present rules of the Commission do not expressly provide for an expedited hearing.[4] Currently, s. 120.574, F.S., provides procedures for a summary hearing before DOAH but only by the voluntary agreement of the parties.[5]

Federal Law
The "Stolen Valor Act of 2005,"[6] signed into law on December 20, 2006, makes it a crime to falsely represent having been awarded a military honor, declaration, or medal, with penalties including fines, imprisonment, or both. The length of imprisonment ranges from 6 months up to 1 year depending upon the type of medal.[7] There is currently disagreement among courts in different federal judicial circuits with regard to the constitutionality of the federal law.[8]

Effect of Proposed Changes[9]

The bill provides that it is a violation of the Florida Election Code for a candidate, in any election, to directly or indirectly falsely represent past or current service in the military.[10] A civil penalty of up to $5,000 may be assessed for each violation by the Commission or an administrative law judge for the

---

[1] Section 104.271(2), F.S. This appears to be the only provision in the Florida Election Code that addresses false political speech.
[2] s. 106.25(5), F.S.
[3] *Florida Elections Commission v. Davis*, 44 So. 3d 1211 (Fla. 1st DCA 2010).
[4] Fla. Admin. Code R. 2B-1.004.
[5] s. 120.574(1)(b), F.S.
[6] Public Law 109-437.
[7] The longer imprisonment of up to 1 year is provided for false claims involving a Distinguished Service Cross, Navy Cross, Air Force Cross, Silver Star, Purple Heart, and Congressional Medal of Honor.
[8] *See U.S. v. Alvarez*, 617 F.3d 1198 (9th Cir. 2010) (holding that the Stolen Valor Act violates First Amendment free speech rights); *but see, U.S. v. Robbins*, 2011 WL 7384 (W.D. Va. 2011) (false statements of fact implicated by the federal statute are not protected by the First Amendment). *U.S. v. Alvarez* is the only appellate decision interpreting the Stolen Valor Act. While the U.S. Circuit Court of Appeals for the Ninth Circuit has a reputation in the legal community for adopting outlier positions rejected by other circuits, in *Alvarez* the Court relied upon the reasoning in *U.S. v. Stevens,* ---U.S.---, 130 S. Ct. 1577, 176 L.Ed.2d 435 (2010), to find the First Amendment to the U.S. Constitution did not permit sanctioning speech content because of its relative lack of social worth. *Alvarez* at 1206. In *Robbins,* the federal district judge expressly refused to follow the 2-1 majority decision in *Alvarez* by adopting the dissent's position that *false speech* is not entitled to First Amendment protection. This conclusion conflicts with the decision in *U.S. v. Stevens.*
[9] The changes proposed to the Florida Election Code are similar to the federal Stolen Valor Act in that they refer to false statements of fact involving military service. The federal law, however, does not relate to having served or serving in the military but to honors, declarations, or medals received related to such service.
[10] Military service in the bill refers to prior service, active duty, or reserve.

(DOAH), depending upon which authority renders the final order. Assessed civil penalties are deposited in the General Revenue Fund.

The bill provides that any person may file a complaint with the Florida Elections Commission alleging that a candidate has falsely represented his or her military service. The Commission is required to adopt rules to provide for the expedited hearing of complaints before the Commission and requires the director of DOAH to assign an administrative law judge to provide an expedited hearing on cases before DOAH.

B. SECTION DIRECTORY:

Section 1. Creates s. 104.2715, F.S., providing that it is a violation of the Florida Election Code for a candidate to directly or indirectly falsely represent his or her military service; permitting anyone to file a complaint with the Florida Elections Commission alleging a violation; requiring the adoption of rules to provide for an expedited hearing for complaints filed with the Commission; requiring the director of DOAH to assign an administrative law judge to provide an expedited hearing in certain cases; and requiring the assessment of a civil penalty.

Section 2. Provides a July 1, 2011, effective date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Violation penalties may provide additional, but minimal, revenues that will be deposited into the General Revenue Fund.

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 take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the

aggregate, nor reduce the percentage of state tax shared with counties or municipalities. The bill is exempt from the mandate requirements because it is amending the elections laws.

2. Other:

As found by the Florida Supreme Court in *Sult v. State,* Florida is bound by the interpretations of the United States Supreme Court concerning the extent of protection afforded to speech content by the First Amendment to the United States Constitution:

> The First Amendment to the United States Constitution and article I, section 4 of the Florida Constitution protect the rights of individuals to express themselves in a variety of ways. The constitutions protect not only speech and the written word, but also conduct intended to communicate. … When lawmakers attempt to restrict or burden fundamental and basic rights such as these, the laws must not only be directed toward a legitimate public purpose, but they must be drawn as narrowly as possible. … As the United States Supreme Court has noted, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."[11]

Regulation of speech during political campaigns is viewed particularly closely under the strict scrutiny standard of constitutional review:

> The First Amendment " 'has its fullest and most urgent application' to speech uttered during a campaign for political office." … For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are "subject to strict scrutiny," which requires the Government to prove that the restriction "furthers a compelling interest and is narrowly tailored to achieve that interest."[12]

In *Weaver v. Bonner,*[13] the Eleventh Circuit Court of Appeals applied a consistent constitutional standard even as to prohibitions against false factual statements by a political candidate:

> A candidate's speech during an election campaign "occupies the core of the protection afforded by the First Amendment." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 346, 115 S.Ct. 1511, 1518, 131 L.Ed.2d 426 (1995). The proper test to be applied to determine the constitutionality of restrictions on "core political speech" is strict scrutiny. *Id.* Under strict scrutiny analysis, the government has the burden of proving that the restriction is "(1) narrowly tailored, to serve (2) a compelling state interest." *Republican Party of Minnesota v. White,* 536 U.S. 765, 122 S.Ct. 2528, 2534, 153 L.Ed.2d 694 (2002); *see also Brown v. Hartlage,* 456 U.S. 45, 53-54, 102 S.Ct. 1523, 1529, 71 L.Ed.2d 732 (1982) ("When a State seeks to restrict directly the offer of ideas by a candidate to the voters, the First Amendment surely requires that the restriction be demonstrably supported by not only a legitimate state interest, but a compelling one, and that the restriction operate without unnecessarily circumscribing protected expression.").

B. RULE-MAKING AUTHORITY:

The bill requires the Florida Elections Commission to adopt rules to provide an expedited hearing of complaints filed with the Commission that relate to false misrepresentation of military service.

A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.[14] Rulemaking authority is delegated by the Legislature[15] through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"[16] a rule. Agencies do not have discretion

---

[11] 906 So. 2d 1013, 1018 (Fla. 2005) (citations omitted).

[12] *Citizens United v. Federal Elections Commission*, ---U.S.---, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010) (citations omitted).

[13] 309 F. 3d 1312 (11th Cir. 2002). Applying the standard of strict scrutiny, the Circuit Court found unconstitutional a prohibition in the Georgia Code of Judicial Conduct against false statements made in a judicial election.

[14] s. 120.52(16), F.S.; *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region,* 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

[15] *Southwest Florida Water Management District v. Save the Manatee Club, Inc.,* 773 So. 2d 594 (Fla. 1st DCA 2000).

[16] s. 120.52(17), F.S.

whether to engage in rulemaking.[17] To adopt a rule an agency must have a general grant of authority to implement a specific law by rulemaking.[18] The grant of rulemaking authority itself need not be detailed.[19] The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.[20]

Proceedings before DOAH are conducted pursuant to the Uniform Rules[21] adopted by the Administration Commission.[22] The bill does not provide authority for either the Commission or DOAH to make rules compelling the parties to participate in an expedited or summary hearing before DOAH.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill does not specify whether “military” is limited to the armed forces of the United States. The bill does not provide a definition for “expedited proceeding” and does not provide rulemaking authority for DOAH or the Administration Commission to adopt rules for expedited proceedings. The bill grants specific penalty power to the administrative law judge.[23]

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

---

[17] s. 120.54(1)(a), F.S.
[18] s. 120.52(8) & s. 120.536(1), F.S.
[19] *Save the Manatee Club, Inc.,* supra at 599.
[20] *Sloban v. Florida Board of Pharmacy,*982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.,* 794 So. 2d 696, 704 (Fla. 1st DCA 2001).
[21] Fla. Admin. Code Chapter 28-106.
[22] Composed of the Governor and Cabinet under s. 14.202, F.S., the Administration Commission is authorized to adopt uniform rules to be applied by all agencies, including rules governing agency enforcement and discipline proceedings. s. 120.54(5)(b)5, F.S.
[23] *Davis v. Florida Elections Commission,* 44 So.3d 1211 (Fla. 1st DCA 2010) (The court found that an ALJ needs express statutory authority to institute penalties for election violations originating with the Florida Elections Commission).