

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/SB 2144

SPONSOR: Governmental Oversight & Productivity Committee, Health, Aging, & Long-Term Care Committee and Senator Clary

SUBJECT: Dentistry

DATE: April 22, 2003

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Munroe</u>	<u>Wilson</u>	<u>HC</u>	<u>Fav/CS</u>
2.	<u>Rhea</u>	<u>Wilson</u>	<u>GO</u>	<u>Fav/CS</u>
3.	_____	_____	<u>AHS</u>	_____
4.	_____	_____	<u>AP</u>	_____
5.	_____	_____	<u>RC</u>	_____
6.	_____	_____	_____	_____

## I. Summary:

The bill revises the structure and process for providing support and administrative services to the Board of Dentistry in the Department of Health. The bill:

- Revises the procedures for employment and retention of an executive director for the Board of Dentistry and board support staff;
- Requires the employment of a Florida-licensed dentist as a dental intake officer with specified responsibilities;
- Requires the Board of Dentistry to establish, in consultation with the Department of Health performance parameters for the prosecution of disciplinary cases by the department or any contract vendors for prosecutorial services;
- Establishes a mechanism for contractual prosecutorial services for the Board of Dentistry cases;
- Creates a formal procedure for the Board of Dentistry to address dental examination issues with the Department of Health;
- Establishes fiscal and budget procedures for spending involving the Board of Dentistry and the board is granted spending authority over discretionary budgetary items; and
- Requires the submission of a report to the Governor, the President of the Senate, and the Speaker of the House of Representatives.

This bill creates section 466.055, Florida Statutes.

## II. Present Situation:

### A. Organizational Structure of the Executive Branch of State Government

Chapter 20, F.S., provides for the organizational structure of the executive branch of government. The chapter reiterates the doctrine of the separation of powers within state government among the legislative, executive, and judicial branches of government.<sup>1</sup> Section 20.02, F.S., states:

. . . The legislative branch has the broad purpose of determining policies and programs and reviewing program performance. The executive branch has the purpose of executing the programs and policies adopted by the Legislature and of making policy recommendations to the Legislature. The judicial branch has the purpose of determining the constitutional propriety of the policies and programs and of adjudicating any of the policies and programs and of adjudicating any conflicts arising from the interpretation or application of the laws.

A state agency, such as a department, is a creature of statute and, as such, it has only those rights and privileges given to it by the Legislature in statute.<sup>2</sup> A department is created in the executive branch and, therefore, is subject to the administrative control of an executive officer who is appointed by, and serves at the pleasure of, the Governor or a Cabinet officer. Nevertheless, the powers and duties which the department is authorized to execute are delegated by the Legislature:

An agency has only such power as expressly or by necessary implication is granted by legislative enactment. An agency may not increase its own jurisdiction and, as a creature of statute, has no common law jurisdiction or inherent power such as might reside in, for example, a court of general jurisdiction. When acting outside the scope of its delegated authority, an agency acts illegally and is subject to the jurisdiction of the courts when necessary to prevent encroachment on the rights individuals.<sup>3</sup>

Section 20.02, F.S., requires agencies that compose the executive branch to be consolidated into no more than 25 departments, exclusive of those specifically provided for or authorized in the State Constitution. The agencies in the executive branch should be integrated into one of the departments of the executive branch to achieve maximum efficiency and effectiveness.<sup>4</sup>

---

<sup>1</sup> Article II, s. 3 of the State Constitution provides: "The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."

<sup>2</sup> *Seaside Properties, Inc., v. State Road Department*, 190 So.2d 391 (3<sup>rd</sup> DCA 1966).

<sup>3</sup> *Lee v. Division of Florida Land Sales and Condominiums*, 474 So.2d 282 (5<sup>th</sup> DCA 1985).

<sup>4</sup> Article IV, s. 6 of the State Constitution states: All functions of the executive branch of state government shall be allotted among not more than twenty-five departments, exclusive of those specifically provided for or authorized in this constitution. The administration of each department, unless otherwise provided in this constitution, shall be placed by law under the direct supervision of the governor, the lieutenant governor, the governor and cabinet, a cabinet member, or an officer or board appointed by serving at the pleasure of the governor, except: (a) when provided by law, confirmation by the senate or the approval of three members of the cabinet shall be required for appointment to or removal from any designated statutory office; (b) boards authorized to grant and revoke licenses to engage in regulated occupations shall be assigned to appropriate departments and their members appointed for fixed terms, subject to removal only for cause.

Section 20.04, F.S., provides the structure of the executive branch of state government. The department is the principal administrative unit of the executive branch.<sup>5</sup> The principal unit of the department is the division, which may be further subdivided into bureaus.<sup>6</sup> A bureau may be further divided into “sections” and “subsections.” Section 20.04, F.S., specifically authorizes departments to combine these various office subdivisions for field operations.

Section 20.04(3), F.S., specifically exempts the Department of Financial Services, the Department of Children and Family Services, the Department of Corrections, the Department of Management Services, the Department of Revenue, and the Department of Transportation from the standard organizational structure for executive branch departments that is established in that subsection.

Subsection 20.04(7)(a), F.S., explicitly forbids department heads from reallocating duties and functions specifically assigned by law to a specific unit of a department, unless otherwise authorized by law. Functions or agencies assigned generally to a department without specific designation to a unit of a department may be allocated and reallocated to a unit at the discretion of the agency head.

Further, an agency head is authorized to recommend the establishment of additional divisions, bureaus, sections, and subsections, within the limitations of the organizational structure provided in ch. 20, F.S., to promote efficient and effective operation of a department.

Section 20.04(7), F.S., permits new bureaus, sections, and subsections to be initiated by a department and established as recommended by the Department of Management Services and approved by the Executive Office of the Governor or as established by specific statutory enactment. The subsection explicitly limits initiation of new divisions and sub-units for the Department of Children and Family Services, the Department of Corrections, and the Department of Transportation except by specific statutory enactment.

## B. Centralized Agency Concept

Florida and a number of states (Illinois, New York, Wisconsin, and Colorado) have created highly centralized regulatory agencies in which health care professional regulatory boards reside, with various licensing and disciplinary functions assigned to them. This model of regulation contrasts with a model that is used by other states in which regulatory boards are autonomous and have final agency action over both licensing and disciplinary functions.

The Department of Health regulates various health professions and administers various public health programs. For health care professions, the Department of Health collects fees, processes licensure applications, and prepares and administers examinations. The department investigates all disciplinary complaints filed against health care professionals. Disciplinary investigative reports are submitted to the probable cause panels designated by each board or the department. Probable cause panels determine whether formal charges should be brought against a licensed health care professional.

---

<sup>5</sup> Section 20.04(1), F.S.

<sup>6</sup> Section 20.04(3), F.S.

### C. General Regulatory Provisions

Chapter 456, F.S., provides the general regulatory provisions for health care professions within the Division of Medical Quality Assurance in the Department of Health. Section 456.001, F.S., defines “health care practitioner” to mean any person licensed under ch. 457, F.S., (acupuncture), ch. 458, F.S., (medicine), ch. 459, F.S., (osteopathic medicine), ch. 460, F.S., (chiropractic medicine), ch. 461, F.S., (podiatric medicine), ch. 462, F.S., (naturopathic medicine), ch. 463, F.S., (optometry), ch. 464, F.S., (nursing), ch. 465, F.S., (pharmacy), ch. 466, F.S., (dentistry and dental hygiene), ch. 467, F.S., (midwifery), Parts I, II, III, IV, V, X, XIII, or XIV of ch. 468, F.S., (speech-language pathology, nursing home administration, occupational therapy, respiratory therapy, dietetics and nutrition practice, athletic trainers, and orthotics, prosthetics, and pedorthotics), ch. 478, F.S., (electrology or electrolysis), ch. 480, F.S., (massage therapy), parts III or IV of ch. 483, F.S., (clinical laboratory personnel or medical physics), ch. 484, F.S., (opticianry and hearing aid specialists), ch. 486, F.S., (physical therapy), ch. 490, F.S., (psychology), and ch. 491, F.S., (psychotherapy).

### D. Medical Quality Assurance Trust Fund

Section 20.435(1)(d), F.S., establishes the Medical Quality Assurance Trust Fund to be credited with revenue related to the licensing of health care practitioners. Section 456.025(5), F.S., requires that all licensure fees, fines, or costs awarded to the agency by a court be paid into the trust fund. Section 456.065(3), F.S., requires that the trust fund also be credited with revenues received from the department’s unlicensed activity efforts. Funds in the trust fund are to be used for the purpose of providing administrative support for the regulation of health care practitioners and for such other purposes as may be appropriate in accordance with legislative appropriation. Any balance in the trust fund at the end of any fiscal year remains in the trust fund and is available for carrying out the purposes of the trust fund.

### E. Licensure Fees, Receipts and Dispositions

Section 456.025(1), F.S., requires each board to determine, by rule, licensure fees within statutory fee caps based upon long-range estimates from the Department of Health. Each board is responsible for ensuring that the licensure fees set out are adequate to cover all anticipated costs in order to maintain a reasonable cash balance. If a board does not take sufficient action within one year after notification from the department that license fees are projected to be inadequate, the department must set licensure fees within the caps on behalf of the board in order to cover anticipated costs and to maintain required cash balances. The department must include recommended fee cap increases in its annual report to the Legislature.

Section 456.025 specifies legislative intent that no regulated profession operate with a negative cash balance. The department is authorized to advance funds to a profession with a negative cash balance for a period not to exceed two consecutive years, however, the profession must pay interest. Section 456.025(3), F.S., provides that each board, or the department if there is no board, may collect a one-time fee from each active and voluntary inactive licensee in an amount necessary to eliminate a cash deficit, or if there is not a cash deficit, in an amount sufficient to maintain the financial integrity of the professions as required; however, no more than one assessment may be made in any four-year period without specific legislative authorization.

Section 456.025(5), F.S., requires the department to maintain separate accounts in the trust fund for each profession and to charge direct expenses as well as proportionately allocate indirect expenses to each profession. Documentation to support allocated expenses must be maintained and the department must provide this information to the boards upon request. The department must provide each board with an annual report of revenue and direct and allocated expenses related to the operation of that profession. Boards are required to use these reports and the long-range plan to determine the amount of license fees. A condensed management report of this information, with recommendations from the department, is to be included in the annual report submitted to the Legislature. Additionally condensed quarterly management reports are to be provided to each board.

#### F. Long-range Policy Planning

Section 456.005, F.S., requires the department and the boards to develop and implement a long-range policy planning and monitoring process to include recommendations specific to each profession. The process includes estimates of revenues, expenditures, cash balances, and performance statistics for each profession over a five year period. The department must monitor compliance with the plan, with input from the boards, and provide annual reports to the Governor and the Legislature by November 1 annually. As part of the review process the department must evaluate specific criteria such as cost effectiveness, the need for continued regulation, adequacy of consumer protection, consistency between practice acts, adequacy of enforcement of unlicensed activity and include conclusions and recommendations. The department must provide concise management reports to the boards quarterly.

In addition to the general regulatory provisions, each profession has its own practice act setting forth provisions applicable to the practice standards and requirements for that profession.

#### G. Dentistry

Chapter 466, F.S., provides for the regulation of dentistry by the Board of Dentistry. The Board of Dentistry is one of 28 boards and councils which are assigned to the Division of Medical Quality Assurance in the Department of Health. The board regulates 10,881 dentists and 9,701 dental hygienists. The division provides investigation and legal services for the health care practitioner boards and board office staff are employed by the department. The Board of Dentistry's executive director provides support services for five professions within the division.

The Legislature, in 2002, appropriated \$50,000 and authorized the Office of Legislative Services to contract for a business case study of the feasibility of outsourcing administrative, investigative, legal and prosecutorial functions and other tasks and services that are necessary to carry out the regulatory responsibilities of the Board of Dentistry; employing its own executive director and other staff; and obtaining authority over collections and expenditures of funds paid by professions regulated by the Board of Dentistry into the Medical Quality Assurance Trust Fund. This feasibility study was to include a business plan and an assessment of the direct and indirect costs associated with outsourcing these functions. The Center for Professional Development of Florida State University received the contract and prepared a report that was released in January 2003. The report recommended the following to the Legislature:

- That the Legislature consider allowing the Board of Dentistry to hire its executive director under the rules of the state personnel system and consider developing a statute to ensure that nepotism does not occur in the executive director selection. The Secretary of the Department of Health or designee may be invited to sit on the interview panel. The executive director should be one hundred percent dedicated and report directly to the Board of Dentistry. The Legislature may consider allowing time sheets and leave requests to go through the Director of the Medical Quality Assurance Division to assure accountability.
- That the Legislature consider outsourcing all board office staff who will work directly for the board but will still have the benefits of and accountability to a state division. The executive director could be responsible for hiring other staff members.
- That the Board of Dentistry be granted the responsibility by the Legislature to hire a dental compliance officer to advise a “pre-discipline review committee,” the executive director, the lead investigators, intake specialists, and the board regarding dental health regulation/compliance issues and track legal sufficiency processes, including the investigations to ensure that complaints are investigated and brought before the probable cause committee in a timely and efficacious manner.
- That a scheme should be developed to obtain dental license fees annually, with half on even years and half on odd years, or by birthday. Dental fees need to be raised by \$100 for dentists and \$15 for dental hygienists.
- That the board be responsible for maintaining the integrity of their agency staff and office operations/expenditures. The Legislature may decide to grant discretionary budget authority to the Board of Dentistry for limited office operations and staff, and may choose to designate a finance committee to oversee these responsibilities. A discretionary budget account can be established within the Medical Quality Assurance Trust Fund to provide annual funds for the Board of Dentistry’s budgetary needs.
- That the statutes be amended to give the Board of Dentistry more responsibility in selecting their legal counsel.
- That the Legislature “consider making an administrative rule to assure that dental investigations are conducted by a specific dental lead investigator(s) and assigned to the Board of Dentistry in each Department of Health district.”
- That “appropriate changes be made to statute or administrative rule to ensure that dental and legal staff is assigned to routinely help determine legal sufficiency for all the complaints that reach the Board of Dentistry.”
- That “the Board of Dentistry continue to use the Department of Health prosecutory and prosecutorial teams and that the statute remains [sic] unchanged.”

### III. Effect of Proposed Changes:

The bill creates s. 466.005, F.S., to allow the Board of Dentistry, at its request, to direct the Department of Health whom to appoint as executive director pursuant to the rules of the state personnel system. The committee that conducts the interview of applicants for the board’s executive director must include the board chair or his or her designee and the Secretary of the Department of Health or his or her designee. A list of final candidates must be submitted to the Board of Dentistry which shall approve the candidate to be hired. The approval process must give the board the right to interview the list of submitted candidates. The executive director must exclusively serve the board. The board must monitor the performance of the executive director

and promptly notify the department, in writing, if it finds by a majority vote of the board that the performance is unacceptable, and the department must take appropriate steps to replace the executive director pursuant to state personnel rules.

The bill requires the executive director to be responsible for overseeing the hiring of all other staff members who work directly for executive director and who perform services for the board. The bill requires the department to contract for a dental intake officer, when requested by the Board of Dentistry, in accordance with the state personnel system and qualifications established for the position by the board. The intake officer must be a Florida-licensed dentist in good standing and must determine the legal sufficiency of all dental complaints received by the Department of Health within 5 working days after the complaint is filed. The dental intake officer must advise the board regarding dental health regulation issues, and field investigators to assure that complaints are properly investigated in a timely and efficacious manner.

The Board of Dentistry, in consultation with the department, must establish reasonable and comprehensive performance parameters for the prosecution of disciplinary cases. The bill specifies requirements for the performance parameters and requires the board to annually evaluate the department's performance based on the parameters. If the board finds, by a majority vote, that the department has failed to meet the established parameters, it may instruct the department to retain sufficient outside contractual prosecutorial services pursuant to s. 287.057(3), F.S., to fulfill the board's prosecutorial needs. Any contract negotiations and vendor selection must be conducted in consultation with the chairman of the board or his or her assignee. Each contract for prosecutorial services must include, at a minimum, the board's performance parameters for its assessment of the department.

The bill requires a representative from the department's testing services to respond to board concerns on testing issues, following the completion of each examination cycle. In consultation with the Board of Dentistry, the department must develop a spending plan for the board that encompasses anticipated revenue and operating expenses of the board as specified in the bill. All expenditure detail must reflect the methodology and calculations of the department in allocating common expenses among all regulatory boards. The board is granted spending authority over specified discretionary budget items, including an operational contingency. "Operational contingency" is that portion of cash on hand that exceeds that required for the 5-year spending plan as described in s. 456.005, F.S. The operational contingency may be used for a special project by the board in fulfilling its responsibilities, if a deficit does not or would not exist for the board.

The Department of Health must submit an annual report, along with the Board of Dentistry's response, to the Governor and Legislature regarding the Board of Dentistry on specified items listed in the bill. The department must include in the report any statement, comment, suggestion, recommendation, or objection made by the board to the report.

The bill provides an effective date of July 1, 2003.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, s. 18 of the Florida Constitution.

**B. Public Records/Open Meetings Issues:**

The provisions of this bill have no impact on public records or open meetings issues under the requirements of Art. I, s. 24(a) and (b) of the Florida Constitution.

**C. Trust Funds Restrictions:**

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The Department of Health reports that to implement the bill it will incur costs equal to \$755,862 in fiscal year 2003-2004 and \$892,976 in fiscal year 2004-2005. The department reports that the bill will increase costs for administration of the Board of Dentistry. The department indicated that hiring an executive director who works exclusively for the board would increase by 60 percent the salary and benefit costs to the board. The bill's requirement for a full-time investigator in each field office would require the addition of eight investigators with part-time workloads.

The department reports that as of December 31, 2002, the Board of Dentistry had a cash balance deficit in the Medical Quality Assurance Trust Fund of (\$88,379).

**VI. Technical Deficiencies:**

Page 1, line 27 – It is unclear who the “it” is in the phrase: “If requested by the Board of Dentistry, it shall direct the department whom to appoint as executive director pursuant to the rules of the state personnel system.” An alternative might be: “The Board of Dentistry may direct the department who to appoint as executive director pursuant to the rules of the state personnel system and the process established in this section.”



**VII. Related Issues:**

The Board of Dentistry unanimously voted at its February 25, 2003, meeting to reject all of the recommendations in the report entitled "Report on the Feasibility of Outsourcing Functions of the Florida Board of Dentistry." At its March 11, 2003, meeting the board voted to oppose the legislation to implement the report's recommendations.

Page 2, lines 23 – 30 requires the department to contract for a dental intake officer when requested by the Board. The bill specifically requires that the intake officer be a licensed Florida dentist in good standing. The bill also requires the dental intake officer to be ". . . responsible for determining legal sufficiency of all dental complaints received by the department . . ." A determination of legal sufficiency is not the practice of dentistry, but the practice of law. Unless the legal intake officer is also an attorney, it would be appropriate to clarify that this determination is to be made with the advice of counsel.

The bill gives the board ". . . spending authority over discretionary budgetary items, as determined by the department and the board jointly." The actual authority that is being delegated by this provision is not clear as it is limited by a determination of the board and the department *jointly*. No provision is made for conflict resolution or final authority in a conflict between the department and the board.

**VIII. Amendments:**

None.