HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1683 w/CS Seaport Security Standards
SPONSOR(S): A. Gibson
TIED BILLS: SB 2526 **IDEN./SIM. BILLS:** CS/SB 2524

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Transportation	13 Y, 4 N w/CS	Pugh	Miller
2) Public Safety & Crime Prevention		Cole	De La Paz
3) Appropriations			
4)			
5)			

SUMMARY ANALYSIS

Chapter 311.12, F.S., establishes minimum seaport security standards, including criminal background checks and employment criteria for employees and prospective employees. It directs Florida's 14 public seaports to develop procedures and policies for handling appeals and waivers for employees or prospective employees who are disqualified from working at the port or from having unrestricted access.

HB 1683 w/CS amends s. 311.12, F.S., to require that each seaport security plan includes a procedure for notifying persons who are disqualified from employment within, or regular access to, a seaport or a restricted area within a seaport. The procedure must be in substantial compliance with federal regulations governing the issuance of hazardous materials endorsements for commercial drivers licenses. The bill also provides criteria that seaports may consider in establishing procedures for appeals and waivers from employment disqualification.

In addition, HB 1683 w/CS "grandfathers-in" those seaport employees who lost their jobs or their security access when 2003 legislation raised from five years to seven years the length of time they had to have been free of felony conviction or incarceration. This provision is repealed as of June 4, 2005.

The bill also requires that by October 1 of each year, each seaport must report to the Florida Department of Law Enforcement (FDLE) the number of waivers issued during the previous 12 months.

HB 1683 w/CS appears to have no fiscal impact to the state, and an indeterminate fiscal impact to the seaports. The bill raises no apparent constitutional or other legal issues.

HB 1683 w/CS takes effect July 1, 2004.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. DOES THE BILL:

1. Reduce government?	Yes[]	No[x]	N/A[]
2. Lower taxes?	Yes[]	No[]	N/A[x]
3. Expand individual freedom?	Yes[]	No[]	N/A[x]
4. Increase personal responsibility?	Yes[]	No[]	N/A[x]
5. Empower families?	Yes[]	No[]	N/A[x]

Reduce government

HB 1683 w/CS does not reduce government because it says the seaports shall establish procedures for individuals who have been disqualified from seaport employment or security access to appeal those decisions, while current law says seaports may establish such procedures.

B. EFFECT OF PROPOSED CHANGES:

Background on Federal Law related to Seaport Security

The Maritime Transportation Security Act of 2002 (MTSA) was signed into law by President Bush on November 25, 2002. The MTSA requires the Coast Guard to conduct vulnerability assessments of vessels and facilities on or adjacent to U.S. waters. It mandates that a National Maritime Transportation Security Plan and regional Area Maritime Transportation Security Plans be developed and implemented by the U.S. Coast Guard for deterring and responding to transportation security incidents. Vessels and port facilities are required to have comprehensive security plans and incident response plans based on detailed U.S. Coast Guard vulnerability assessments and security regulations. These security plans must be approved by the U.S. Coast Guard.

Biometric Transportation Security Cards

The MTSA requires that access to security-sensitive areas be limited through background checks and the issuance of transportation security cards. Persons accessing secure areas on vessels or facilities are required to undergo a background check. A biometric transportation security card must be issued to individuals allowed unescorted access to a secure area of a vessel or facility.

An individual may be denied a transportation security card if that person has been convicted within the preceding seven-year period of a felony or found not guilty by reason of insanity of a felony that could cause the individual to be a terrorism security risk or could cause the individual to be responsible for causing a severe transportation security incident. An individual who has been released from incarceration within the preceding five-year period for any such felony is ineligible for a transportation security card. A person who may be denied admission to the United States or removed from the country under the Immigration and Nationality Act may be denied a card.

Under the MTSA provisions, the U.S. Department of Transportation (USDOT) must prescribe regulations that establish a waiver process for issuing a transportation security card to an individual who is ineligible to receive a card based on the reasons listed above. The waiver process must:

- ***o*** Give consideration to the circumstances of any disqualifying act or offense, restitution made by the individual, federal and state mitigation remedies, and other factors from which it may be concluded that the individual does not pose a terrorism risk warranting denial of the card.

- ***o*** Issue a waiver to an individual if the individual's employer establishes alternate security arrangements that are acceptable to the USDOT.

The USDOT is in the process of developing regulations relating to the issuance of biometric transportation security cards. Those regulations will include provisions for background checks, a waiver process, and an appeals process for individuals who are ineligible for a transportation security card that includes notice and an opportunity for a hearing. However, federal regulations governing the issuance, appeal, and waiver process for biometric transportation security cards have not been issued and the date of release for those regulations has not been established by the Transportation Security Administration (TSA), although the agency is establishing a standardized identification system.

This "Transportation Worker Identification Credential (TWIC)" system consists of an electronic personal card that will positively identify transportation workers who require unescorted physical and logical access to secure areas and functions of the transportation system. The objective of the TWIC is to provide one standardized, common credential supported by a single integrated and secure network of databases to manage worker access into secure transportation areas and operations.[1] On March 18, 2004, the TSA entered into a Memorandum of Agreement with Florida that allows the state to participate in the federal prototype for the national transportation worker identification card.

Appeal and Waiver Process Hazardous Materials CDL Endorsement

In addition to the security requirements of the MTSA, the USA PATRIOT Act requires states to conduct background checks through the U.S. Attorney General and the TSA before issuing licenses to individuals to transport hazardous materials in commerce. Federal regulations governing the issuance of hazardous materials endorsements for a commercial drivers license (CDL) prohibit an individual from holding such a license if the individual: does not meet citizenship requirements; was convicted, or found not guilty by reason of insanity, of a disqualifying criminal offense; has been adjudicated as a mental defective; or if the TSA has notified the individual that he or she poses a security threat. To determine if an individual poses a security threat warranting denial of authorization for a hazardous materials endorsement, the TSA conducts a security threat assessment that includes a review of citizenship status and criminal history records. An individual poses a security threat when TSA determines or suspects that individual is a threat to national security, to transportation security, or poses a threat of terrorism.[2]

The regulation provides for the TSA to notify an individual that he poses a security threat warranting denial of an application for a hazardous materials endorsement. An individual may appeal the initial notification within 15 days after the initial notification is issued **only** if the individual is asserting that he or she meets the standards for authorization of the endorsement. An individual may make this assertion by presenting evidence that an underlying criminal record is incorrect or that the conviction was pardoned, expunged, or overturned on appeal.

If TSA determines that an individual poses a security threat, a final notification is issued to the individual and the state in which that individual applied for authorization. Once final determination has been made, TSA provides a final notification indicating that the department has determined that the individual poses a security threat warranting denial of authorization. The individual may not appeal this determination, but may apply for a waiver. For purposes of judicial review, the final notification constitutes a final TSA order in accordance with 49 U.S.C. 46110.

A person who does not meet the standards for authorization for a hazardous materials endorsement may apply to TSA for a waiver. In determining whether to grant a waiver, if the disqualification was based on a disqualifying criminal offense, TSA will consider: the circumstances of the disqualifying offense; restitution made; any federal or state mitigation remedies; and other factors that indicate the person does not pose a security threat.

[1] Broad Agency Announcement (BAA No. DTRS56-02-BAA-0005), U.S. Transportation Security Administration, June 24, 2002.
[2] 49 C.F.R. Part 1572 (2003).

Background on Florida Law related to Seaport Security
The 2000 Legislature directed the Governor's Office of Drug Control Policy to develop a statewide security plan for Florida's 14 public seaports. The Office of Drug Control was directed to develop statewide minimum security standards and each seaport was required to develop individual security plans based on the statewide standards, pursuant to chapter 2000-360, Laws of Florida.

Section 311.12, F.S., provides statewide minimum security standards for the following deepwater seaports: Jacksonville, Port Canaveral, Fort Pierce, Palm Beach, Port Everglades, Miami, Port Manatee, St. Petersburg, Tampa, Port St. Joe, Panama City, Pensacola, Key West, and Fernandina. Each seaport must maintain a security plan that is tailored to meet the individual needs of the port and assures compliance with the statewide standards. As part of each security plan, a seaport may designate restricted access areas within the seaport. These restricted areas include those areas required by federal law to be "restricted" or "secure" areas, and any other areas selected by a seaport for designation as a restricted area.

Section 311.12(3)(a), F.S., requires that a fingerprint-based criminal history check be performed on any applicant for employment, every current employee, and other persons as designated pursuant to the seaport security plan. Each seaport security plan must identify criminal convictions or other criminal history factors that disqualify a person from either initial seaport employment or new authorization for regular access to seaport property or to a restricted area.

Pursuant to s. 311.12(3)(c), F.S., any person who has within the past seven years been convicted, regardless of whether adjudication was withheld, for the following offenses, does not qualify for employment or access to restricted areas at a seaport:

- A forcible felony as defined in s. 776.08, F.S.
- An act of terrorism as defined in s. 775.30, F.S.
- Planting of a hoax bomb as provided in s. 790.165, F.S.
- Manufacture, possess, sale, delivery, display, use, or attempted or threatened use of a weapon of mass destruction or hoax weapon of mass destruction as provided in s 790.166, F.S.
- Dealing in stolen property;
- Narcotics trafficking;
- Any violation involving the sale, manufacturing, delivery, or possession with intent to sell, manufacture, or deliver a controlled substance;
- Burglary;
- Robbery;
- Display, use, threaten, attempt to use any weapon while committing or attempting to commit a felony;
- Any crime an element of which includes use or possession of a firearm;
- Any conviction for any similar offenses under the laws of another jurisdiction; or
- Conviction for conspiracy to commit any of the listed offenses.

A person who has been convicted for any of the offenses listed does not qualify for initial employment or authorized regular access to either a seaport or restricted area unless, after release from incarceration (and any post-incarceration supervision), the person remains free from any subsequent conviction for such offenses for seven years preceding the employment or access date under consideration.

Each seaport subject to the statewide minimum seaport security standards must use a Uniform Port Access Credential Card that is accepted at all identified seaports. Each seaport is responsible for operating and maintaining the system to control access security within the boundaries of the seaport. A fingerprint-based criminal history check is performed on each credential applicant to determine that the individual does not have a conviction for a disqualifying criminal offense.

Each seaport security plan may establish a procedure to appeal a denial of employment or access based on procedural inaccuracies or discrepancies regarding criminal history factors. A seaport also may allow waivers on a temporary basis to meet special or emergency needs of the seaport or its users. All waivers granted under these provisions must be reported to FDLE within 30 days of issuance, according to s. 311.12(3)(b), F.S.

Chapter 2003-96, Laws of Florida, increased from five years to seven years the period of time for which an individual must remain free of a conviction for a disqualifying offense before that individual may qualify for employment or restricted area access on a seaport. The law also increased from five to seven years the length of time a person must remain conviction-free after release from incarceration before he or she may qualify for employment or restricted area access.

Shortly after the passage of Chapter 2003-96, the FDLE addressed concerns about an unintended potential consequence the law might have on seaport workers who had met the five-year, conviction-free requirement under the prior law and who were employed in secured areas of seaports, but had not yet reached the seven-year conviction-free requirement. FDLE determined that in instances such as this, a seaport could exercise its authority under s. 311.12(3)(b), F.S., so that otherwise acceptable workers who had met the five-year requirement under the previous law to continue to work under a waiver of access standards. Based on this determination, FDLE advised that limited waivers of criminal history standards may be granted by seaports to workers whose sole disqualification is that the person has not yet secured a full seven-years, conviction-free period as required by law. FDLE advised that these temporary waiver options are currently available to seaports without a modification to existing law.[3]

Effect of Proposed Changes

HB 1683 w/CS amends s. 311.12, F.S., to require that each seaport security plan includes a procedure for notifying persons who are disqualified from employment within, or regular access to, a seaport or a restricted area within a seaport. The security plan must include a procedure for an individual to appeal a seaport's decision.

The procedure for notification and appeal must be in substantial compliance with 49 C.F.R., Part 1572, which provides regulations for the issuance of hazardous materials endorsements for commercial drivers licenses and individuals who hold or are applying for a hazardous materials endorsement. As drafted in HB 1683 w/CS, the basic procedure must include, but is not limited to:

- Written notification to the individual that he or she poses a security threat to the seaport and is disqualified for employment in or access to the seaport. The notification also must include the basis for the determination and information about the correction of records and appeal procedures.
- An individual may appeal a disqualification determination only if the individual asserts that he or she meets the seaport's qualifications for the position for which he or she applied. If the disqualifying determination is based on a conviction for a disqualifying offense, the individual may present evidence that the underlying criminal record is incorrect or that the conviction was pardoned, expunged or overturned on appeal; such pardon, expungement, or conviction may nullify a disqualifying conviction if the pardon, expungement, or conviction does not impose any restrictions on the person.
- A person may initiate an appeal of a disqualification determination in writing to the seaport within 15 days of receiving notification of the determination. If the individual does not initiate an appeal within that time, the seaport's decision is final.
- The individual may make a written request to the seaport for copies of materials upon which a disqualification determination is based. If the determination was based on a state or Federal Bureau of Investigation criminal history record that the person believes is erroneous, the individual may correct the record and submit corrections to the seaport, which must respond within 30 days after

[3] Office of General Counsel, Florida Department of Law Enforcement, Memorandum from General Counsel Michael Ramage to Chief of Domestic Security Stephen Lauer, June 25, 2003.

receiving an individual's request for materials. The seaport is required to provide the individual a copy of releasable materials and the seaport may not include any classified information as provided under federal law.

- An individual may serve a written reply to the seaport stating that the seaport made errors when issuing a disqualification determination.
- A seaport is required to respond to an appeal no later than 30 days after receiving an individual's request. If a seaport determines that a person poses a security threat, the seaport must provide written notice to the individual of its final decision that the person is disqualified for employment in or access to the seaport. If, upon reconsideration, the seaport concludes that the individual does not pose a security threat, the individual must be given written notification of this decision, and the seaport must issue a Uniform Port Access Credential Card to the individual.
- If a seaport decides that the individual poses a security threat, that determination is considered "final agency action" and the disqualified person is able to appeal that decision first through an administrative hearing, if the seaport is subject to Chapter 120, F.S., the Florida Administrative Procedures Act. Otherwise, the disqualified individual must appeal a seaport's decision directly to circuit court.

HB 1683 w/CS also provides a "grandfather clause" intended to apply to those seaport workers last year who may have lost their jobs or lost their security access because they did not meet the 2003 legislative requirements that they be conviction-free for seven years, rather than five. Seaport employees who held security credentials on June 3, 2003, but did not meet the seven-year conviction-free requirement implemented by Chapter 2003-96, Laws of Florida (SB 1616), shall not be denied security access, if they meet other criteria. This provision is repealed on June 4, 2005.

New and prospective seaport employees will have to meet the seven-year requirement currently in law.

Finally, the bill requires that by October 1 of each year, each seaport must report to the FDLE the number of waivers issued during the previous 12 months.

HB 1683 w/CS takes effect July 1, 2004.

C. SECTION DIRECTORY:

Section 1: Amends s. 311. 12, F.S., to delete provisions allowing each seaport to establish procedures for persons to appeal a denial of employment or security access that based on inaccuracies or discrepancies about their criminal histories; to create a waiver process; and to include these two processes in its seaport security plan. Directs each seaport to establish procedures by which persons are notified in writing that they have been disqualified for employment or restricted-security access, and which can be appealed. Requires annual notification to the FDLE about numbers of waivers issued. Makes technical changes.

Section 2: Amends s. 311.125, F.S., to make technical grammar changes.

Section 3: Re-enacts s. 315.02, F.S., because the definition of "port facilities" in this chapter, which addresses seaport financing and how seaports may spend their public funding, includes a reference to "security measures identified pursuant to s. 311.12," F.S.

Section 4: Provides that those seaport employees who held security credentials on June 3, 2003, but did not meet the seven-year conviction-free requirement implemented by Chapter 2003-96, Laws of Florida, shall not be denied security access. Repeals this provision on June 4, 2005.

Section 5: Provides that this act shall take effect July 1, 2004.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   Not applicable.

2. Expenditures:

   Not applicable.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   Not applicable.

2. Expenditures:

   Indeterminate. Section 311.12, F.S., currently directs the seaports, which are considered units of local government, to develop an employment and security -access appeals process, but the process described in HB 1683 w/CS is more subjective and complicated than what seaport officials originally envisioned, based on conversations with staff of the Florida Ports Council. Administrative and judicial appeals as part of the process also were not anticipated by the seaports, and could be costly, if extensive.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate. As mentioned above, seaports may experience unanticipated expenses with the appeals process created in HB 1683 w/CS, so conceivably could raise the fees, rents, or other charges they assess their private tenants and customers to cover higher operating costs.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   This mandates provision is not applicable to HB 1683 w/CS because the bill does not require counties or municipalities to expend local funds or to raise local funds, nor does it reduce their state revenue-sharing.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

Florida's 14 public seaports are units of local government, but do not appear to have been made expressly subject to chapter 120, F.S., by general or special law or by judicial decision. Most of the seaports are managed by boards comprised of local elected officials or are dependent special districts with a majority of their governing boards being elected officials, and as such are not subject to the rulemaking or other provisions of the Administrative Procedures Act.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The Florida Seaports Council and the FDLE have expressed concerns about HB 1683 w/CS. These entities have said establishing an appeals process in state law may be premature, since the TSA continues to work on developing a federal process. FDLE also noted that the process created in the bill is based on the appeals process for commercial drivers who have been denied a hazardous materials endorsement on their licenses, and this process may be different from what TSA eventually adopts for those persons denied seaport security access and employment.

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

At its March 30, 2004, meeting, the House Transportation Committee adopted three amendments without objection. Briefly:

- Amendment #1: Clarified that disqualification decisions by those seaports subject to chapter 120, F.S., the Administrative Procedures Act, are "final agency actions" and subject to administrative appeal. Those persons disqualified by seaports not subject to Chapter 120, F.S., have no administrative recourse and must appeal the decision to circuit court.

- Amendment #2: Deleted a provision that would have reduced from seven years to five years the amount of time a seaport employee or job applicant must remain conviction-free in order to meet the security requirements for employment or restricted access.

- Amendment #3: Addresses the issue of those seaport employees who had security credentials as of June 3, 2003, but with the implementation of SB 1616 (Chapter 2003-96, F.A.C.) and its seven-year conviction-free requirement, may have lost their jobs or lost security clearance. The amendment grandfathers-in those employees, as long as they meet all of the other job requirements. This provision is repealed June 4, 2005.

The committee then voted 13-4 in favor of the bill, which was reported favorably as a CS.