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: SB 2086

SPONSOR: Senator Villalobos

SUBJECT: DJJ Employment Screening

DATE: April 9, 2004 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Dugger	Cannon	CJ	Favorable
2.	Cibula	Lang	JU	Favorable
3.			GO	
4.			ACJ	
5.			AP	
6.				

I. Summary:

Senate Bill 2086 increases the screening level required for Department of Juvenile Justice (DJJ) employees from a Level 1 to a Level 2. In addition, the bill prevents the DJJ from removing a disqualification from employment or granting an exemption from the screening requirements for any employee who is found guilty of, regardless of adjudication, or who entered a plea of guilty or nolo contendere to three or more of the enumerated disqualifying offenses, regardless of the time of disposition.

The bill creates a new section in ch. 435, F.S., providing that an arrest, in addition to a guilty disposition, may also be used in determining whether a person satisfies the requirement for "good moral character." The bill amends specific sections of statutes which address employment by the Department of Children and Family Services (DCF) and the DJJ to provide that a person may be disqualified or denied an exemption from employment disqualification if the person "fails to satisfy the requirement of good moral character as evidenced by criminal history information documenting multiple arrests or convictions."

Finally, the bill creates a new section of ch. 435, F.S. that would allow 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. This means that any future bill containing cross references to this chapter would not need to reenact the referenced statute, and that any changes to the screening requirements or exemptions provided in ch. 435, F.S., would not need to reenact adopting statutes containing cross references to ch. 435, F.S.

This bill creates ss. 435.015 and 435.025, amends ss. 435.04, 984.01, 985.01, and 985.407, and reenacts ss. 400.953, 943.0585, 943.059, and 985.05.

II. Present Situation

Background Screening Requirements

Several agencies such as the Department of Education, the Department of Children and Families (DCF), and the Department of Juvenile Justice (DJJ) have statutes mandating that employees be of "good moral character." Chapter 435, F.S., provides two levels of employment background screening. Under s. 435.03, F.S., Level 1 screenings include background checks in the form of employment history checks and statewide criminal history checks, and may include local criminal history checks. At this screening level, the person must not have been convicted of or pled guilty to certain enumerated disqualifying offenses, including in part, murder, child abuse, or prostitution.

Section 435.04, F.S., provides for Level 2 screenings, which are more comprehensive. This level requires employment history checks and fingerprint-based state and federal criminal records checks and may include local criminal records checks. The list of disqualifying offenses is more extensive for Level 2 screenings than it is for Level 1 screenings. Although s. 985.407(4), F.S., directs the DJJ to require Level 1 screening for personnel in delinquency facilities and programs, s. 984.01(2)(b), F.S., and s. 985.01(2)(b), F.S., require the DJJ to use Level 2 screenings. According to the department, Level 2 screenings are currently being conducted pursuant to s. 984.01, F.S., and s. 985.01, F.S.

Current law also provides that departments may grant an exemption to employees who would otherwise be disqualified from employment. Under s. 435.07, F.S., exemptions may be granted for felonies committed more than three years ago, any misdemeanor, delinquent act, or act of domestic violence. However, s. 435.04(3), F.S., provides that the DJJ is prohibited from granting an exemption for an offense occurring within the last seven years. Arrests are not currently used to determine whether to disqualify a person from employment; the disposition of that arrest is the determining factor.

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." 364 So.2d at 458.

Generally, good moral character is required in statutes regulating licensure of various professions and occupations, including family foster home personnel (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. 472.013(5)(a), F.S.), engineers (s. 471.013(1)(a), F.S.), and teachers (s. 1012.56(2)(e), F.S.). The DCF and DJJ employees and contracted program providers are also required to be of good moral character under s. 984.01, 985.01(2), and s. 985.407(3), F.S.

Recently, there have been some high profile cases that have highlighted issues involving the qualifications and screening process for certain state agencies whose employees and private providers interact with children. A recent grand jury investigating the death of Omar Paisley, a youth being held in a DJJ detention center in Miami who died of a burst appendix last summer, stated in its final report that:

"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."

The Final Report of the Miami-Dade Grand Jury Report, filed January 27, 2004 at 34.

Incorporation by Reference

Current law allows for one section of statute to reference another section. 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.

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. 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 punishment for criminal offenses (s. 775.082, s. 775.083, and s. 775.084, F.S.) contain clauses which allow for any reference to them to constitute a general reference. 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.

III. Effect of Proposed Changes:

Senate Bill 2086 increases the screening level of Department of Juvenile Justice (DJJ) employees from a Level 1 to a Level 2. (According to the DJJ, Level 2 screening is already being done.) In addition, the bill prevents the DJJ from removing a disqualification from employment or granting an exemption from the screening requirements for any employee who is found guilty of, regardless of adjudication, or who entered a plea of guilty or nolo contendere to three or more of the enumerated disqualifying offenses, regardless of the time of disposition. (They are currently eligible to be removed after seven years.)

The bill creates a new section in ch. 435, F.S., providing that an arrest, in addition to a guilty disposition, may also be used in determining whether a person satisfies the requirement for "good moral character." It would provide that "[a]ny 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 may be considered in determining whether such person satisfies the requirement, notwithstanding the disposition of the arrest."

The bill also amends specific sections of statutes that address employment by the Department of Children and Families (DCF) and the DJJ to provide that a person may be disqualified or denied an exemption from employment disqualification if the person "fails to satisfy the requirement of good moral character as evidenced by criminal history information documenting multiple arrests or convictions."

Finally, the bill creates another new section in ch. 435, F.S., that would allow 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. This means that any future bill containing cross references to this chapter would not need to reenact the referenced statute, and that any changes to the screening requirements or exemptions provided in ch. 435, F.S., would not need to reenact adopting statutes containing cross references to ch. 435, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Imposing permanent disqualification upon individuals with three or more disqualifying offenses could be challenged as creating an irrebuttable presumption because such persons will be unable to access the exemption process. This challenge would likely be 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 in that it is reasonable for the Legislature to preclude such persons from having direct contact with clients.

Because s. 435.03, F.S., requires background screenings 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 that 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,

> 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. *Id.*

Notwithstanding this point, SB 2086 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 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 ch. 120, F.S. Moreover, a court would likely find 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.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Since according to the DJJ, it currently conducts Level 2 screenings instead of Level 1, there should not be an increased fiscal impact upon current or perspective employees.

C. Government Sector Impact:

According to the DJJ, there will be no fiscal impact on it.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.