

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 226

SPONSOR: Senators Posey and Fasano

SUBJECT: Law Enforcement Fair Defense Act

DATE: February 25, 2004 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Cellon</u>	<u>Cannon</u>	<u>CJ</u>	<u>Favorable</u>
2.	<u>Brown</u>	<u>Lang</u>	<u>JU</u>	<u>Favorable</u>
3.	<u>Herrin</u>	<u>Yeatman</u>	<u>CP</u>	<u>Favorable</u>
4.	_____	_____	<u>ACJ</u>	_____
5.	_____	_____	<u>AP</u>	_____
6.	_____	_____	_____	_____

I. Summary:

The bill creates the Law Enforcement Fair Defense Act by revising existing law, to require an agency to provide and pay for legal representation for criminal cases against a law enforcement officer, under certain circumstances. Specifically, the bill:

- Broadens the definition of officer to include law enforcement officer, corrections officer, and correctional probation officer for purposes of who may qualify for the provision and payment of legal representation in a civil or criminal action.
- Requires an employing agency to provide and pay for legal representation in criminal actions against an officer if all of the following criteria are met:
 - (a) The officer's action occurred in response to an emergency; upon the need to protect the officer or others from imminent death or bodily harm; or during an officer's fresh pursuit, apprehension, or attempted apprehension of a suspect whom the officer reasonably believes has perpetrated or attempted to perpetrate a forcible felony or escape;
 - (b) The officer's actions arose within the course and scope of duties; and
 - (c) The officer's actions were not acts of omission or commission which constituted a material departure from written policies and procedures, or from generally recognized criminal justice standards in the absence of policies and procedures.
- Provides an alternative process for an agency to reimburse an officer's legal representation when the agency does not provide an attorney or the officer does not use the agency's attorney, if the officer did not plead guilty, nolo contendere, or was not found guilty at trial.
- Caps reimbursement for fees and costs under the alternative process at \$100,000.

This bill substantially amends section 111.065 of the Florida Statutes.

II. Present Situation:

Under current law, an employing agency of a law enforcement officer is authorized, but not obligated, to pay legal costs and reasonable attorney's fees for any officer's defense in a civil action under specified circumstances.¹ An action must have arisen out of the performance of the officer's official duties, and the plaintiff must request dismissal of the suit, or the officer is found not liable or not guilty, for the agency to cover defense costs.²

A law enforcement officer is defined as "any person employed full time by any municipality or the state or any political subdivision thereof or any deputy sheriff whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, traffic, or highway laws of this state."³ In ch. 943, F.S., governing the Department of Law Enforcement, a law enforcement officer is more specifically defined as:

...any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency.⁴

Civil Actions Against Law Enforcement Officers

Currently, any agency of the State, or any county, municipality, or political subdivision is authorized to:

Provide an attorney to defend any civil action arising from a complaint for damages or injury suffered as a result of any act or omission of action of any of its officers, employees, or agents for an act or omission arising out of and in the scope of his or her employment or function, unless, in the case of a tort action, the officer, employee, or agent acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety or property.⁵

However, the state, a municipality, a county, or other political subdivision, may recover attorney's fees paid from public funds from the law enforcement officer, if the employee is found personally liable by having acted outside the scope of employment, or having acted in bad faith,

¹ Section 111.07, F.S.

² Section 111.07, F.S.

³ Section 111.065(1), F.S.

⁴ Section 943.10(14), F.S., defines an "officer" as "any person employed or appointed as a full-time, part-time, or auxiliary law enforcement officer, correctional officer, or correctional probation officer." Unlike the definition in s. 111.065(1), F.S., the s. 943.10(14), F.S., definition includes correctional officers and correctional probation officers.

⁵ Section 111.07, F.S.

with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety, or property.⁶

State agencies have access to a self-insurance fund to pay defense counsel in certain civil actions, including counsel from the Office of the Attorney General's Civil Division or a private law firm that contracts with the State. If the civil action falls outside of those areas, the agency may pay the officer's legal defense out of its own funds. In practice, most law enforcement agencies provide legal representation for a civil action against an officer until a conflict of interest arises. At that point, the agency may hire separate legal counsel for the officer.

The State operated self-insurance fund covers claims for worker's compensation, general liability, fleet automotive liability, federal civil rights actions under 42 U.S.C. s. 1983 or similar federal statutes, and court-awarded attorney's fees in other proceedings, except awards in eminent domain and inverse condemnation actions or awards by the Public Employees Relations Commission.⁷ This fund, the State Risk Management Trust Fund, is administered by the Department of Financial Services. Claims covered by the Fund must be immediately reported to the department, so that they can assign counsel and receive reports on the status of litigation.⁸

In most cases brought against an officer for actions taken while on duty, the employing agency is additionally named in the action. In practice, most agencies opt to provide legal representation for the officer's civil or criminal defense until a conflict of interest arises. At that point, the agency may hire separate legal counsel for the officer. Usually, the cost of defense is covered by insurance or self-insurance. Some agencies expressly provide for defense in their union contract.⁹

Course and Scope of Employment

In third-party liability actions, an entity may be liable for the negligent acts of its employees, but only when those acts occurred in the course and scope of the employee's duties. In addition, the act must not have been taken in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard of human rights, safety, or property. The Legislature has expressly waived sovereign immunity in tort actions for claims against its agencies and subdivisions, resulting from the negligent or wrongful act or omission of an employee acting within the scope of employment, and established limits on the amount of liability.¹⁰ A claim or judgment by any one person may not exceed \$100,000, and may not exceed \$200,000 paid by the state or its agencies or subdivisions for claims arising out of the same incident or occurrence.¹¹

⁶ Section 111.07, F.S.

⁷ Section 284.31, F.S.

⁸ Section 284.385, F.S.

⁹ For example, the City of Atlantic Beach, in its contract with the police union, agrees "to provide at no cost to the employee, the services of an attorney to defend the employee against any civil actions brought against him while acting as an agent of the City, in the line of duty and on the city's behalf, unless such action is brought about by an act of the employee due to his own violation of Department Rules, Policies, Procedures or Instructions, negligence, carelessness or the employee acted in bad faith, with malicious purpose, or in a manner exhibiting wanton and willful disregard for human rights, safety, or property."

¹⁰ Section 768.28(1), F.S.

¹¹ Section 768.28(5), F.S.

In *Sussman v. Florida East Coast Properties, Inc.*,¹² a fitness instructor who picked up a cake on her way to work as requested by her boss, was distracted as she attempted to stop the cake from falling off the seat, causing her to hit the plaintiff. The court relied on a three prong test in holding that the employee was not acting within the course and scope of employment. An employee's actions are within the course and scope of employment, the court ruled, in assessing the employer's vicarious liability to third persons injured by the employee, only if:

- (a) the conduct is of the kind the employee is hired to perform;
- (b) the conduct occurs substantially within the time and space limits authorized or required by the work to be performed; and
- (c) the conduct is activated at least in part by a purpose to serve the master.¹³

Craft v. John Sirounis and Sons, Inc.,¹⁴ involved an off-duty officer who was injured in a drunken bar room brawl with four off-duty police officers. None of the officers wore uniforms or badges, or carried guns. Craft sued the cities of Fort Lauderdale and Deerfield Beach, the employers of the officers. Each officer asserted they were on duty 24 hours a day. The Fourth District Court of Appeal applied the *Sussman* test to conclude that the officers' conduct was not within the scope of employment "nor was their action in the interest of the cities."¹⁵

Fresh Pursuit

Many civil cases against police departments and law enforcement officers have arisen due to injuries to third persons caused by high-speed chases by officers in "fresh pursuit" of a suspect. Early court cases implicitly recognized a fundamental social cost-benefit analysis regarding immunity from liability for an officer's decision to pursue despite the inherent risk of harm to innocent persons.¹⁶ Over the years, actions of officers during high-speed pursuits, including what functions are discretionary or operational and whether benefits outweigh risks, have come under increased judicial and public scrutiny. Partly in response to this scrutiny, many law enforcement agencies have adopted high-speed pursuit policies.

In *City of Pinellas Park v. Brown*,¹⁷ the Florida Supreme Court ruled that the police failed to meet the duty of care in a high-speed pursuit, in that a substantial risk of injury to a foreseeable victim was created by the police themselves, and the duty would have existed regardless of whether a specific policy governing pursuits was in place. Although the hot pursuit chase is an operational function, the court concluded, it is not immune from liability or subject to sovereign immunity if done in a manner contrary to public reason and safety.

¹² 557 So. 2d 74 (Fla. 3d DCA 1990).

¹³ *See id.* at 76, *citing*, *Kane Furniture Corp. v. Miranda*, 506 So. 2d 1061 (Fla. 2d DCA 1987). *See also* *Whetzel v. Metropolitan Life Ins. Co.*, 266 So. 2d 89 (Fla. 4th DCA 1972).

¹⁴ 575 So. 2d 795 (Fla. 4th DCA 1991).

¹⁵ *See id.* at 11.

¹⁶ *See City of Miami v. Horne*, 198 So. 2d 10 (Fla. 1967).

¹⁷ *See* 604 So. 2d 1222 (Fla. 1992).

Criminal Charges Against Law Enforcement Officers

Under current law, an agency has the *option* under s. 111.065, F.S., to cover costs of criminal defense for an officer, but these costs are payable from the agency's own funds. The State self-insurance fund cannot cover the cost of any criminal defense.¹⁸

The majority of employing agencies do not provide legal defense of an officer who is charged criminally. However, an officer that has been charged criminally may request union representation, assuming the officer is a member and the union provides representation in a criminal action as part of its benefits. The Police Benevolent Association currently provides representation to its members as a union member benefit, if the alleged criminal conduct occurred in the line of duty.

Survey of Attorney's Fees and Costs Paid by Law Enforcement Agencies

The Florida Legislative Committee on Intergovernmental Relations conducted a survey of law enforcement agencies regarding the number and costs of civil and criminal actions brought against full-time officers employed in the fiscal year ending September 30, 2001. The surveys were sent to approximately 400 municipalities and 67 counties with the following results:

1. Municipalities (115 responded-28 percent)

- 83 reported no civil or criminal actions against full-time law enforcement officers for FY ending September 30, 2001.
- 30 municipalities responded that they had civil actions against full-time law enforcement officers for FY ending September 30, 2001.
- 2 municipalities responded that they also had criminal actions against full-time law enforcement officers for FY ending September 30, 2001 (Cities of St. Petersburg and Daytona Beach).

Many municipalities with actions taken against their law enforcement officers were covered in full or by deductible insurance policies.¹⁹

2. Counties (12 counties-18 percent)

- 6 counties reported that they had no civil or criminal actions against full-time law enforcement officers for FY ending September 30, 2001.
- 5 counties responded that they had civil actions against full-time law enforcement officers for FY ending September 30, 2001.
- 1 county (Hillsborough) also had criminal actions against full-time law enforcement officers for FY ending September 30, 2001.

As was the case with municipalities, the majority of counties with actions taken against their law enforcement officers were covered in full or by deductible insurance policies.

Calculation of Reasonable Attorney's Fees

¹⁸ Section 284.31, F.S., specifies the scope and types of coverage for the Insurance Risk Management Trust Fund, and these do not include criminal charges.

¹⁹ LCIR FAXNET Survey Data on HB 575, Law Enforcement Fair Defense Act, January 2002.

Lodestar provisions refer to the calculation of attorney's fees by formula as defined by the Florida Supreme Court, based on the number of hours reasonably expended multiplied by a reasonable hourly rate.²⁰ In calculating the hourly rate, the court is to consider a multitude of factors, including the time and labor required, novelty and difficulty of the question, skill necessary to perform the legal service properly, likelihood that the acceptance of the particular employment will preclude other employment by the lawyer, fee customarily charged in the locality for similar legal services, experience, reputation, and ability of the lawyer or lawyers performing the service, and whether the fee is fixed or contingent.²¹

III. Effect of Proposed Changes:

Section 1 provides the act may be cited as the "Law Enforcement Fair Defense Act."

Section 2 amends s. 111.065, F.S., to expand the scope of the term "officer" so that it includes law enforcement officer, correctional officer, and correctional probation officer as defined in s. 943.10, F.S. Subsection (2) of s. 111.065, F.S., is amended to change the prerequisites under which an employing agency may pay an officer's reasonable attorney's fees in a civil or criminal action to also include costs when the underlying basis for the action arose out of an officer's official duties.

Subsection (3) of s. 111.065, F.S., is created to require an employing agency to provide and pay for the legal defense of an officer in a criminal action if the employing agency determines that the officer's actions that gave rise to the charges occurred in response to what the officer reasonably believed was an emergency; to protect the officer or others from imminent death or bodily harm; or during an officer's fresh pursuit, apprehension, or attempted apprehension of a suspect whom the officer reasonably believed has perpetrated or attempted to perpetrate a forcible felony or escape; arose within the course and scope of the officer's duties; and were not acts of omission or commission which constituted a material departure from the employing agency's written policies and procedures, or from generally recognized criminal justice standards in the absence of written policies and procedures.

Newly-created subsection (4) of s. 111.065, F.S., provides that when legal representation is requested under subsection (3) and the employing agency does not provide an attorney or the officer does not use the employing agency's attorney, the officer can select an attorney from a list provided by the employing agency or choose his or her own attorney.

An officer can request reimbursement for legal representation under this subsection if the officer's actions did not result in a guilty or nolo contendere plea, or in a finding of guilt by a court or jury to any offense charged or any lesser or included offense that is substantially related to the offense charged. The reimbursement and determination of reasonable attorney's fees and costs is as follows:

1. The officer has 30 days from the termination of the criminal case to submit an application for payment, which shall include an itemization statement from an attorney or expert witness

²⁰ See *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145, (Fla. 1985).

²¹ See *id.* at 1150.

representing the officer, with the actual time expended and the rate at which fees and other expenses were computed. The officer is specifically prohibited from applying for the recovery of attorney's fees and costs incurred in an effort to collect the attorney's costs and fees provided for by the bill. The agency and the officer have 30 days thereafter to reach an agreement on the amount payable, or for payment to take place.

2. If the officer and the employing agency do not reach an agreement or payment is not provided within 30 days, the officer may submit his or her application for reimbursement to the court within 30 days of the failure to reach an agreement, failure to pay, or 30 days after the conclusion of the criminal action, whichever is later. The employing agency has the right to respond to the application. The court then is required to make a determination based on prevailing market rates for the defense of similar actions, other relevant factors, and whether the officer's actions complied with subsection (3). However, the amount is capped at \$100,000. Also, the court is prohibited from applying a lodestar or fee multiplier provision to determine reasonable attorney's fees and costs under this subsection.

Section 3 provides that this bill shall take effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

To the extent that political subdivisions including cities and counties (through the sheriff's department) are obligated to pay the legal costs and reasonable attorney's fees for certain civil and criminal actions brought against law enforcement officers, the bill could constitute a mandate as defined in Article VII, Section 18(a) of the Florida Constitution for which no funding source is provided to such political subdivisions:

No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the Legislature has determined that such law fulfills an important state interest and unless: funds have been appropriated that have been estimated at the time of enactment to be sufficient to fund such expenditure; the Legislature authorizes or has authorized a county or municipality to enact a funding source not available for such county or municipality on February 1, 1989 ... and the law requiring such expenditure is approved by two-thirds of the membership of each house of the Legislature...

For purposes of legislative application of Article VII, Section 18 of the Florida Constitution, the term "insignificant" has been defined as a matter of legislative policy as an amount not greater than the average statewide population for the applicable fiscal year times ten cents. A bill that would have a statewide fiscal impact on counties and municipalities in the aggregate or in excess of \$1.73 million would be characterized as a mandate. While the terms of the bill limit the exposure of the employing agencies payment of attorney's fees and costs to no more than \$100,000 per action, 18 lawsuits

involving \$100,000 in attorney's fees and costs per case would reach the mandate threshold.

In the event that the fiscal impact of this bill would exceed \$1.73 million, the bill may be excepted from the constitutional mandate funding requirements, given its legislative finding that it fulfills an important state interest, if it is passed by two-thirds of the membership in both houses of the Legislature.²²

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

This bill does not include constitutionally required language that provides that the Legislature has determined that this legislation fulfills an important state interest. Section 18 of Article VII of the State Constitution provides:

(a) No county or municipality shall be bound by any general law requiring such county or municipality to spend funds or to take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless....

This bill sets a \$100,000 cap on attorney's fees and costs. The issue of fee caps was recently addressed in a Florida Supreme Court case, *Olive v. Maas*.²³ At issue in *Olive* was the trial court's authority to grant fees in excess of the fee caps set forth in s. 27.711, F.S., relating to capital collateral cases, for a registry attorney who did not sign the services contract, contending that by agreeing to the statutory cap in the contract, the attorney would be waiving any other compensation to which he or she may be entitled. The court held that where extraordinary or unusual circumstances exist in a capital collateral case, the cap may be exceeded to ensure adequate representation.

The court reaffirmed its ruling and reasoning in *Makemson v. Martin County*,²⁴ and held that extraordinary circumstances may be used as a basis for exceeding the statutory fee cap. The court stated:

“it is within the inherent power of Florida's trial courts to allow, in extraordinary and unusual cases, departure from the statute's fee guidelines when necessary in order to ensure that an attorney who has served the public by defending the

²² See Article VII, s. 18(a) of the Florida Constitution.

²³ 811 So. 2d 644 (Fla. 2002).

²⁴ 491 So. 2d 1109 (Fla. 1986).

accused is not compensated in an amount which is confiscatory of his or her time, energy and talents. . . . Trial and appellate judges, well aware of the complexity of a given case and the attorney's effectiveness therein, know best those instances in which justice requires departure from statutory guidelines."²⁵

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Officers qualifying under the Act will be able to obtain legal representation and payment of attorney's fees and costs in specified actions providing the actions arose within the course and scope of employment and satisfy other criteria.

C. Government Sector Impact:

All full-time officers, correctional officers, and correctional probation officers are now accorded the same potential benefit if the employing agency opts to pay for their legal fees and costs associated in their defense in certain civil or criminal cases. These same officers will benefit from the employing agency being required to provide and pay for legal representation in specified criminal actions.

The employing agency of the state, municipality, or any political subdivisions of a law enforcement officer will now incur the additional costs of providing and paying for the criminal defense of a broader category of law enforcement officers whose actions meet the criteria of the bill. Because the State Risk Management Trust Fund does not provide coverage for criminal actions, these attorney's fees and costs would have to be paid out of general revenue dollars.

Budgeting for attorney's fees and costs that may or may not be incurred during the next budget period may be difficult at best.

This bill may result in a burden on the courts due to an increase in litigation regarding a failure to reach an agreement over attorney's fees.

VI. Technical Deficiencies:

None.

²⁵ See *id.* at 1115.

VII. Related Issues:

- Under the rules of statutory construction, a section of law that cross-references another section or portion thereof that is subsequently amended does not incorporate those amendments unless the section containing the cross-reference is reenacted (republished). Otherwise, the statutory cross-reference is linked to the version of the section that existed prior to the amendment. Section 111.065, F.S., as revised by this bill, is cross-referenced in s. 633.175, F.S., which relates to the right to request release of information connected to an investigation of fraudulent insurance claims, and makes reference to the definition of “law enforcement officer” as contained in s. 111.065, F.S.
- Because the State Risk Management Trust Fund coverage does not provide for the defense of criminal claims, there is no mechanism for paying attorney’s fees and costs for the criminal defense of law enforcement officers employed by the state out of the state self-insurance fund. Accordingly, to pay attorney’s fees and costs, a state agency employing officers, as defined in the bill, would likely need to obtain a specific appropriation from the Legislature.
- The Department of Corrections bill analysis raises a concern that this bill may conflict with s. 287.059, F.S., which relates to private attorney services contracted by agencies. s. 287.059, F.S., provides in part:

(2) No agency shall contract for private attorney services without the prior written approval of the Attorney General, except that such written approval is not required for private attorney services:

(c) Necessary to represent the state in litigation involving the State Risk Management Trust Fund pursuant to part II of chapter 284.

(3) An agency requesting approval for the use of private attorney services shall first offer to contract with the Department of Legal Affairs for such attorney services at a cost pursuant to mutual agreement.

VIII. Amendments:

None.