

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/SB 2524

SPONSOR: Home Defense, Public Security and Ports Committee and Senator Hill

SUBJECT: Seaport Security Standards

DATE: April 15, 2004

REVISED: 04/20/04 _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Dodson</u>	<u>Skelton</u>	<u>HP</u>	<u>Fav/CS</u>
2.	<u>Erickson</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/1 amendment</u>
3.	_____	_____	<u>JU</u>	_____
4.	_____	_____	<u>TR</u>	_____
5.	_____	_____	<u>GO</u>	_____
6.	_____	_____	_____	_____

I. Summary:

Committee Substitute for Senate Bill 2524 amends s. 311.12, F.S., to require that each seaport security plan has a procedure for notifying an individual that he or she is disqualified from employment within or regular access to a seaport or a restricted access area. The security plan must include a procedure for an individual to appeal a seaport's decision, and procedures for an appeal must be in substantial compliance with federal regulations governing the issuance of hazardous materials endorsements for commercial driver's licenses. The CS provides a non-exclusive list of those procedures.

Provisions enacted by the Legislature in 2003 in ch. 2003-96, L.O.F., increased from 5 years to 7 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. The CS provides that those seaport workers holding access credentials on June 3, 2003, who, but for the increase from 5 to 7 years implemented by ch. 2003-96, L.O.F., and who are otherwise qualified for seaport access shall not have such access denied. This provision is repealed on June 4, 2005.

The CS provides 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.

This CS amends ss. 311.12 and 311.125, F.S.

II. Present Situation:

Federal Law

The federal government has authority over any public or private port facility located in, on, under, or adjacent to any waters subject to the jurisdiction of the United States. The Maritime Transportation Security Act of 2002 (MTSA)¹ 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 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 Coast Guard vulnerability assessments and security regulations. Such security plans must be approved by the Coast Guard.

Biometric Transportation Security Cards: 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 7-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 5-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 United States under the Immigration and Nationality Act may be denied a card.

Under the MTSA provisions, the U.S. Department of Transportation 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:

- 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.
- Issue a waiver to an individual if the individual's employer establishes alternate security arrangements that are acceptable to the Department of Transportation.

The Department of Transportation is currently 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

¹ Maritime Transportation Security Act of 2002, Pub. L. no 107-295, 116 Stat. 2073 (2002).

hearing. To date, according to the Transportation Security Administration (TSA), 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 TSA.

The Transportation Security Administration is currently establishing a standardized Transportation Worker Identification Credential (TWIC) system consisting 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.² The Transportation Security Administration recently negotiated a Memorandum of Agreement with Florida that allows the state to participate in the federal prototype for the national transportation worker identification card.

Commercial Drivers' Licenses - Appeal and Waiver Process: In addition to the security requirements of the MTSA, the USA PATRIOT Act³ requires states to conduct background checks through the 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; TSA also performs checks of certain databases and watch lists. 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.⁴

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

² Broad Agency Announcement (BAA No. DTRS56-02-BAA-0005), U.S. Transportation Security Administration, June 24, 2002.

³ Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, P.L. 107-56.

⁴ 49 C.F.R. Part 1572 (2003).

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.

Florida Law

In its final report issued in November of 1999, the Florida Legislative Task Force on Illicit Money Laundering recommended the establishment of minimum security standards for the state's seaports. The 2000 Legislature directed the Governor's Office of Drug Control to develop a statewide security plan for Florida's 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.⁵

Statewide Minimum Standards: 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.⁶ 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.

Criminal History Checks: 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.

Any person who, within the past seven years, has been convicted for the following offenses, regardless of whether adjudication was withheld, 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, possession, 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.⁷;

⁵ Ch. 2000-360, L.O.F.

⁶ s. 311.12(2), F.S.

⁷ s. 311.12(3)(c), F.S.

- Dealing in stolen property;
- Drug 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;
- Similar offenses under the laws of another jurisdiction; or
- 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 7 years preceding the employment or access date under consideration.

Uniform Port Access Credential System: 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.

Appeal Procedure/Waivers: 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 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.⁸

III. **Effect of Proposed Changes:**

Notification and Appeal Procedures: The CS amends s. 311.12, F.S., to require each seaport, as part of its security plan, to establish a procedure to notify an individual that he or she is disqualified for employment within or regular access to a seaport or a restricted access area when that individual has been disqualified from employment based on criminal convictions or other criminal history factors. The security plan must also include a procedure by which a person may appeal the decision of the seaport to disqualify that person from employment or restricted area access.

A seaport's procedures 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 driver's licenses and individuals who hold or are applying for a hazardous materials endorsement.

⁸ s. 311.12(3)(b), F.S.

The CS provides a non-exclusive list of notification and appeal procedures for employment disqualification. The Maritime Transportation Security Act of 2002 (MTSA)⁹ requires the Department of Transportation to prescribe federal regulations governing the issuance of transportation worker identification cards to include provisions for background checks, a waiver process, and an appeals process for individuals who are ineligible for a card. As noted previously in this analysis, regulations for the Transportation Worker Identification Credential (TWIC) have not been issued by the Transportation Security Administration, and the date of release for those regulations has not been established. The criteria provided in the CS for use by seaports in developing notification and appeals procedures are similar to those found in federal regulations governing commercial driver licenses. The procedures must include, but are not limited to:

- A seaport must provide written notification to an individual that he or she poses a security threat to the seaport and is disqualified for employment in or access to the seaport. In addition to a statement from the seaport that the individual has been determined to pose a security threat warranting disqualification, the notification 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 applied for. 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. Seaports are required to respond within 30 days after 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

⁹ Maritime Transportation Security Act of 2002, Pub. L. no 107-295, 116 Stat. 2073 (2002).

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 the seaport makes a determination that an individual poses a security threat, the seaport's decision is considered final agency action subject to judicial review under ch. 120, F.S., where applicable, or if the seaport is not subject to ch. 120, F.S., that the seaport's decision is subject to judicial review in circuit court.

A seaport may grant waivers on a temporary basis to meet special or emergency needs. The seaport security plan must include policies, procedures, and criteria for the granting of waivers and the seaport must consider, if a disqualification is based on a disqualifying offense, the circumstances of the offense, whether the individual made restitution, and other factors. The seaport must provide written notification to an individual of its decision regarding a waiver request. Waivers granted under the provisions of this bill must be reported to FDLE within 30 days after issuance.

Chapter 2003-96, L.O.F., increased from 5 years to 7 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 5 to 7 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 ch. 2003-96, L.O.F., FDLE addressed concerns about an unintended potential consequence the law might have on seaport workers who had met the 5 year conviction-free requirement under the prior law and who were satisfactorily employed in secured areas of seaports, but had not yet reached the 7 year conviction-free requirement. FDLE determined that in such instances a seaport could exercise its authority under s. 311.12(3)(b), F.S., to articulate a special need to allow otherwise acceptable workers who had met the 5 year requirement under the previous law to continue to work under waiver of access standards. Based upon 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 7 years conviction-free period as required by ch. 2003-96, L.O.F.

The CS clarifies that those seaport workers holding access credentials on June 3, 2003, who, but for the increase from 5 to 7 years implemented by ch. 2003-96, L.O.F., and who are otherwise qualified for seaport access shall not have such access denied. This provision is repealed on June 4, 2005.

The CS provides 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.

The CS amends s. 311.125, F.S., to make conforming changes as a result of the amendments of s. 311.12, F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The implementation of the appeal and waiver procedures for employment disqualification will have an indeterminate fiscal impact on seaports.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

#1 by Criminal Justice:

The amendment deletes the provision in the CS requiring that notice procedures must be in substantial compliance with federal regulations governing the issuance of hazardous materials endorsements for commercial driver's licenses, and provides procedures for notice when a person is denied employment or access to a seaport and requesting reconsideration of that denial.
(WITH TITLE AMENDMENT)