June 5, 1989

MEMORANDUM

Re: H.B. 1456 -- Ban on Off-Duty Smoking by New Firefighters

The Florida Legislature has passed a bill (H.B. 1456) that would, if signed into law, prohibit new firefighters from smoking on or off the job. The legislation would apply only to firefighters hired in the future. Firefighters hired before the legislation took effect could continue to smoke.

Governor Martinez should veto this legislation. The legislation would violate the Florida Constitution's protection of privacy and the guarantee of equal protection under the Florida and U.S. Constitutions.

1. Privacy. Article I, section 23 of the Florida Constitution provides:

> "Right of Privacy.--Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein."

This right of privacy is "much broader in scope" than that of the U.S. Constitution. Winfield v. Division of Pari-Mutuel Wagering, 477 So. 2d 544, 548 (Fla. 1985). The Florida Supreme Court has made clear, in addition, that this right extends to applicants for governmental privileges. See Florida Board of Bar Examiners Re Applicant, 443 So. 2d 71, 74 (Fla. 1983).

H.B. 1456 is a blatant invasion of privacy. As long as a person can do his job when he shows up for work, his private life should be just that -- private. What a law-abiding person does on his own time, in the company of friends and family, is his own concern -- not his employer's or the government's. Cf. South Florida Blood Service, Inc. v. Rasmussen, 467 So. 2d 798, 802 (Fla. App. 1985), approved, 500 So. 2d 533 (Fla. 1986) (holding "intimate details" of blood donors' lives protected by privacy guarantee against involuntary disclosure).

Because H.B. 1456 would regulate the private lives of government employees, its enforcement would require police state tactics. The government would have to rely on snitching -- encouraging firefighters to identify the secret smokers in their midst -- and divert law enforcement resources from the desperate war against crack and other hard drugs.

Once the government begins dictating the ways in which its employees may live their lives off the job, there is no logical stopping point. Anything the government concludes is not "good" for its employees will be fair game -- from

eating habits to leisure activities. The Surgeon General blames poor diet for 1.4 million deaths nationwide each year.

Under the Florida Constitution, any attempt by government to invade a person's private life must serve a "compelling" state interest and be the "least intrusive means" of serving that interest. Winfield v. Division of Pari-Mutuel Wagering, supra, 477 So. 2d at 547. "Least intrusive" means that a statute must be necessary, not merely related, to serving the asserted governmental interest. E.g., McGlaughlin v. Florida, 379 U.S. 184, 196 (1964).

However one might characterize the government's interest in prohibiting smoking by firefighters on or off the job, the Legislature obviously did not consider that interest "compelling" enough to apply the prohibition to all firefighters. Only firefighters hired after the law takes effect -- those firefighters who presumably are least at risk! -- would be prohibited from smoking on or off the job.

Protecting our firefighters from job-related hazards surely is a compelling state interest, but smoking cannot be considered a "job-related" hazard. For example, leading studies of on-the-job heart attacks among firefighters, by the National Fire Protection Association, do not associate smoking with this serious problem. See "Fire Fighter Heart Attacks," Fire Command, July 1987; U.S. Fire Fighters Deaths," Fire Command, June 1987.

These studies point clearly to "less intrusive" means of protecting firefighters from job-related hazards. They indicate that on-the-job heart attacks are largely the result of allowing fire service personnel with heart problems to remain in active service, and that more systematic ongoing medical review would "reduce the frequency of these highly preventable incidents."

The more "intrusive" approach of a no-smoking rule for new firefighters might be easier from the government's standpoint. But administrative convenience does not rise to the level of a "compelling" state interest. See Frontiero v. Richardson, 411 U.S. 677, 688-90 (1973); Jackson v. Godwin, 400 F.2d 529, 535-38 (5th Cir. 1968). Respect for privacy demands that persons who satisfy the fitness criteria for firefighters should not be turned away because they smoke.

2. **Equal protection.** Under the equal protection clause of the Fourteenth Amendment and the Florida Constitution, the Legislature may classify individuals for disparate treatment -- but only if the classification is rationally related to the statutory goal and the goal itself is legitimate. E.g., Hooper v. Bernalillo County Assessor, 472 U.S.

612, 618 (1985); Eslin v. Collins, 108 So. 2d 889, 891 (Fla. 1959).

The classification established by H.R. 1456 is not rational. As noted above, the legislation discriminates against smokers despite the absence of persuasive evidence that smoking presents a special hazard to firefighters. To compound the irrationality, it prohibits smoking only among firefighters hired after the legislation takes effect -- firefighters who, as mentioned, presumably are least at risk.

The Florida Supreme Court repeatedly has invalidated classifications that discriminate against newcomers. Thus, in Eslin v. Collins, the court invalidated legislation forbidding neuropaths in practice fewer than 15 years to prescribe medicine while allowing neuropaths in practice longer to write prescriptions. In Rabin v. Conner, 174 So. 2d 721, 725 (Fla. 1965), the court invalidated a marketing order giving greater celery quotas to producers that were in business in 1960-1962 than to producers who entered the business more recently.

Similarly, a federal Court of Appeals went out of its way to observe, in a case where the issue was not raised by the parties and therefore was not ultimately ruled upon by the court, that the application of a state no-smoking rule to new firefighters only "does not appear entirely rational." Grusendorf v. City of Oklahoma City, 816 F.2d 539, 543 (10th Cir. 1987). See also Hander v. San Jacinto Junior College, 519 F.2d 273, 276-77 (5th Cir. 1977) (irrational to impose stricter grooming requirements on junior college faculty than on students).

The only conceivable purpose of distinguishing between firefighters hired before and after H.B. 1456 takes effect would be to avoid negotiating over the no-smoking rule with firefighter bargaining representatives. See Fla. Stat. Ann. § 447.309 (West 1981). Smoking by employees is a term or condition of employment subject to bargaining. See, e.g., In re Rush-Henrietta Employees' Ass'n, No. U-9463 (N.Y. Public Employees Relation Bd. 1988); In re Department of Defense, No. 6-LA-70055 (Fed. Labor Relations Auth. 1987).

The purpose of evading bargaining obligations is illegitimate. The courts consistently have rejected analogous attempts to avoid collective bargaining obligations. See, e.g., O'Brien v. Leidinger, 452 F. Supp. 720, 722-23 (E.D. Va. 1978); Truck Drivers & Helpers Local Union No. 728 v. City of Atlanta, 468 F. Supp. 620, 623-24 (N.D. Ga. 1979); Brown v. Alexander, 718 F.2d 1417, 1425-26 (6th Cir. 1983). Thus the classification established by H.B. 1456 would violate equal protection because it is not rationally related to a legitimate statutory goal.