

HOUSE BILL REPORT

E2SHB 3026

As Passed House:
February 14, 2004

Title: An act relating to fair competition in correctional industries.

Brief Description: Revising provisions relating to correctional industries.

Sponsors: By House Committee on Appropriations (originally sponsored by Representatives O'Brien, Mielke, Darneille, Ahern, Pearson, Nixon and Linville).

Brief History:

Committee Activity:

Criminal Justice & Corrections: 1/27/04, 2/6/04 [DPS];
Appropriations: 2/9/04, 2/10/04 [DP2S(w/o sub CJC)].

Floor Activity:

Passed House: 2/14/04, 96-0.

Brief Summary of Engrossed Second Substitute Bill

- Requires the Correctional Industries Board (Board) to conduct a threshold analysis, a business impact analysis, and a public hearing for any new or the expansion of an existing class I correctional industry work program to determine if the proposed program will compete with any Washington business.
- Prohibits the Department of Corrections (DOC) from contracting or approving any agreement for a new class I work program, or the expansion of an existing class I work program, that competes with any Washington business.
- Prohibits any inmate with a release date that is more than 10 years in the future from participating in a class I correctional industry.
- Expands the Board's duties to include reviewing and setting policy for class III capital programs or community work crews and class IV work crews.
- Requires institutions of higher education to purchase up to 1 percent of their products and services from the DOC class II industries.
- Authorizes the DOC to expand its class I and class II inmate work programs by 1,500 inmates over the next six years.

HOUSE COMMITTEE ON CRIMINAL JUSTICE & CORRECTIONS

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 7 members: Representatives O'Brien, Chair; Darneille, Vice Chair; Mielke, Ranking Minority Member; Ahern, Assistant Ranking Minority Member; Kagi, Pearson and Veloria.

Staff: Yvonne Walker (786-7841).

HOUSE COMMITTEE ON APPROPRIATIONS

Majority Report: The second substitute bill be substituted therefor and the second substitute bill do pass and do not pass the substitute bill by Committee on Criminal Justice & Corrections. Signed by 27 members: Representatives Sommers, Chair; Fromhold, Vice Chair; Sehlin, Ranking Minority Member; Pearson, Assistant Ranking Minority Member; Alexander, Anderson, Boldt, Buck, Chandler, Clements, Cody, Conway, Cox, Dunshee, Grant, Hunter, Kagi, Kenney, Kessler, Linville, McDonald, McIntire, Miloscia, Ruderman, Schual-Berke, Sump and Talcott.

Staff: Bernard Dean (786-7130).

Background:

The corrections system in Washington is designed to accomplish several stated objectives, such as to punish offenders, discourage recidivism, reflect the values of the community, avoid idleness, provide opportunities for self improvement, and provide for restitution.

Correctional Industries Board of Directors. The DOC provides inmate work programs through the Board. The Board develops and implements programs that offer inmates employment, work experience and training, and that reduce the cost of housing inmates. To achieve these goals, the Board operates five classes of correctional industry work programs. All inmates working in class I - IV employment, receive financial compensation for their work. Class V jobs are court ordered community work that is preformed for the benefit of the community without financial compensation.

The Board is required to review all proposed class I and II correctional industry programs prior to the DOC agreeing to provide such products and services. The Board is not required to approve other classes of correctional industry work programs (classes III, IV, or V work programs) prior to employing inmates and providing inmate products and services.

Class I Industries. Inmates working in class I ("free venture") industries are paid according to the prevailing wage for comparable work in that locality. There are two models for class I industries authorized under state law — an employer model and a customer model.

Employer model industries are operated and managed by for-profit or nonprofit organizations under contract with the DOC. They produce goods and services for sale to both the public and private sector. Customer model class I industries are operated and managed by the DOC to

produce and provide Washington businesses with products or services currently produced only by out-of-state or foreign suppliers. There are currently no customer model class I industries operating in the state.

Inmates working in free venture industries do so at their own choice and are paid a wage comparable to the wage paid for work of a similar nature in the locality in which the industry is located (ranging from \$7.16 to \$14.76 per hour). The production of window blinds, metal fabrication, upholstery, concrete work, water-jet cutting, sewing, cabiners, and multi-packaging services, are examples of jobs found in the class I industries work program. Security and custody services are supplied to the participating firm without charge.

An inmate's release date does not preclude specific inmates from working in a class I industry program.

Class II Industries. Class II ("tax reduction") industries are state-owned and operated industries designed to reduce the costs for goods and services for public agencies and nonprofit organizations. Industries in this class must be closely patterned after private sector industries but with the objective of reducing public support costs rather than making a profit. The products and services of this industry, including purchased products and services necessary for a complete product line, may only be sold to public agencies, nonprofit organizations, and to private contractors when the goods purchased will ultimately be used by a public agency or a nonprofit organization. However, to avoid waste or spoilage, by-products and surpluses of timber, agricultural, and animal husbandry enterprises may be sold at private sale or donated to nonprofit organizations, when there is no public sector market for such goods.

Inmates working in tax reduction industries do so at their own choice and are paid a gratuity which can not exceed the wage paid for work of a similar nature in the locality in which the industry is located. Class II gratuities range from 35 cents to \$1.10 per hour and includes such jobs as producing aluminum signs, license plates and tabs, mattresses, asbestos abatement, meat processing, optical lab, engraving, pheasant raising, furniture manufacturing, screen printing and embroidery, industrial sewing, and laundry. Security and custody services are provided without charge by the DOC.

Class III Industries. Class III ("Institutional Support") industries are solely operated by the DOC with the objective being to offset tax and other public support costs. Except for inmates who work in training programs, inmates in this class are paid a gratuity ranging between \$30 to \$55 per month. All supervision, management, and custody services are solely provided by the DOC.

Inmates working in class III industries provide maintenance and operation of the DOC's institution. Ground keepers, barbers, dental assistants, truck drivers, fork lift operators, mechanics, library aides, typists, and interpreters, are examples of jobs found in the class III industries work program.

Class IV Industries. Class IV ("Community Work") industries are operated by the DOC and are designed to provide services in the inmate's resident community. Inmates working in class

IV industries provide services at a reduced cost to other state agencies, county and local government, to persons who are poor or infirm, and nonprofit organizations. Local governments that hire inmates must provide supervision service without charge to the state and must pay the inmate a gratuity.

Janitorial services, grounds keeping, litter control, institutional kitchen support, special event seating set-up, wheelchair cleaning, tree planting, forest maintenance, and fire suppression are examples of jobs found in the class IV industries work program.

Inmate Wage Deductions. The DOC is required by statute to take certain mandatory deductions from the gross wages and gratuities of each inmate working in class I through class IV correctional industry programs.

For inmates working in class I industries (and others earning at least minimum wage), the DOC takes a minimum of 55 percent of the inmates' income. The 55 percent is divided into:

- 5 percent for crime victims' compensation;
- 10 percent for the inmate's savings account;
- 20 percent to the DOC for costs of incarceration; and
- 20 percent for any owed legal financial obligations (LFOs) which can also include restitution for the victim.

In addition, in instances where an offender works for a class I industry and owes child support, the Division of Child Support (DCS) has two options: (1) to send a payroll deduction notice directly through the employer to have child support payments withdrawn from the inmate's paycheck each pay period prior to the inmate receiving the paycheck; or (2) the DCS may issue an order to withhold and deliver child support payments from any inmate who owes child support. Once the DOC receives the order, the funds in the inmate's savings account are sent to the DCS.

For inmates working in class II industries, the DOC takes 65 percent of the inmate's income. The 65 percent is divided into:

- 5 percent for crime victims compensation;
- 10 percent for the inmate's savings account;
- 15 percent to the DOC for costs of incarceration;
- 15 percent for any child support owed; and
- 20 percent for any owed LFOs.

For inmates working in class III industries, the DOC takes 5 percent of the inmate's income for the purpose of crime victim's compensation and 15 percent for any child support owed under a support order.

For inmates working in class IV industries, the DOC takes 5 percent of the inmate's income to contribute to the cost of incarceration and 15 percent for any child support owed under a support order.

Universities & Other Institutions of Higher Education. The DOC of General Administration establishes requirements for the purchasing activities of all state agencies. State agencies, and

the Legislature are required to purchase all goods and services that are produced from class II inmate work programs operated by the DOC through state contract. These goods and services cannot be purchased from any other source, unless upon application by the agency: (1) it finds the article or products do not meet the reasonable requirements of the agency; (2) the goods are not of equal or better quality; or (3) the price of the product or service is higher than that produced by the private sector.

There is an exception for institutions of higher learning. If an institution of higher education can demonstrate to the Office of Financial Management that the costs of compliance are greater than the benefits, then it is exempt from requirements for: purchases from inmate programs; energy conservation requirements for leases; and clean fuel vehicles.

Summary of Engrossed Second Substitute Bill:

It is the intent of the Legislature to ensure that the Board in developing and designing correctional industries work programs, does not encourage the development or provide for selection of or contracting for, the significant expansion of new or existing class I correctional industries work programs that unfairly compete with Washington businesses. Furthermore, the requirements relating to fair competition in the correctional industries work programs are to be liberally construed to protect Washington businesses from unfair competition.

Correctional Industries Board of Directors. The Board must develop and select (instead of design) Correctional Industries work programs that do not unfairly compete with businesses in Washington. In addition, although the Board must continue to review any potential new class I or II industry programs, the Board's duties are also expanded to review and set policy for class III and IV work crews (with the exception of those work crews operated by the Department of Natural Resources). As part of the review for class III and IV programs, the DOC must present a quarterly report to the Board showing where the crews worked, what correctional industry class performed the work, and the total hours worked.

As part of the Board's review for class I industries, the DOC must conduct a threshold analysis to determine if any proposed correctional industry work program will compete with any Washington business. The DOC is prohibited from contracting or approving any agreement for a new class I work program or the significant expansion of an existing class I work program, that unfairly competes with any Washington business.

Threshold & Business Analysis. The DOC must prepare a threshold analysis for any proposed new class I Correctional Industries work program or the significant expansion of an existing class I Correctional Industries work program before the DOC enters into an agreement to provide such products or services. The analysis must state whether the proposed new or expanded program will impact any Washington business and must be based on information sufficient to evaluate the impact on Washington business.

If the threshold analysis determines that a proposed new or expanded class I Correctional Industries work program will impact a Washington business, the DOC must complete a business impact analysis before the DOC enters into an agreement to provide such products or services. The business impact analysis must include a detailed statement that:

- Identifies the scope and types of impacts caused by the proposed new or expanded correctional industries work program on Washington businesses; and
- Includes the business costs of the proposed correctional industries work program compared to the business costs of the impacted Washington businesses. Business costs of the proposed correctional industries work program include rent, utility rates (for water, sewer, electricity, and disposal), labor costs, and any other quantifiable expense unique to operating in a prison. Business costs of the impacted Washington business include rent, utility rates (for water, sewer, electricity, and disposal), property taxes, and labor costs including employee taxes, unemployment insurance, and workers' compensation.

The completed threshold analysis and any completed business impact analysis with all supporting documents must be shared in a meaningful and timely manner with affected chambers of commerce, trade or business associations, local and state labor union organizations, and government entities before a finding is made (regarding whether the work program will or will not compete with any Washington business) on the proposed new or expanded class I Correctional Industries work program.

Public Hearing. If a business impact analysis is completed, the DOC must conduct a public hearing to take public testimony on the business impact analysis. The DOC must establish a web site containing information to provide notice to each Washington business assigned the same three-digit standard industrial classification code, or the corresponding North American industry classification system code, as the organization seeking the class I Correctional Industries work program contract. Notice of the hearing must be posted at least 30 days prior to the hearing.

Following the public hearing, the DOC must adopt a finding that the proposed new or expanded class I Correctional Industries work program: (1) will not compete with any Washington business; (2) will not compete unfairly with any Washington business; or (3) will compete unfairly with any Washington business and is therefore prohibited.

"Significant expansion" includes any expansion into a new product line or service or an increase in production of the same product or service. An increase in production of the same product or service is one that results from an increase in benefits provided by the DOC, including a decrease in labor costs, rent, utility rates, work program space, tax advantages, or other overhead costs.

"Unfair competition" means any net competitive advantage that a business may acquire as a result of a correctional industries contract, labor costs, utility rates, tax advantages, and other overhead costs. In order to determine net competitive advantage, the board must review and quantify any expenses unique to operating a for-profit business inside a prison.

"Washington business" is defined as a business subject to business and occupation tax.

Class I Industries & Inmates. Any inmate with a release date that is more than 10 years in the future, and who is not participating in a class I industry on the effective date of this act, is precluded from participating in a class I correctional industry.

Universities & Other Institutions of Higher Education. Institutions of higher education must purchase up to 1 percent of their products and services from the DOC class II industries. Current statute will remain the same for all other purchases. As a result, if an institution of higher education can demonstrate to the Office of Financial Management that the costs of compliance are greater than the benefits, then it is exempt from requirements for purchases from inmate programs.

Expansion of Class I & II Work Programs. The DOC, within available resources, may expand its class I and class II inmate work programs according to the following schedule:

- By no later than June 30, 2005, the DOC must achieve a net increase of at least 200 in the number of inmates employed in class I or class II Correctional Industries work programs above the number so employed on June 30, 2003;
- By no later than June 30, 2006, the DOC must achieve a net increase of at least 400 in the number of inmates employed in class I or class II Correctional Industries work programs above the number so employed on June 30, 2003;
- By no later than June 30, 2007, the DOC must achieve a net increase of at least 600 in the number of inmates employed in class I or class II Correctional Industries work programs above the number so employed on June 30, 2003;
- By no later than June 30, 2008, the DOC must achieve a net increase of at least 900 in the number of inmates employed in class I or class II Correctional Industries work programs above the number so employed on June 30, 2003;
- By no later than June 30, 2009, the DOC must achieve a net increase of at least 1,200 in the number of inmates employed in class I or class II Correctional Industries work programs above the number so employed on June 30, 2003; and
- By no later than June 30, 2010, the DOC must achieve a net increase of at least 1,500 in the number of inmates employed in class I or class II Correctional Industries work programs above the number so employed on June 30, 2003.

Appropriation: None.

Fiscal Note: Available on the original bill. Fiscal note requested on the first substitute bill February 9, 2004.

Effective Date: The bill takes effect 90 days after adjournment of session in which bill is passed.

Testimony For: (Criminal Justice & Corrections) Private industries are concerned about the unfair competition in the DOC correctional industries programs specifically relating to class I industries work programs. Class I industries are private companies that operate inside prisons and use prison labor. It is clear from the example of the water-jet industry that at least some of the companies that operate inside the prison environment enjoy significant financial advantages.

There is something wrong when a single company inside the prison dominates an entire industry. Private industries have a distinct disadvantage when competing with businesses that are subsidized with taxpayer money. In fact, one correctional industry requires inmates to sign

non-compete agreements. This displays a disregard to the correctional industry program. Employees, through their own tax dollars, essentially have had a hand at losing their jobs.

The business and labor community jointly support this bill. This bill tries to level the playing field and addresses recidivism by making sure inmates in class I industries will actually be released and be able to secure employment in a job that they were trained for. The bill tries not to harm the current Correctional Industries programs, fosters growth of class II industries, and carves out an exemption for the Department of Natural Resources. As a result, there should be no fiscal note from the Department of Natural Resources.

Over the last several years inmates have: (1) built three buildings for the Department of Natural Resources; (2) re-roofed schools in Quinault, Forks, and Milton; (3) completed concrete work, painting, and fence building at Stafford Creek Corrections Center; (4) demolished a building in Tacoma; and (5) demolished a building in Gig Harbor. Statewide there are thousands of inmates working in these jobs everyday.

In our state it is not "three strikes you're out," it's "three strikes you're hired." Citizens are asking for a fair and open process.

Testimony For: (Appropriations) This bill was brought before you by business and organized labor in an effort to level the playing field and create more fair competition, with business and labor working outside of the penitentiary and correctional industries working inside. We're trying to maintain jobs for the inmates while they're incarcerated but we're trying to keep them from competing with business. On the labor side, the example from a couple of years ago included a situation where a class IV crew knocked down a DNR building and rebuilt it. That's a job that could have been handled by organized labor and contractors.

We're all on the same page. This addresses issues about protecting business from class I expansion. The bill will look at the level of competition. We are satisfied with all of the provisions related to class I.

A prime example of the concerns we're facing can be found at the penitentiary. Monroe Welding lost a bid to an industry for a welding contract for several hundreds of thousands of dollars. These are the kinds of issues we're trying to alleviate and deal with. It's a rare example that business and labor can agree on an issue and come together with the agency to come to a solution.

In the past, class III and IV had no guidelines to work under. Now class III and IV would fall under the CI Board to set policy for those community-based work crews.

(Concerns) The Department of Corrections (Department) has concerns about definitions in the bill relative to class I employment and the definition of a Washington business. We have agreement on what the language should be. Also, the Department has concerns about whether the inmate employment targets in the bill are mandates or goals. If they are mandates, they will be accompanied by a request for funds. If the targets are goals then the Department would not need additional funds.

It should be pointed out that, as drafted, the first folks to feel the impact of this bill are victims that receive restitution through the Crime Victims Compensation program. We would like an amendment to deal with the loss restitution for victims.

Testimony Against: (Criminal Justice & Corrections) Every session has its theme for corrections and this year it seems to be trying to determine how to get inmates out of prison and how to deter further crime. This bill will increase recidivism and require taxpayers to pay more money. This bill will result in more violence in our prisons and will result in less money going to victims and less restitution being paid.

It was admitted that inmates dig ditches and re-roof schools for small organizations that would otherwise not be able to get that work done. The salaries paid to inmates are not minimum wage, and are set by federal regulation, and are established by employment security. However, the language in the bill would harm each class of the Correctional Industries. The bill states that you cannot expand to a new business line and that you can never compete with a private business. Many of the class I industries have already threaten to leave if this bill passes. This bill would also remove the business principals that have caused the class II industry program to be a success.

The Correctional Industries program began with 41 class I industries and as of today there are only nine industries left. Next month there will only be eight left. Correctional industries does not have a waiting list of companies waiting to join the program. Currently there are no applicants for the program, and since 1995, 17 companies have left the DOC because of the difficulties of their experience of working within the prison. The class I industries program only has a total of 179 employees working for them.

Inmate employment is not increasing but decreasing and is one-half of what it was back in 1998. Previously, during good financial times, the Legislature mandated that the DOC increase its class I industry program. Now under severe state constraints, budget difficulties and rising prison populations, a bill like this threatens to eliminate the program in its entirety. In 1995, the Board accessed the market and the growth potential of the water-cutting business. It was determined that this was a progressing industry. Since that time the water-jet business has grown over 300 percent and today there are over 30 shops offering water cutting services.

Today correctional industries have provided significant economical benefits through a number of up and down economic cycles to not only the State of Washington, but also to inmates, and taxpayers. The State of Washington and Microjet have been in litigation with private industries over this issue for the last several years. If enacted, this bill will destroy the class I program and completely end class I industries within the DOC prisons. This bill would ensure that no company would ever consider joining the correctional industry program. In addition, the analyses required in the bill would take the DOC months and money to complete.

Currently, all Correctional Industry Board meetings are already open to the public.

Testimony Against: (Appropriations) SHB 3026 eliminates an exemption from the requirement to purchase products from Correctional Industries (CI) that higher education

earned through very hard work with CI to purchase certain furniture. A new provision in the House bill requires that institutions of higher education purchase up to 1 percent of their goods and services from CI. We're not quite clear what that means. If it means anywhere from 0 to 1 percent of goods and services, we think we can live with that. If the expectation is that we purchase 1 percent of goods and services, we will not be able to comply and we're not sure that CI will be able to produce the products necessary to make that completion. We need clarity as to what you want us to do with regard to this.

Higher education has an excellent working relationship with CI at this time. We purchase products from them that work for us. By eliminating our exemption, you negate the direct relationship that we worked so hard to achieve with CI.

Persons Testifying: (Criminal Justice & Corrections) (In support) Jan F. Young, Northwest Association for Private Industry and CEO, Busby Marine; Charles Mulcahy, Sheet Metal Workers Local 66 and Northwest Association for Private Industry; Sally Kirkpatrick, Northwest Association for Private Industry; Bob Abbott, Laborers District Council; Rick Bender, Washington State Labor Council; Mark Johnson, National Federation of Independent Business; Amber Balch, Association of Washington Business; and Rick Slunaker, Association of General Contractors.

(Opposed) Eldon Vail and Howard Yarbrough, Department of Corrections; Ken Piel, Microjet and Private Industries and Prisons; Rob Nadeau, Omega Pacific and Private Industries and Prisons; and Chris Michaelson, Elliott Bay Metal Fabrication and Private Industries and Prisons.

Persons Testifying: (Appropriations) (In support) Representative O'Brien, prime sponsor; Mark Johnson, National Federation of Independent Business; and Bob Abbott, Laborers Council.

(With concerns) Howard Yarbrough, Correctional Industries; Lonnie Johns-Brown, Washington Coalition of Sexual Assault Programs; and Eldon Vail, Department of Corrections.

(Opposed) Terry Teale, Council of Presidents; and Chuck Greenough, Community and Technical Colleges.

Persons Signed In To Testify But Not Testifying: (Criminal Justice & Corrections) (Opposed) Jerry Farley, Private Industries and Prisons.

Persons Signed In To Testify But Not Testifying: (Appropriations) None.