



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNSEL

MEMORANDUM

To: Senate Judiciary Committee
From: Benjamin Novogroski, Legislative Counsel
Date: January 25, 2022
Subject: Comparison of S.254 and Colo. Rev. Stat. Ann. 13-21-131

This memorandum compares the provisions of Senate Bill 254 (hereinafter referred to as “S.254” or “the Bill”) with the provisions of Section 13-21-131 of the Colorado Revised Statutes entitled “Civil action for deprivation of rights” (hereinafter referred to as the “Colorado Law”), which went into effect on June 19, 2020.¹ While the Colorado Law and S.254 are similar, there are differences in both form and substance. Specifically, S.254 creates a broader basis under which an individual can bring an action against a law enforcement officer. The Colorado Law also outlines the effect of a law enforcement officer’s criminal conviction on indemnification, in addition to a process for a law enforcement agency to make a “good faith” determination about the law enforcement officer’s conduct. These types of provisions do not exist in S.254. S.254 also incorporates language that is more common to Vermont law, in addition to cross-references Vermont statutes that are the functional equivalent to cross-references contained in the Colorado Law; however, these distinctions are more form than substance. This memorandum specifically addresses the substantive differences between S.254 and the Colorado Law.

The major substantive difference between S.254 and the Colorado Law concerns the basis under which an individual can bring a civil action against a law enforcement officer. S.254 permits an individual to sue a law enforcement officer for almost any alleged violation of an individual’s rights under Vermont law. The Colorado Law only permits actions that are based on violations of “any individual rights that create binding obligations on government actors secured by the bill of rights, article II of the state constitution, . . .”² For example, one such right and corresponding obligation is contained in Section 7 of Article II of the Colorado Constitution – Colorado’s search and seizure provision.³

¹ Colo. S.B. 21-1250, 72d Gen. Assemb. § 3 (2020).

² Colo. Rev. Stat. Ann. § 13-21-131(1) (West 2022).

³ Colo. Const. art. II, § 7.

S.254 provides a basis for suit for violations of Vermont constitutional rights, statutory rights, or rights created by Vermont common law. Similar to the Colorado Law, an individual may bring a civil action for an alleged violation of Vermont's constitutional rights, like the protection from unreasonable search and seizure.⁴ However, unlike the Colorado Law, an individual could directly sue a law enforcement officer for a common law tort, like negligence, or when a statute confers a substantive right. Therefore, S.254 provides a broader basis to bring an action against a law enforcement officer than the Colorado Law.

S.254 also differs from the Colorado Law in the scope of immunity that can be used as a defense to liability. Both S.254 and the Colorado Law waive qualified immunity⁵ as a defense. However, S.254's language precludes "common law doctrines as a defense to liability," which includes the common law doctrine of absolute immunity.⁶

Both S.254 and the Colorado Law contain an attorney's fee provision to award reasonable attorney's fees and costs to plaintiffs and defendants in certain situations. S.254 provides a court discretion to award such fees and costs in any action in which the plaintiff substantially prevails and to a defendant for defending any claims a court finds frivolous. The Colorado Law's attorney's fee provision also awards attorney's fees and costs in the same circumstances but provides more detail concerning when a court deems a plaintiff to have "prevailed" in an action for injunctive relief. Under the Colorado Law, a plaintiff prevails if the plaintiff's suit was a "substantial factor or significant catalyst" in obtaining the results sought by the litigation. S.254 is silent on actions for injunctive relief.

The indemnification provisions of S.254 and the Colorado Law are nearly identical. However, the Colorado law provides a public entity with discretion to indemnify a law enforcement officer if the law enforcement officer "was convicted of a criminal violation for the conduct from which the claim arises. This discretion is eliminated if the law enforcement officer's employer was a causal factor in the violation, either through its action or inaction. S.254 does not contain any language concerning the effect of a law enforcement officer's related criminal conviction on indemnification.

In 2021, a new provision was added to the Colorado Law placing restrictions on when a law enforcement officer's employer can determine whether a law enforcement officer acted in good faith for purposes of indemnification.⁷ The provision also provides

⁴ Vt. Const. art. 11.

⁵ Qualified immunity applies to lower-level government officials, employees, and agents. Immunity extends to these individuals when they perform discretionary acts in good faith during the course of their employment and within the scope of their authority. *Sprague v. Nally*, 2005 VT 85, ¶ 4.

⁶ Absolute immunity is generally afforded to judges, legislators, and the highest executive officials, where the acts complained of are preformed within their respective authorities. *O'Connor v. Donovan*, 2012 VT 27, ¶ 6.

⁷ Colo. H.B. 21-1250, 73d Gen. Assemb. § 6 (2021).

for an administrative process for violations of the restrictions by an employer.⁸ Specifically, an employer is prohibited from preemptively determining whether a law enforcement officer acted in good faith before the conduct occurs.⁹ The employer is also prohibited from making a good faith determination until completion of a documented investigation by the employer.¹⁰ If an employer is alleged to violate the good faith determination guidelines, then the complaint is referred to an administrative law judge for adjudication.¹¹ The judge must notify the Colorado Police Standards and Training Board¹² (the “POST Board”) if a violation is found.¹³ If a violation is found, the POST Board is prohibited from funding the employer for one year from the date of the finding.¹⁴

While S.254 does not have a corresponding provision to the good faith determination process, Vermont does have laws requiring law enforcement agencies to investigate allegations of unprofessional conduct by its officers.¹⁵ The bases for such unprofessional conduct investigations involve allegations of the criminal behavior or the willful failure or substantial deviation from statewide or agency policies by law enforcement officers.¹⁶ Additionally, the Vermont Criminal Justice Council is empowered to investigate unprofessional conduct allegations if it deems a law enforcement agency’s investigation invalid.¹⁷

In conclusion, S.254 and the Colorado Law have many similarities and some differences. The major differences are (i) S.254 permits a broader basis under which an individual can bring an action against a law enforcement officer; (ii) the Colorado Law outlines the effect of a law enforcement officer’s criminal conviction on indemnification by a law enforcement agency; and (iii) the Colorado Law creates process for a law enforcement agency to make a good faith determination about the law enforcement officer’s conduct while also providing redress for an employer’s misconduct in making the good faith determination.

⁸ Colo. Rev. Stat. Ann. § 13-21-131(4)(b) (West 2022).

⁹ *Id.* at § 13-21-131(4)(b)(I)(A).

¹⁰ *Id.* at § 13-21-131(4)(b)(I)(B).

¹¹ *Id.* at § 13-21-131(4)(b)(II).

¹² The POST Board is the Colorado equivalent of the Vermont Criminal Justice Council. *Compare* Colo. Rev. Stat. Ann. § 24-31-303 (West 2022) *with* 20 V.S.A. § 2355.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ 20 V.S.A. §§ 2404, 2408.

¹⁶ *Id.* at §§ 2401, 2404.

¹⁷ *Id.* at § 2408.