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F I S C A L I M P A C T R E P O R T

SPONSOR Roybal/Caballero ORIGINAL DATE 2/06/17 LAST UPDATED _____ HB 214
SHORT TITLE Use of Force Act SB _____
ANALYST Rogers

APPROPRIATION (dollars in thousands)

| Appropriation | | Recurring or Nonrecurring | Fund Affected |
|---------------|-----------|------------------------------|------------------|
| FY17 | FY18 | | |
| \$0.0 | \$1,500.0 | Recurring | General Fund |

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY17 | FY18 | FY19 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|--------------------------------|--------------------------------|--------------------------------|------------------------------|------------------|
| Total | NFI | Unknown, but significant | Unknown, but significant | Unknown, but significant | Recurring | General Fund |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
Bernalillo County Metropolitan Court (BCMC)
Administrative Office of the District Attorney (AODA)
Law Office of the Public Defender (LOPD)

SUMMARY

Synopsis of Bill

House Bill 214 proposes to create a Use of Force Act, which would include the formation of a “special use of force unit” within the Office of the Attorney General (OAG). This unit would be required to investigate and prosecute excessive use of force cases against law enforcement officers. The bill would define “excessive use of force” as an action taken by a law enforcement officer and includes a shooting, assault, battery, or homicide, or other allegation of the excessive use of force by an officer. The proposed act would require that excessive use of force cases be

presented in a preliminary hearing before the District Court, which Court would then be required to determine probable cause. The act also provides that these cases would not be presented to a grand jury. Lastly, the bill proposes to appropriate \$1.5 million from the general fund to the OAG in fiscal year 2018 to establish the special use of force unit.

FISCAL IMPLICATIONS

The appropriation of \$1.5 million contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of FY18 shall revert to the general fund. Although the bill does not explicitly appropriate this amount in future fiscal years, LFC analysis shows it would be difficult for the Attorney General to sustain the unit without a recurring appropriation. To maintain the unit, the FIR assumes the appropriation becomes recurring.

The OAG explains it appears that the appropriation will only fund the new unit for one year and is likely is not enough funding to effectively investigate all use of force allegations in the entire state. “It would be impossible, on already scarce resources, to fund the specialized unit past FY18 without a recurring fund especially since the act is extremely broad in what it considers to be excessive force.”

BCMC analysis explains it is difficult to estimate the number of excessive use of force cases that might be brought and to quantify the amount of time on an annual basis that would be needed if Metropolitan Court staff were required to initiate these cases and then transfer them to the District Court. “Arguably, with each such case initiated in the Metropolitan Court, there would be additional time expended by Court staff in transferring the case and paperwork to the District Court – estimating approximately 1.5 hours of a Court Clerk II’s time at \$21.79 (salary and benefits) per hour, plus approximately 1 hour of a Trial Court Administrative Assistant’s time at \$33.56 (salary and benefits) per hour for a total estimated additional cost per case of \$66.25.”

The AOC states HB 214, depending on enforcement of the act and commenced prosecutions, would increase the caseloads for district courts, without appropriating additional resources to the courts to handle the increase. Excessive force cases take up a considerable amount of judicial time because they are very fact intensive and usually require lengthy hearings. The additional costs to the courts are not capable of quantification. There will also be a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

SIGNIFICANT ISSUES

The OAG provides the following information:

[...] Section 4 of the act limits the discretion of a prosecutor by requiring that the excessive force case be presented to a district court via a preliminary hearing. The way the section currently reads, it might be interpreted to require that all excessive force cases be presented, even where the prosecutor does not believe there is probable cause to present the case. Forcing a prosecutor to present a case where probable cause does not exist could result in claims that the prosecutor acted in an unethical manner. There are also situations where a prosecutor may feel that it is in the interest of justice to present a case to a grand jury. Also, cases of simple assault or battery (misdemeanor offenses) may be more appropriately handled by a magistrate or metropolitan court.

It is possible that the Special Use of Force Unit would be subject to constitutional challenge. Article VI Section 24 provides that the elected district attorney “shall be the law officer... of the counties within his district.” Relieving the district attorney of any and all authority to investigate allegations of excessive force committed by law enforcement officers could potentially be seen as contrary to the intention of Article VI, Section 24.

BCMC states the act “specifically requires that excessive use of force cases be presented before the District Court in the judicial district in whose jurisdiction the incident took place. The act requires that the District Court review these cases for probable cause and hold preliminary hearings, and further provides that these cases not be presented to a grand jury. However, in Bernalillo County, preliminary hearings are not held. Instead, the Metropolitan Court holds felony first appearances of all felony cases, reviews the charges for probable cause, and sets any conditions of release. The cases are then taken by the Second Judicial District Attorney’s Office before a grand jury or they file a charge upon information.”

The AOC points out that, currently, the vast majority of preliminary hearings throughout the state are conducted by magistrate courts. Many district courts are not accustomed to conducting preliminary hearings. HB 214 would require the preliminary hearings to be conducted in the district courts, which may require additional training of district court judges. This would also disrupt district court dockets, which are not currently structured to support preliminary hearing settings. Additional judicial and clerical time may be required for training and restructuring of dockets to accommodate the hearings required by HB 214.

The AODA submits the following analysis, detailing potential conflicts of interest:

Since District Attorneys are created by the New Mexico Constitution and the OAG is a creature of statute, there may be separation of powers issues since the Constitution gives District Attorneys primary criminal jurisdiction.

This bill does not address potential situations where the OAG may have a conflict of interest. The procedures already in use adequately deal with the concerns raised by this bill.

HB 214 gives the OAG exclusive powers to investigate and prosecute excessive force cases by law enforcement officers. Presumably, once an allegation of excessive force is made, or once a local body determines that a situation may involve excessive force, the matter must be referred to the OAG for investigation. And, presumably, the attorney general may initiate an investigation even if no referral is made.

Currently, district attorneys may arrange for cases to be prosecuted by attorneys outside their office or refer cases to the attorney general if local prosecution would create the appearance of a conflict of interest or lack of independent review. And currently the attorney general has jurisdiction over criminal matters when the district attorney either refers a case or fails to prosecute a case. Under HB 214, however, that prosecution decision is automatic: all excessive force cases will be handled by the attorney general.

HB 214 not only gives the OAG the exclusive power over such cases, it creates a new division and unit in the office of the attorney general to handle the cases. Currently, the attorney general has a special prosecutions division, which handles criminal cases, and units devoted to particular types of crime. Creating a new division for excessive force cases helps

ensure that the review will be independent – special prosecutions division attorneys may not be charged with handling cases against the law enforcement officers with which they work.

HB 214 requires cases to be presented in a preliminary hearing or inquiry before the district court in the judicial district in whose jurisdiction the incident occurred, and not to a grand jury. Preliminary hearings are public, while grand jury proceedings are not. While transparency in charging such cases is one factor to consider, HB 214 will not allow the attorney general to consider any other factors: a grand jury proceeding is not an option. HB 214 also takes away discretion regarding which court should hear the case: the case must be heard in the district court, although currently many preliminary hearings are conducted in magistrate court. Some of the excessive force cases, involving simple assault and battery, may be misdemeanor cases but they must still be brought for preliminary hearing in district court.

HB 214 contains no provision expressly giving the attorney general the responsibility of determining whether probable cause exists to present a case in a preliminary hearing. If all cases, regardless of merit, must be brought to a public preliminary hearing, this will raise ethical concerns for the prosecuting attorney.

PERFORMANCE IMPLICATIONS

BCMC submitted the following information:

In FY16, approximately 6,945 felony cases were filed in the Metropolitan Court, and in FY15, approximately 6,339 felony cases were filed. Metropolitan Court staff work at the Metropolitan Detention Center (“MDC”) 24 hours a day, 7 days a week (with limited exception for when the Court is closed), so that as defendants are booked into MDC, Court staff are initiating cases and defendants are being scheduled for custody arraignments or in the case of felonies for felony first appearances. Defendants, who are not released or who are unable to post a bond, are scheduled for an arraignment or for a felony first appearance typically within 24 hours. At this time, it is impossible to determine the volume of such excessive use of force cases that potentially could be filed in the Metropolitan Court. However, it will create additional cost and expense for the Metropolitan Court if this one sub-set of criminal cases is treated in a unique and distinctive fashion from every other felony charge for which a defendant is arrested in Bernalillo County.

AODA states “HB214 removes discretion in the handling of excessive force cases, requiring the investigation and prosecution to be by the attorney general’s office, and requiring the determination of probable cause in a public preliminary hearing in district court, rather than by grand jury. HB214 also dictates the internal structure of the attorney general’s office, requiring establishment of a new division and unit.”

ADMINISTRATIVE IMPLICATIONS

AOC analysis states there will be an administrative impact on the court resulting from added judicial and clerical time needed to monitor and dispose of these types of cases.

OTHER SUBSTANTIVE ISSUES

The OAG states Section 2 of HB 214 defines an “excessive force case” as “a case that arises out of an action taken by a law enforcement officer while the officer was acting in the officer’s official capacity.” Section 2 also provides a non-exhaustive list of examples including the catchall language “any other allegation of the use of excessive force brought against a law enforcement officer.” This definition could be construed as overly broad. The drafters may wish clarify the definition. Most law enforcement agencies have use of force reports that are not necessarily excessive in nature. The current definition, specifically subsection A, leaves open the possibility that a justified law enforcement action must proceed to a preliminary hearing. A “shooting” is not defined and is subject to interpretation. It is not clear if this means any discharge of a firearm, shooting at an individual, shooting resulting in a bullet hitting an individual, or other circumstances. A “allegation” is not defined and is subject to interpretation. Does this include any allegation or does it require substantiation?

TR/al