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FISCAL IMPACT REPORT

ORIGINAL DATE 3/9/17

SPONSOR McQueen LAST UPDATED _____ HB 501

SHORT TITLE Public Corruption Act SB _____

ANALYST Esquibel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		See Fiscal Implications				

(Parenthesis () Indicate Expenditure Decreases)

HB501 relates to HB502, Forfeiture of Svc Credit for Public Officials; HJR8, State Ethics Commission, CA; SB218, State Ethics Commission Act; HB10, Public Accountability Act; HB462, Public Accountability Act; HJR7, Independent Legislative Conduct Entity, CA; SB 72, Public Accountability Act.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (AODA)
 Attorney General’s Office (OAG)
 Educational Retirement Board (ERB)
 Secretary of State’s Office (SOS)

SUMMARY

Synopsis of Bill

House Bill 501 (HB501) would create the “Public Corruption Act”. Upon conviction of public corruption, a public official would become ineligible to receive a pension and PERA benefits, in addition to the penalties of the specific crime they are convicted of.

Public corruption is committed when a public official is convicted, pleads guilty or nolo contendere to fraud, embezzlement, extortion, forgery, bribery, racketeering, computer crime, money laundering, perjury, soliciting or receiving a kickback, or conspiracy to commit any of the referenced crimes.

The penalty for committing any of these crimes is forfeiture of all service credit accrued pursuant to PERA retirement during all periods of service. However, the service credit accrued by the public official during employment by an affiliated public employer shall not be forfeited.

This Act would repeal 31-18-15.4 and would go into effect on July 1, 2017.

FISCAL IMPLICATIONS

The Administrative Office of the District Attorneys (AODA) notes HB501 adds significant consequences for “corruption offenses” committed by elected officials. This may make it more difficult to prosecute such crimes, with more such offenses going to trial. If there are more trials, there will be more costs for the district attorneys.

The Administrative Office of the Courts (AOC) notes under the provisions of the bill there would be minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

SIGNIFICANT ISSUES

The Attorney General’s Office (OAG) notes the bill does not address due process issues regarding forfeiture of pension and credit accrued pursuant to PERA retirement based on the conviction of an above referenced crime. Additionally, to the extent that the bribery provisions of HB501 specifically relate to legislators, there may be a conflict with Article IV, Sections 39 and 40 of the New Mexico Constitution. Article IV, Section 39 defines bribery, as it related to legislators, and Article IV, Section 40 states that a legislator convicted of bribery “shall be deemed guilty of a felony and upon conviction shall be punished by fine of not more than one thousand dollars or by imprisonment in the penitentiary for not less than one nor more than five years.” [N.M. Const. art. IV, § 40; See e.g. *State v. Olguin*, 1994-NMCA-050, ¶ 8, 118 N.M. 91, 879 P.2d 92 aff’d in part, set aside in part, 1995- NMSC-077, 120 N.M. 740, 906 P.2d 731.]

Also, the bill does not contain a catch-all for all other crimes committed in connection with public employment. For example, a public official who commits harassment or assault on the job would not necessarily lose his or her pension benefits.

Further, only some of the enumerated crimes necessarily include a connection to public employment (receiving a bribe as a public employee for example). Others are more general without requiring any additional finding of connection to public employment. This means the bill leaves open the possibility that an elected official could lose his or her pension for committing a crime that has nothing to do with his or her position as a public official. For example, if an official runs an unrelated business and commits a fraud in the course of that business, pension benefits would be lost.

As used in the Public Corruption Act, “‘public official’ means a person campaigning for or elected to an office in an election covered by the Campaign Reporting Act or a person appointed to an office that is subject to an election covered by that Act.” An official only campaigning for elective office would not have PERA benefits or a pension through the state for their service as an elected official.”

The Administrative Office of the District Attorneys (AODA) notes HB501 is a stand-alone act. It is not placed within the sentencing statutes or within the Public Employees Retirement Act. It is not clear how it is to be administered. Will criminal courts factor in HB501 during sentencing proceedings, determine that the offender is a “public official” as defined by the act, and order the Public Employees Retirement Association to forfeit the service credits according to the act’s provisions? Or is the administration entirely by the Public Employees Retirement Association?

The bill may be challenged as an ex post facto law, prohibited under both the United States and New Mexico Constitutions. [U.S. Const. art. 1, § 10, cl. 1; N.M. Const. art. 2, § 19.] Penal laws cannot be applied retroactively to increase the penalty of crimes that have already been committed. The bill appears to have a retroactive effect. The bill looks at the date of conviction; not the date of the offense. A person who committed a “corruption offense” prior to the effective date of the bill would still be subject to the forfeiture if the conviction occurred after the effective date of the bill. It could be argued that the bill isn’t “penal,” but a civil or remedial bill. But given that the loss of benefits would be a direct result of a criminal conviction, it is possible the courts would view the bill as punishing corrupt public officials. To avoid the ex post facto issue, the bill should be changed to clarify it applies only to crimes committed after its effective date.

HB501 defines “corruption offense” as one of the listed offenses committed by a public official during that public official’s time in office. Note that it does not require the listed offense have any relationship to the elected official’s duties. That makes HB501 easy to administer because its provisions are automatic, and does away with the need for special findings linking the crime to the public office. However, if the intent is to punish malfeasance in office, HB501 may go beyond that and punish behavior unrelated to the elected official’s duties.

Note that the impact of HB501 on an offender can be severe, and some elected officials will feel the impact of HB501 more than others. Its application is automatic: if an elected official is convicted of a corruption offense, his or her service credit as an elected official is forfeit. For a person whose career has been in elected office, taking away the service credit can be the equivalent of taking away that person’s entire pension. For a person who held an elected position for a short time, the financial impact may not be so significant.

The Educational Retirement Board (ERB) indicates HB501 would have a minor effect on the retirement benefits administered by the New Mexico Educational Retirement Board (ERB). As the bill recognizes, all public officials receive retirement benefits through the Public Employees Retirement Act (PERA). However, pursuant to the Reciprocity Retirement Act, NMSA 1978, Section 10-13-1, *et seq.*, public employees who have earned service credit in both the PERA and ERB systems are permitted to combine service credit to determine eligibility for retirement benefits. The Reciprocity Act also allows members to use salary earned under one system to calculate the “final average salary” component of the pension benefit under both systems. As a result, if a corrupt public official (PERA member) with reciprocal service credit under the ERB system sought to retire under the ERB system, ERB would not recognize any PERA service credit or salary which had previously been forfeited under the Public Corruption Act when ERB determined the member’s eligibility for retirement and final average salary. As of this date, there are currently 1,341 ERB retirees who have reciprocal service credit with the PERA and 1,680 PERA retirees who have reciprocal service credit with ERB.

PERFORMANCE IMPLICATIONS

The Administrative Office of the District Attorneys (AODA) notes the collateral consequences of HB501 can be severe, and may result in more cases on “corruption offenses” going to trial and appeal.

ADMINISTRATIVE IMPLICATIONS

The AODA notes district attorneys, and courts, would be wise to insist that defense counsel advise their elected official clients charged with “corruption offenses” about the consequences of HB501 before accepting a plea agreement. The collateral consequences of HB501 are severe, and appellate courts may conclude that a plea agreement was involuntary if the defendant was not fully informed of the consequences of that plea.

It is likely that PERA will administer the forfeiture provisions of HB501. There is nothing in the bill that provides notice of a conviction to PERA. Possibly the assumption is that a criminal conviction of an elected official would be news-worthy enough that a notice provision is not necessary. Or, perhaps the assumption is that HB501 will be invoked by the sentencing judge, and the sentence will be forwarded to PERA.

The Educational Retirement Board (ERB) notes for reciprocity retirees who have been convicted of or plead guilty or nolo contendere to public corruption, as defined in this bill, ERB staff would need to coordinate with PERA staff to correctly determine retirement eligibility and final average salary under the Reciprocity Retirement Act.

TECHNICAL ISSUES

The Secretary of State’s Office (SOS) notes the bill includes state, legislative, and county officials, but excludes school board officials.

The Attorney General’s Office (OAG) notes HB501 should specify which agency would prosecute violations of the Public Corruption Act, such as the District Attorney, the Attorney General or other entity.

Also, the Criminal Code defines “public officer” as any elected or appointed officer of the state or any of its political subdivisions...whether or not he receives remuneration for his services.” NMSA 1978, § 30-1-12(I). If the bill’s intent is to exclude “public officials” covered under the Public Corruption Act from any duplicative and/or conflicting provision in the Criminal Code, it may be best to amend the definition of “public officer” found in the Criminal Code to explicitly exclude “public officials.”

The Administrative Office of the District Attorneys (AODA) suggests adding, “H. The provisions of this section apply to corruption offenses committed after its effective date.”

The Educational Retirement Board (ERB) notes Section 4, paragraph B states “service credit accrued, if any, by the public official during employment by an affiliated public employer shall not be forfeited”. This paragraph seemingly contradicts Section 4, paragraph B which states “A public official who has committed public corruption shall... forfeit all service credit accrued pursuant to the Public Employees Retirement Act.

OTHER SUBSTANTIVE ISSUES

The Administrative Office of the Courts (AOC) writes HB214 introduced in 2015 amended various criminal statutes to increase the penalties for public corruption offenses such as embezzlement, paying or receiving public money for services not rendered, and making or permitting false public voucher. HB214 also provided a one-year sentence enhancement when the crime is committed by a person elected or appointed to a position with or employed by a public entity.

HB155 introduced in 2016, created new crimes such as fraud by a public official, and embezzlement by a public official, and provided that whoever is convicted, pleads guilty to or pleads *nolo contendere* to a crime under the Public Corruption Act (Section 25):

(1) shall have an additional fine imposed, not to exceed the value of the salary and fringe benefits paid to the offender by virtue of holding an elected public office, from the date of the commission of the first act that was the basis of the offense; and

(2) shall forfeit his or her pension under the Public Employees Retirement Act (PERA) attributed to any time served as a public official after the person's first election or appointment to public office, except that portion of a pension that is committed to satisfy community property interest or child support. Any amounts contributed by and credited to the official's account in the state retirement system shall be refunded, and any pension subject to forfeiture under Section 10-12B-17(B) NMSA 1978 shall not be affected by the provisions of this section.

HB501 takes a third approach, neither creating new crimes nor amending existing crime statutes; rather, HB501 provides additional penalties for an offender who commits an existing crime while a public official. HB501, like HB155 introduced in 2016, repeals Section 31-18-15.4 NMSA 1978, providing enhancement of sentences when a public official is convicted of a felony. Section 31-18-15.4 NMSA 1978 provides that a basic sentence for a public official convicted of a felony that relates to, arises out of, or is in connection with the an elected office, may be increased by an additional fine not to exceed the value of the salary and fringe benefits paid to the offender by virtue of holding an elected public office, after the commission of the first act that was a basis for the felony conviction. HB155 repeals this statute and it incorporates this enhancement in Section 25(A)(1). HB501 does not incorporate the Section 31-18-15.4 enhancement. Additionally, HB501, unlike HB 155 from 2016, has no provision about setting aside the portion of a pension committed to satisfy community property interest or child support obligations.

Unlike the definition of “public official” in the Campaign Reporting Act (CRA), Section 1-19-26(P) NMSA 1978, the definition of “public official” in HB501 and the Public Corruption Act includes a person *campaigning* for an office in an election covered by the CRA, and includes judges, as covered by the CRA. [See, *NM Secretary of State's Office, Guide to Campaign Finance and Campaign Reporting*:

<http://www.sos.state.nm.us/uploads/files/Guidelines%20of%20Candidates%20and%20Campaign%20Committees%2012-16-2013.pdf>]

The National Conference of State Legislatures has compiled a table listing state-by-state penalties for violations of state ethics and public corruption laws @ www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx.

POSSIBLE QUESTIONS

The AODA notes HB501 also leaves other unanswered questions about its administration:

- Are service credits or pension payments halted while a conviction is being appealed? If so, what happens if the conviction is overturned?
- What impact does HB501 have on the rights of an innocent spouse? If the offender's pension has vested, and is subject to a divorce settlement, does HB501 void the rights of the spouse?

RAE/jle