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FISCAL IMPACT REPORT

SPONSOR <u>Nibert/Romero, A</u>	LAST UPDATED <u>03/03/23</u>
SHORT TITLE <u>Ethics Commission Jurisdiction</u>	ORIGINAL DATE <u>02/23/23</u>
	BILL NUMBER <u>House Bill 466/aHGEIC</u>
	ANALYST <u>Hitzman</u>

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT* (dollars in thousands)

	FY23	FY24	FY25	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
SEC Contract Support	No fiscal impact	\$60.0	\$60.0	\$120.0	Recurring	General Fund
AHO Admin & FTE	No Fiscal Impact	\$20.0 - \$146.0	\$20.0 - \$146.0	\$40.0 - \$292.0	Recurring	General Fund
AOC Admin	No fiscal impact	Indeterminate but minimal	Indeterminate but minimal			
Total	No Fiscal Impact	\$80.0 - \$206.0	\$80.0 - \$206.0	\$160.0 - \$412.0	Recurring	General Fund

Parentheses () indicate expenditure decreases.
 *Amounts reflect most recent analysis of this legislation.

Sources of Information

LFC Files

Responses Received From

State Ethics Commission (SEC)
 Office of the State Auditor (OSA)
 Administrative Office of the Courts (AOC)
 Office of the Attorney General (NMAG)
 Administrative Hearings Office (AHO)
 General Services Department (GSD)

SUMMARY

Synopsis of HGEIC Amendments to House Bill 466

House Government, Elections and Indian Affairs Committee amendments to House Bill 466 (HB466) remove the additional expanded jurisdictions for the commission and specifies that a hearing officer, rather than general counsel or a panel of a hearing officer and commissioner, will determine probable cause.

Synopsis of Original Bill

House Bill 466 (HB466) originally added new material to the State Ethics Commission Act to

clarify the commission’s jurisdiction—to enforce the applicable civil compliance provisions for public agencies, public officials, public employees, public office candidates, and persons subject to the Campaign Reporting Act, government contractors, other agents of the state, and lobbyists and lobbyist employers. The jurisdiction includes Article IV, Sections 27 & 28 of the New Mexico Constitution; Article 5, Section 12 of the New Mexico Constitution; and Article 20, Section 9 of the New Mexico Constitution. However, HGEIC amendments to the bill remove this material.

Regarding complaints, the original bill requires a hearing officer and two commissioners (chosen on a rotating basis)—rather than the general counsel—to determine probable cause. However, HGEIC amendments specify the determination will be made by a hearing officer. The hearing officer chosen to consider probable cause shall not participate in the adjudication of the complaint.

This bill does not contain an effective date and, as a result, would go into effect June 16, 2023, (90 days after the Legislature adjourns) if signed into law.

FISCAL IMPLICATIONS

As amended, the bill no longer expands the State Ethics Commission’s (SEC) jurisdiction, which would have required the commission to likely adjudicate and investigate additional complaints or violations under HB466. SEC notes “currently, the State Ethics Commission Act requires a hearing officer to take action following the general counsel’s investigation and determination of probable cause, either to dismiss the complaint if there is no probable cause or to hold a full hearing on the complaint if the general counsel determines it is supported by probable cause.” SEC reported it would initially need an additional \$100 thousand per year in contract funds to cover the increased hearing costs. However, SEC notes HGEIC amendments have resulted in an adjustment of this cost downward:

The proposed amendment would additionally require the services of a hearing officer in the probable cause determination phase. The Commission estimates it would need an additional \$60 thousand per year in contract funds to cover the increased hearing officer costs. This estimate is lower than originally proposed because the bill, as amended in HGEIC, does not include the expansion of the Commission’s jurisdiction, which was contemplated in the original bill and which would have entailed additional proceedings and hearing officer costs.

If SEC decides to utilize hearing officer services from the Administrative Hearings Office (AHO), there would be a cost to that office. AHO provided the following analysis of the original bill that is assumed to still be applicable to bill amendments:

Currently, AHO has a [Memorandum of Understanding] MOU with the SEC to provide hearing officer services for SEC administrative hearings. Under that agreement, AHO charges a \$100 case referral fee for initial staff time in creating a new hearing file/case assignment/scheduling, \$50 per hour for any required travel time for conducting the hearing, and \$100 per hour for hearing officer time in preparation for the hearing, in conducting the hearing, and in writing a hearing officer report or orders on the case. Based on prior administrative hearings conducted by AHO for the SEC, a typical case that requires a lengthy review of the record, yet a brief written order would cost the administrative agency approximately \$1250. Revenue generated from conducting other agency hearings supports AHO’s personnel compensation costs. AHO would continue to

use this fee model to provide hearing officer services under this bill if requested to do so by SEC.

According to SEC, since January 1, 2020, out of 125 administrative cases before the SEC, 35 have resulted in probable cause determinations based on an investigative file. (7 of those 125 cases settled during the investigation phase.) 3 of those 35 cases in which a determination was made resulted in a finding of probable cause and required notice of a public hearing. 32 of those cases resulted in a finding of no probable cause, either because the evidence did not support the allegations or, even if the factual allegations were true, they could not establish a violation of a statute for which the Commission has jurisdiction. 35 probable cause determinations over a three-year period amounts to approximately 12 cases per year under the...scope of SEC's jurisdiction.

The bill also does not stipulate the process by which probable cause is determined. AHO notes it envisions three methods by which the hearing officer and, under the original bill, two commissioners could determine probable cause:

- 1) SEC general counsel could provide the investigatory findings, a bench memorandum, and a recommended probable cause order for the hearing officer and two commissioners to consider. Then the hearing officer and commissioners would conduct a documentary review and either sign the proposed order or edit the proposed order to address any additional concerns or make a contrary probable cause determination. AHO notes such method would result in a potential increased costs to SEC under the MOU for AHO hearing officer services of approximately \$19 thousand per year.
- 2) SEC's general counsel would not provide a bench memorandum summarizing the case, requiring the hearing officer to do substantial reconstruction of the investigation before making a probable cause determination. This option would require at least triple the work of a current average case, increasing potential costs to SEC under the MOU for AHO hearing officer services of approximately \$60 thousand per year.
- 3) The hearing officer and two commissioners would be required to conduct a probable cause hearing themselves and subsequently issue an extensive written probable cause order, likely requiring more than 20-40 pages (and often several hundred pages) of analysis and citations to the supporting investigatory record. Even if the expected case load was only 15 hearings in a fiscal year, AHO notes it would lack hearing officer capacity to perform this volume of work under this scenario given other statutory hearing obligations, limiting its ability to accept some of the case referrals from SEC or other agencies. In such a scenario, AHO would need to seek an expansion hearing officer position, totaling around \$146 thousand per year.

This is still assumed to be applicable under HGEIC amendments despite requiring only one hearing officer to make the determination, so estimated costs are scored the same.

AHO notes SEC may very well have other additional costs, including increased payments for other hearings officers who charge different amounts for their services, as well as increased administrative costs outside of the scope of the MOU and knowledge of AHO. Therefore, fiscal impact to AHO is scored between \$20 thousand and \$146 thousand per year, which would be the range associated with providing services at a level consistent with prior caseload to the cost of an additional hearing officer FTE at AHO to support the increase in demand. This would be a recurring cost to the general fund.

However, because the amended bill does not expand the jurisdiction of the SEC, it is less likely that AHO will need additional staff to handle the existing caseload.

There may also be a minimal impact on the judiciary related to the administrative cost for statewide update, distribution, and documentation of statutory changes. However, it is unknown if this would still be applicable under HGEIC amendments.

Although not an impact to the state's overall revenue, and therefore not scored in the revenue table above, AHO notes it would likely receive between \$0 and \$60 thousand annually from SEC for its hearing services.

SIGNIFICANT ISSUES

SEC notes "...because the probable-cause determination necessarily requires the application of legal standards to facts and allegations, and because the determination can require time-intensive research into applicable law and review of depositions and document discovery, only a licensed attorney or retired judge would be in a position to perform this work." Therefore, removing the commissioners from the list of persons required to determine probable cause in HGEIC amendments is more in line with the requirements to be a commissioner and the limits placed upon commissioners.

AOC echoed those concerns, noting "the general counsel of the commission, currently charged with determining probable cause under Section 10-16G-10(G) NMSA 1978, is an attorney" and that determinations of probable cause is a legal determination and should be done by those with legal experience. HGEIC amendments seem to address this concern by requiring a hearing officer to determine probable cause and not any commissioners.

HGEIC amendments also address concerns posed by the Office of the Attorney General (NMAG), AOC, and SEC, which all noted those two commissioners that make the probable cause determination "are precluded from participating in the adjudication of the complaint," and "given the small size of the seven-member Commission and its unique quorum and consent requirements, it is likely that HB466's recusal requirement of two Commissioners could make it difficult for the Commission to meet its quorum and consent requirements in taking any action in further proceedings."

PERFORMANCE IMPLICATIONS

SEC notes its requirements under the Accountability in Government Act;

...the State Ethics Commission has an explanatory performance measure regarding the percent of ethics complaints within the agency's jurisdiction that are either disposed of or set for public hearing within 180 days after the complaint is received.

Processes for determining probable cause would need to align with this goal.

AOC notes the bill "may have an impact on the measures of the district courts in the following areas: Cases disposed of as a percent of cases filed [and] percent change in case filings by case type."

ADMINISTRATIVE IMPLICATIONS

AHO notes the potential for scheduling conflicts between a hearing officer employed by AHO and the two voluntary commissioners, which “would lead to an increased burden on agency staff and commissioner time.”

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