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FISCAL IMPACT REPORT

SPONSOR Park **ORIGINAL DATE** 1/31/2006
LAST UPDATED 2/4/2006 **HB** 446/aHGUAC

SHORT TITLE Forfeiture of Retirement Benefits for Crimes **SB** _____

ANALYST McOlash

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY06	FY07		
	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Employees Retirement Association (PERA)

Office of the Attorney General (AGO)

SUMMARY

Synopsis of the HGUAC Amendment

The House Government and Urban Affairs Committee amendment to HB 446 adds the word “accumulated” and the phrase “any unexpended accumulate member contributions to the forfeited member” when referring to the refund of member contributions. The bill, as introduced defines member contributions as the amounts deducted from a member’s salary and credited to the member’s account, plus interest.

If a conviction is overturned, the member may reinstate forfeiture service credit and the system shall waive any “membership” requirements for the purchase.

Synopsis of Bill

House Bill 446 provides for the forfeiture of present or future retirement benefits when a state officer or employee is convicted of a felony offense related to his public duties (e.g. NMSA 1978, §§ 30-24-1; 30-24-2; 10-16-4; N.M. Const. art. IV, § 39).

The bill also provides certain definitions including “conviction” (which includes a plea of nolo contendere), “felony offense,” and “forfeited member” and enhances the penalties for certain felons (members or retired members of state retirement programs) and felonies (arising from con-

duct related to public employment).

SIGNIFICANT ISSUES

AGO

House Bill 446 provides for forfeiture of pension benefits from any state retirement system upon a finding that a defendant in a criminal proceeding has been convicted of a state or federal felony arising out of conduct related to a member or retired member's public employment. Provisions apply to all the various state retirement funds.

If the member is not retired, the right to draw future payments is forfeited.

If the member is already retired, the bill provides that payments cease.

In either event, member contributions will be returned to the forfeited member.

The bill requires a judicial determination in accordance with similar forfeiture statutes. If enacted it would require a single, yet bifurcated, trial on the allegations of the criminal offenses and the civil forfeiture. It provides that the rules of criminal procedure will apply to the former and the rules of civil procedure will apply to the latter. The bill also provides "clear and convincing evidence" as the burden of proof. If a person is convicted of any such an offense in federal court or the court of another state, the district attorney or attorney general may proceed with forfeiture in the New Mexico courts. Alternative venues are designated in the bill

The bill makes provisions for the protection of previously vested community property rights and child support obligations under NMSA 1978, §§ 10-11-136; 10-11-136.1; 10-28-7; 10-12B-7, 10-12C-7 and 22-11-42.

PERA

While HB 446 defines felony as "a crime designated by law as a felony or a crime for which the authorized penalty is imprisonment for a year or more," the court makes the determination whether a felony arises from conduct related to public employment. If so, the court may order forfeiture. Many crimes are designated a felony which may "arise from conduct relating to public employment," such as possession of a personal use amount of a controlled substance at work. It is a policy decision for the legislature whether such a crime fall within the purview of anti-corruption legislation. Many states, including California, Florida, Michigan and Pennsylvania, have forfeiture of retirement benefit statutes specific only to felonies relating to the misuse of public monies (bribes, extortion, theft of public money, embezzlement of public money, forgery, etc.).

Colorado subjects public pensions to legal process if the retirement system member is required to pay restitution for theft, embezzlement, misappropriation, or wrongful conversion of public property or for willful and intentional violations of fiduciary duties where the offender received a financial gain. HB 446 does not subject public pensions to legal process for restitution.

OTHER SUBSTANTIVE ISSUES

House Bill 446 conflicts with the PERA Act [NMSA 1978, Section 10-11-4 (F)], requiring that an individual be a “member” in order to reinstate forfeited service credit.

The Judicial Retirement Act [NMSA 1978, Section 10-12B-17] provides for the forfeiture of pension benefits if a member is removed from office pursuant to the provisions of Article 6, Section 32 of the Constitution of New Mexico.

The Magistrate Retirement Act [NMSA 1978, Section 10-12C-16] provides for the forfeiture of pension benefits if a member is removed from office pursuant to the provisions of Article 6, Section 32 of the Constitution of New Mexico.

The Public Employees Retirement Act [NMSA 1978, Section 10-11-136] allows for court ordered division of retirement funds as community property.

The Public Employees Retirement Act [NMSA 1978, Section 10-11-136.1] allows legal process to satisfy child support obligations.

The Judicial Retirement Act [NMSA 1978, 10-12B-7] allows for court ordered division of retirement funds as community property and legal process to satisfy child support obligations.

The Magistrate Retirement Act [NMSA 1978, 10-12C-7] allows for court ordered division of retirement funds as community property and legal process to satisfy child support obligations.

Current statute (Chapter 31, Article 18) provides the sentencing authority and the basic sentences for noncapital felonies.

31-18-15. Sentencing authority; noncapital felonies; basic sentences and fines; parole authority; meritorious deductions.

- A. If a person is convicted of a noncapital felony, the basic sentence of imprisonment is as follows:
- (1) for a first degree felony resulting in the death of a child, life imprisonment;
 - (2) for a first degree felony, eighteen years imprisonment;
 - (3) for a second degree felony resulting in the death of a human being, fifteen years imprisonment;
 - (4) for a second degree felony for a sexual offense against a child, fifteen years imprisonment;
 - (5) for a second degree felony, nine years imprisonment;
 - (6) for a third degree felony resulting in the death of a human being, six years imprisonment;
 - (7) for a third degree felony for a sexual offense against a child, six years imprisonment;
 - (8) for a third degree felony, three years imprisonment; or
 - (9) for a fourth degree felony, eighteen months imprisonment.
- B. The appropriate basic sentence of imprisonment shall be imposed upon a person convicted and sentenced pursuant to Subsection A of this section, unless the court alters the sentence pursuant to the provisions of Section 31-18-15.1, 31-18-16, 31-

18-16.1 or 31-18-17 NMSA 1978. The Criminal Sentencing Act (Chapter 31, Article 18 NMSA 1978), among other things, includes provisions for criminal sentencing.

31-18-13. Sentencing authority; all crimes.

A. Unless otherwise provided in this section, all persons convicted of a crime under the laws of New Mexico shall be sentenced in accordance with the provisions of the Criminal Sentencing Act [Chapter 31, Article 18 NMSA 1978]; provided, that a person sentenced as a serious youthful offender or as a youthful offender may be sentenced to less than the basic or mandatory sentence prescribed by the Criminal Sentencing Act.

B. Whenever a defendant is convicted of a crime under the constitution of New Mexico, or a statute not contained in the Criminal Code [30-1-1 NMSA 1978], which specifies the penalty to be imposed on **conviction**, the court shall set as a definite term of imprisonment the minimum term prescribed by the statute or constitutional provision and may impose the fine prescribed by the statute or constitutional provision for the particular crime for which the person was convicted; provided, that a person sentenced as a serious youthful offender or as a youthful offender may be sentenced to less than the minimum term of imprisonment prescribed by the statute or the constitutional provision.

C. A crime declared to be a **felony** by the constitution or a statute not contained in the Criminal Code [30-1-1 NMSA 1978], without specification of the sentence or fine to be imposed on **conviction**, shall constitute a fourth degree **felony** as prescribed under the Criminal Code [30-1-1 NMSA 1978] for the purpose of the sentence, and the defendant shall be so sentenced.

D. Any other crime for which the sentence to be imposed upon **conviction** is not specified shall constitute, for the purpose of the sentence, a petty misdemeanor.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Persons convicted of felony offense, under selected retirement systems, will be able to draw state retirement benefits despite the misconduct associated with their public duties.

POSSIBLE QUESTIONS

Certain New Mexico retirement systems statutes have provisions for the forfeiture of retirement benefits. The right to receive a pension pursuant to the provisions of the Judicial Retirement Act [10-12B-1 NMSA 1978] shall be forfeited if the member is removed from office pursuant to the provisions of Article 6, Section 32 of the constitution of New Mexico and the member's only entitlement from the fund shall be the refund of the member's own contributions.

Would it be more prudent to address, in a similar manner, those systems that do not have such provisions?

Should the provisions in the other retirement system statutes, for the protection of previously vested community property rights and child support, be amended to coincide with the other statutes?

The AGO indicates this legislation will not be applicable to one who is indicted for a felony offense, enters a plea of guilty or nolo contendere and then receives a conditional discharge from the court. NMSA 1978, § 30-20-13. **Is this what the author of HB 446 intended?**

The procurement code has a requirement that all contracts and solicitations therefore shall contain reference to the criminal laws prohibiting bribes, gratuities and kickbacks (13-1-191). **How are violations of this provision determined and how is this provision enforced? Should a similar provision also apply to cases involving felonies in violation of public duties?**

Although the forfeiture of retirement benefits will require a bifurcated trial on the allegations of the criminal offenses and the civil forfeiture, is the state introducing a second prosecution for the same crime once the first one is totally finished and decided?

AMENMENTS

As recommended by PERA:

1. On page 4, line 22, after "refund" insert "accumulated".
2. On page 5, line 2, after "refund" insert "any unexpended accumulated".
3. On page 5, line 3, strike "less any pension amounts received".
4. On page 5, line 23, before "requirement" insert "membership".

Add a section similar to current law:

30-1-13. Accessory.

A person may be charged with and convicted of the crime as an accessory if he procures, counsels, aids or abets in its commission and although he did not directly commit the crime and although the principal who directly committed such crime has not been prosecuted or convicted, or has been convicted of a different crime or degree of crime, or has been acquitted, or is a child under the Children's Code [~~32A-1-1~~ NMSA 1978].