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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/24/09

SPONSOR Griego, E. LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Educational Employees As Legislators SB 644

ANALYST Haug

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	NFI	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Companion to SJR 14

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General (AGO)

Higher Education Department (HED)

### SUMMARY

#### Synopsis of Bill

Senate Bill 644 amends Section 2-1-3, NMSA 1978 to explicitly permit employees of state educational institutions to serve as legislators and while employed by a state educational institution.

### FISCAL IMPLICATIONS

Senate Bill 644 has no fiscal impact.

### SIGNIFICANT ISSUES

The AGO states:

Current law prohibits a state legislator from receiving any compensation for services performed as an employee of the state except compensation and expense money that member is entitled to receive as a member of the State Legislature. NMSA Section 2-1-3. Current law also prohibits payment of any compensation to a state legislator for services

rendered as an employee of the state, other than compensation and expense money that legislator is entitled to receive as a member of the State Legislature. NMSA Section 2-1-4. This bill would amend those sections to allow a state legislator to also receive compensation as an employee of one of the state educational institutions listed in Article XII Section 11 of the New Mexico Constitution. Those institutions include state universities and several other state institutions.

Current law effectively prevents a state employee from serving in the State Legislature. Presumably this bill is intended to allow employees of certain state institutions to serve as members of the State Legislature and receive compensation as state employees and as members of the Legislature.

This bill raises issues under several provisions in the New Mexico Constitution: Article III Section 1, Article IV Section 3, and Article IV Section 28. Those provisions limit a state legislator's ability to also serve in the executive branch of government during the term for which they were elected, regardless of changes the Legislature may make to state statutes. See Opinion of the Attorney General AGO IAL 041408. The intent of those provisions is to avoid any conflicts between the powers and duties of a state legislator within the legislative branch of government, and those of a state employee within the executive branch. Those provisions also serve to prevent encroachment by one branch of government on the powers and functions of another.

Article III Section 1 of the Constitution is commonly referred to as the "separation of powers" clause, and operates to prevent a member of one branch of government from performing, or encroaching on, the powers and functions of another. In *State ex rel. Stratton v. Roswell Independent Schools*, 111 N.M. 495, 806 P.2d 1085 (Ct.App. 1991) the New Mexico Court of Appeals held that *public school teachers employed by local school districts* are not state employees and could therefore serve in the State Legislature. The Court discussed the application of Article III Section 1 and ruled that because public school teachers were not state employees, and were not entitled by virtue of their positions as employees of local school districts to set policy within the executive branch of state government, their dual service in the Legislature and as public school teachers did not violate that provision. However, it is possible that this clause would apply to prevent an employee of a *state* institution, who may or may not be entitled to set policy for the executive branch of government, from serving in the State Legislature.

Article IV Section 3 of the New Mexico Constitution provides in part that "No person shall be eligible to serve in the legislature who, at the time of qualifying, holds any office of trust or profit with the state, county or national governments". This provision could also prevent an employee of a state institution from holding office as a state legislator, depending upon the interpretation of the phrase "office of trust or profit with the state".

Article IV Section 28 of the New Mexico Constitution prohibits a state legislator from being appointed to any "civil office in the state" during the term for which they were elected, and also prohibits their appointment to a "civil office" which was created, or the "emoluments" of which were increased during their term for one year after that term. That section also provides "nor shall any member of the legislature during the term for which he was elected nor within one year thereafter, be interested directly or indirectly in any contract with the state or any municipality thereof, which was authorized by any law

passed during such term.” State legislators vote on funding for the state institutions listed in Article XII Section 11, and therefore indirectly provide for salaries of employees of those institutions. Employees of those institutions could also be considered to be serving under “contracts of employment”.

The issue of whether the State Legislature can enact a statute which would effectively allow employees of certain state institutions to also serve in the Legislature, and would allow members of the Legislature to serve as employees of those institutions while collecting compensation for both positions, will be subject to legal challenge.

The HED notes:

An Attorney General's Opinion (No. 06-01) reviewed the question of whether a legislator may serve as president of Luna Community College (formerly Luna Vocational-Technical Institute) without resigning office. The conclusion of the Attorney General was that a legislator may serve as President of Luna Community College without violating the relevant constitutional and statutory provisions of New Mexico law.

The same analyses would apply to employees of the constitutional state educational institutions, thus avoiding any constitutional problem. It is worth noting that the A.G.'s Opinion is not binding on the courts and thus without amending the Constitution as well, as proposed in SJR 14, these individuals holding these positions could still be challenged.

The A.G. opinion noted above does not address potential conflicts of interest as prohibited by the Governmental Conduct Act. However, employees of educational institutions would be in a position to affect statutes, funding and other decisions directly impacting their primary employment at their respective educational institutions. Funding requests, for example, Research & Public Service Projects (RPSP), are reviewed through the New Mexico Higher Education Department for annual recommendations. These are put forth to the Legislature for review and approval. As a result of SB644, a legislator could be in a position to vote in favor or against his or her institution's funding recommendations. This could allow for potential conflicts of interest.

## **COMPANIONSHIP**

Senate Bill 644 is a companion to Senate Joint Resolution 14. Senate Bill 644 would remove the statutory impediment regarding compensation to employees of state educational institutions serving in the legislature. Senate Joint Resolution 14 would remove the constitutional impediments, except for separation of powers issues, to employees of state educational institutions serving in the legislature.

According to the AGO's analysis of SJR 14, both Senate Bill 644 and Senate Joint Resolution 14 must be enacted in order to allow employees of those state educational institutions to serve in the legislature; and to receive compensation from both entities; and to allow state legislators to hold paid positions in those state educational institutions. However, “separation of powers” issues would still remain.

GH/svb