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FISCAL IMPACT REPORT

SPONSOR Ivey-Soto **ORIGINAL DATE** 01/31/14
LAST UPDATED 02/15/14 **HB** _____

SHORT TITLE Human Rights Commission Members & Hearings **SB** 137/aSJC

ANALYST Cerny/Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY14	FY15	FY16	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI	NFI	NFI		

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Attorney General (AGO)

Workforce Solutions Department (WSD)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary amendment to SB 137 changes the time in which a written objection to a video conference is to be filed from ten days to fifteen days, and makes the same change to the time (from ten to fifteen days) in which the commission must issue its determination as to venue following that objection.

Synopsis of Original Bill

Senate Bill 137 constitutes a proposal to amend several sections of the Human Rights Act, Section 28-1-1 to -15 NMSA 1978 (1969, as amended through 2007) as follows:

- Allows the governor to appoint two members to the Human Rights Commission (HRC) from any given county. Under current statute, the governor may appoint no more than one member from any county.
- Increases the amount of time in which a hearing on the merits of a complaint before the Human Rights Commission must be held following service of the Commission's complaint upon the respondent. Currently, the hearing must occur

between ten and fifteen days following service of a complaint, whereas SB 137 would authorize the hearing to occur between thirty and sixty days following service of a complaint.

- Authorizes the use of video conferencing to allow a complainant to appear at a hearing before the HRC and proscribes a method by which a party may object to the use of this technology. Currently, hearings conducted entirely by video conference are not authorized and the proposed amendment would require that the hearing take place in person where a party objects to video conferencing and files a written objection within ten days of service of the complaint. Where a party objects to a video conference hearing, the Commission would be required to issue a determination as to the venue for the in-person hearing within ten days after service of the objection to a video conference hearing.
- Substitutes language throughout the amended sections to reflect the definitions provided in 28-1-2(D) NMSA 1978.
- Eliminate references to the Human Rights Division which has now been replaced by the Human Rights Bureau (“bureau”) of the Labor Relations Division of WSD and assigns virtually all duties and responsibilities previously specifically assigned to the labor relations division director to the bureau.
- Eliminates gender-specific language.

FISCAL IMPLICATIONS

AGO analysis states: “Should SB 137 be passed and signed into law, significant savings to the parties, the bureau and the Attorney General’s Office could be realized. However, the costs of procuring video conferencing equipment sufficient to ensure that an administrative adjudicatory proceeding be properly conducted so as to minimize due process concerns may negate any savings realized.”

WSD indicates no fiscal impact. Any additional operating costs would be absorbed into the current operating budget. No savings were addressed although increases in efficiency would be anticipated.

SIGNIFICANT ISSUES

According to AGO analysis, “It should first be noted that the Commission likely possesses the authority to permit a party or witness to appear at a hearing telephonically or via video conference, in its discretion, by virtue of its authority to grant relief sought by a party under Rule 9.1.1.11(C)(7) NMRA (9/1/1998). Therefore, to the extent that the intent of SB 137 is limited to granting authority to a party or witness to appear at a Commission hearing via video conference, legislative action does not appear to be necessary. However, if the intent of SB 137 is to permit the Commission to conduct hearings where all participants, including Commission members, would appear via video conference, the concerns described below are implicated.”

AGO analysis points out a possible conflict with legislative intent if hearings conducted entirely via video conference are permitted, specifically the Open Meetings Act, Section 10-15-1 to -4 NMSA 1978. Under Section 10-15-1(A) NMSA 1978, the Legislature has previously directed that:

In recognition of the fact that a representative government is dependent upon an informed electorate, it is declared to be public policy of this state that all persons are entitled to the greatest possible information regarding the affairs of government and the official acts of those officers and employees who represent them. The formation of public policy or the conduct of business by vote shall not be conducted in closed meeting. All meetings of any public body except the legislature and the courts shall be public meetings and all persons so desiring shall be permitted to attend and listen to the deliberations and proceedings. . . . All meetings of a quorum of members of any board, commission, administrative adjudicatory body or other policymaking body of any state agency . . . held for the purpose of formulating public policy, including the development of personnel policy, rules, regulations or ordinances, discussing public business or taking any action within the authority of or the delegated authority of any board, commission or other policymaking body are declared to be public meetings open to the public at all times, except as otherwise provided in the constitution of New Mexico or the Open Meetings Act.

AGO analysis states “Although the legislature could certainly fashion an exception to the Open Meetings Act to exclude hearings before the Commission, no such exception currently exists. Because the Open Meetings Act currently requires public access to hearings of the commission, it is difficult to imagine how members of the public would be afforded their right to attend and listen to such hearings where they are conducted entirely via video conferencing. It may be possible to circumvent this issue by setting up, at a minimum, a location in the county where the respondent does business or the alleged discriminatory conduct occurred so that members of the public could view and listen to the video conferenced hearing in progress, in addition to setting up a link whereby members of the public could simultaneously access the video conference in progress from a computer linked to the internet.”

In addition, AGO analysis states “although NMSA 1978, Section 10-15-1(C) permits a member of a public body to attend a meeting by means of a conference telephone or other similar communications equipment in certain circumstances, remote appearance is limited only to those situations in which it is ‘otherwise difficult or impossible for the member to attend the meeting in person.’ This stated legislative preference that members of a public body attend meetings in person wherever possible appears to be at odds with the proposed amendment to the Human Rights Act which would allow the Commission to conduct its hearings via video conferencing, at its discretion. While video conferencing would certainly be more convenient for the members of the Commission, convenience alone does not appear to satisfy the ‘otherwise difficult or impossible to attend in person’ standard for justifying remote participation.”

Analysis from WSD, however, contradicts this assessment: “SB 137 does not raise due process concerns because any party is permitted to object to video conferencing. If any party objects, then the hearing will be held in person as ordered by the commission.”

Lastly, AGO analysis suggests that although increasing the time in which a hearing before the Commission is to occur following the issuance of the Commission’s complaint may make holding such hearings more workable, it appears to be inconsistent with the legislature prior intent to afford the complainant the right to a speedy hearing. Although increasing the time in which such a hearing can occur to up to sixty days following the service of the complaint may not be unreasonable, such an amendment would delay the hearing significantly.

WSD states the bureau currently completes its investigations within 10 months from the taking of the initial charge. This practice must continue in order to allow for issuance of commission complaints within the new 60- to 30-day time limit in cases where probable cause is found.

PERFORMANCE IMPLICATIONS

WSD analysis notes that video conferencing would increase the efficiency of bureau staff and commissioners, as they will be able to spend less time out of the office. However, the bill will increase the need for information technology support both for hardware and software/training.

Similarly, the AGO notes that adopting the amendments proposed by SB 137 may increase efficiency and reduce travel expenses associated with AGO representation of the Human Rights Commission at hearings and meetings.

OTHER SUBSTANTIVE ISSUES

AGO analysis suggests the permitting HRC hearings to be conducted via video conference presents certain due process considerations that also would need to be addressed: “For example, such conferencing would require pre-filing and distribution to all parties of all hearing exhibits, or a mechanism that would allow participants to view exhibits simultaneously. Further, determining credibility of witness testimony may be inhibited where witnesses are not available for in-person examination. Limiting the ability to appear at a hearing via video conference to only the complainant may incite denial of due process challenges.”

AMENDMENTS

AGO analysis recommends the following changes to the bill with regard to attendance of participants by video conference, stating:

It is unclear whether SB 137 would permit all participants to appear at Commission hearings via video conference. Section 2 of SB 137 appears to contemplate video participation by all parties, Commission members and staff. Section 3; however, appears to limit video conference participation to only the complainant.

If the will of the legislature is to afford the ability to appear at a Commission hearing via video conference to the Respondent to the same extent as the Complainant, it may wish to consider adding “either in person or by video conference pursuant to Subsection G of Section 28-1-10 NMSA 1978,” after the phrase “appear at the hearing” on line 3 of page 8 of SB 137.

The legislature should consider further amending this Bill to clarify the ambiguity as to whether members of the Commission and staff are authorized to appear via video conference, taking into consideration the issues described above.