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## FISCAL IMPACT REPORT

ORIGINAL DATE 2/24/15  
 LAST UPDATED 2/25/15      HB 456

SPONSOR Gentry

SHORT TITLE Move Fire Marshal From PRC      SB \_\_\_\_\_

ANALYST Clark

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		
	See Fiscal Implications	See Fiscal Implications	Recurring	General Fund

(Parenthesis ( ) Indicate Revenue Decreases)

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
		\$363.5				PRC P611 Fire Protection Fund
		\$389.5				PRC P613 Fire Protection Fund
<b>Total</b>		\$753.0				PRC

(Parenthesis ( ) Indicate Expenditure Decreases)

Conflicts with HB 474, SB 519  
 Relates to SJR 13  
 Relates to Appropriation in the General Appropriation Act

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Public Regulation Commission (PRC)/State Fire Marshal (SFM)  
 Attorney General's Office (AGO)  
 Office of Superintendent of Insurance (OSI)  
 New Mexico Municipal League (NMML)  
 Department of Public Safety (DPS)  
 Department of Finance and Administration (DFA)

## **SUMMARY**

### Synopsis of Bill

House Bill 456 repeals Article 52 and Article 53 from the Insurance Code, which established the State Fire Marshal (SFM) division within the Public Regulation Commission (PRC) and established the Fire Protection Fund Law. To replace these two sections of law, the bill enacts the State Fire Marshal Act and the Fire Protection Fund Act.

The bill creates a State Fire Board, which would hire the fire marshal; creates SFM as an adjunct agency of the executive branch with powers and duties including rule-making; fire protection, prevention, and control training programs; fire investigations and abatement; and use of the state police laboratory; and grants SFM police powers and the power to issue and enforce cease and desist orders.

## **FISCAL IMPLICATIONS**

The estimated operating budget impact shows the fire protection fund appropriations contained in the HAFC Substitute for HB 2 for PRC's P611 Policy and Regulation Program and P613 Program Support. The bill would move all fire protection fund revenues out of PRC, but these revenues pay for a portion of the salaries of several employees in the two programs who provide some support for the Fire Marshal's Office but would not move over to the new adjunct agency. For example, these funds pay a portion of the salary of the PRC chief of staff and chief administrative officer, both of whom would need to remain at PRC. This could create a funding shortfall for the agency if vacancy savings are insufficient to cover the revenue gap (see Significant Issues for additional information).

Making part of an agency into a new adjunct agency is likely to have an overall negative operating budget impact due to the need to establish an administrative services function within the new adjunct agency. PRC is primarily funded by general fund revenues, and the fire protection fund partially reverts to the general fund, so there is likely to be an overall negative impact to the general fund.

## **SIGNIFICANT ISSUES**

The bill does not address administrative services and personnel required by the new adjunct agency that are currently provided by PRC, such as legal, financial, human resources, etc. PRC and SFM report the new adjunct agency would require adding an additional bureau called "Administrative Services" that would consist of one "GEN I-ASD Director/CFO," one "GEN I-General Counsel," one "HR Train & Labor Spec A," one "Budget Analyst A," two "Financial Specialists (Accounts Payable, Accounts receivable/Fleet)," one "A/O II IT Manager," one "IT Network Spec 3," and one "Info Records Clerk A."

However, the bill is also silent on the excess administrative positions that would remain at PRC. The bill would transfer 42 FTE from PRC, leaving 112 FTE behind; with more than one-fourth of the authorized positions departing PRC, the agency would not need every authorized administrative position. Perhaps around half a dozen administrative FTE and \$400 thousand in budget appropriations could be transferred from PRC's Program Support to the new adjunct agency, creating savings for the PRC operating budget and fulfilling or nearly fulfilling the new

agency's administrative services needs. This would solve the revenue gap for Program Support, but the funding gap for the Policy and Regulation Program would still exist.

The bill's language creating the Fire Protection Fund Act repeats a significant portion of the language currently in the Fire Protection Fund Law repealed by the bill, but the new language omits the following key sections of current law. The omission of the creation of the fire protection grant fund creates a conflict with other sections of the bill referencing and distributing money to the fire protection grant fund, and PRC and SFM report this and the other missing items would be detrimental to critical operations.

- It omits Section 59A-53-14 NMSA 1978, which describes the closure of a fire department by local government and the procedures for reassignment of apparatus and equipment and return of unexpended state fire funds.
- It omits Section 59A-53-16 NMSA 1978, which describes the certification of new fire departments and the application of a pro rata funding rate.
- It omits Section 59A-53-17 NMSA 1978, which describes allowable mutual assistance between fire departments and the requirements to maintain a minimum level of protection within each district.
- It omits Section 59A-53-18 NMSA 1978, which establishes the fire protection grant fund (which is separate from the fire protection fund).

The bill allows for fines to be assessed by the State Fire Board. Under current law, such fines would be deposited into the fire protection fund, but this bill would direct those fines to the school fund. Theoretically, this could negatively impact the general fund, because the fire protection fund partially reverts to the general fund, but within the last 12 years, the Fire Marshal's Office has not assessed a penalty for a violation. When violations occur, the business or entity rectifies the problem without a penalty being assessed. However, PRC and SFM note the following concern.

For a penalty to be assessed and credited to the school fund creates a problem in the fact that when or if the Fire Marshal's Office were to issue a penalty or fine on a school for a violation, the fine would be paid by the school and then go right back to the school being credited to the school fund. We believe that the fines and penalties that could be assessed by the Fire Marshal's Office should be credited back to the fire protection fund.

The Attorney General's Office notes the following additional significant issues.

- Section 5 gives the board authority to hear administrative appeals of orders and modifications of the state fire marshal and to hear appeals from the state fire marshal's determinations, but does not give the board authority to promulgate rules to set forth procedures for these hearings. The board needs authority to promulgate such rules to ensure that the proceedings conform to any due process requirements.
  - Similarly, Section 33 gives the board authority to hear appeals from municipalities and county fire districts affected by the state fire marshal's

determination of needs, but does not give the board authority to promulgate rules to set forth procedures for these hearings. Further, HB 456 directs the board to “review the determination of the state fire marshal in such informal and summary proceedings as it deems proper.” The board needs authority to promulgate procedural rules for the hearings and to ensure that the proceedings conform to any due process requirements.

- Section 7 provides that the state fire marshal’s “office may adopt or revise rules to carry out the provisions of the State Fire Marshal Act and the Fire Protection Fund Act,” and provides further that the state fire “board shall approve rules before they are promulgated.” Section 7 provides for a public hearing on proposed rules before the state fire marshal’s office, but does not provide for the process by which the board approves the rules. The process by which the board approves rules should be set forth and the process should provide for public participation (to comply with due process) or the board should be given the authority to promulgate rules to set forth the process (with provision for public participation).
  - Similarly, Section 17 gives the state fire marshal authority to adopt and revise certain rules, and provides for approval of the rules prior to adoption by the board, but does not set forth the process by which the board approves the rules. Again, the process by which the board approves rules should be set forth, and the process should provide for public participation (to comply with due process) or the board should be given the authority to promulgate rules (with provision for public participation).
- In circumstances “where a fire or explosion or attempt to cause a fire or explosion has occurred, or which at the time is burning,” Section 12 of HB 456 allows the state fire marshal and others to “in their discretion, take full control and custody of buildings and premises described in this subsection, and place someone in charge of the buildings and premises as they deem proper until their examination and investigation is completed.” This section should be amended to provide for a hearing before full control and custody is taken if there is time for a hearing beforehand or for a hearing within a reasonably short time period after full control and custody is taken if there is not time for a hearing beforehand in order to provide for due process for taking possession of a person or entity’s property.
- Section 19(B) authorizes “a fine not to exceed five hundred dollars (\$500). Each day the violation continues constitutes a separate offense.” Similarly, Section 22 authorizes “a fine of not more than five hundred dollars (\$500). Each day the violation continues constitutes a separate offense.” The intent of these provisions appears to authorize a fine of \$500 per day per violation. However, because these sections set a maximum of \$500 per violation, it is possible to interpret the provisions as setting a \$500 maximum. To clarify, the provisions could be amended to provide that violations are punishable by “a fine of not more than five hundred dollars (\$500) per day per violation.”

## **ADMINISTRATIVE IMPLICATIONS**

As noted in Significant Issues, this bill would result in excessive administrative positions within PRC and a lack of key administrative positions in SFM.

## **CONFLICT, RELATIONSHIP**

The bill conflicts with HB 474, which amends the existing statute for the fire protection fund that would be repealed and enacted as a different section of law in this bill.

The bill also conflicts with SB 519. In the 2014 Regular Session, HB 287 increased the firefighter line-of-duty death benefit from \$50 thousand to \$250 thousand. However, Article 59A was not changed to reflect the increased amount. SB 519 of the 2015 Regular Session makes that correction, but this bill does not make the correction on page 24, lines 20 - 24, resulting in conflicting language.

The bill relates to SJR 13, which proposes amending the New Mexico constitution to change PRC from a five-member elected commission to a three-member commission appointed by the governor, creating a positive, recurring fiscal impact to PRC by reducing the number of commissioners and commissioner assistants from five of each to three of each. Based on the FY15 operating budget, the agency's savings would be more than \$400 thousand annually, and this could partially offset the negative operating budget impact created by this bill, although not immediately; the offset would occur in future years (FY18 at the earliest) after the passage of legislation enacting the proposals in SJR 13.

## **TECHNICAL ISSUES**

In addition to the four sections of current law that aren't replicated in this bill (see Significant Issues), the bill's long title indicates the bill would make requirements for continuing education for certification as a firefighter; however, those requirements are not addressed in the bill.

Additionally, Section 17 of the bill gives the state fire marshal authority to promulgate rules, but does not provide for approval of the rules by the board. The other rules provisions in the bill provide for board approval of rules, and it is possible the omission for Section 17 is unintentional.

## **OTHER SUBSTANTIVE ISSUES**

The Attorney General's Office provided the following other substantive issues.

- Section 7 gives the state fire marshal's "office" the authority to adopt or revise rules. Generally, the authority is given to the head of an executive agency, and not to the agency in general, so that it is clear with whom the responsibility for adopting and revising rules lies. Section 16, for example, gives rule making authority to the "state fire marshal", not to the "office." The bill should be amended, also, to address this inconsistency. Moreover, often, the boards or commissions that oversee executive agencies are given the rulemaking authority.
- Section 7 requires 20 days' notice of proposed rules to persons who have requested notice of proposed rules, and requires the proposed rules to be posted on the fire marshal's website. Posting of the proposed rules on the website is the only notice to the general public that is required.
  - The bill should clarify how many days' notice should be given for the website

posting.

- To provide greater public notice, the bill could require notice of the public hearing and proposed rules to be published in the New Mexico register.
- Section 7 provides that, “Any interested person may appear and present testimony at the hearing on proposed rules.” The bill could be clarified to allow persons to submit written comment prior to or during the hearing (in lieu of testimony), to submit written information at the hearing, and/or to cross-examine witnesses. As an example, language from the Water Quality Act providing for such public participation, states:
  - “At the hearing, the [board] shall allow all interested persons reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing.” (Section 74-6-6(D) NMSA 1978)
- Section 10 authorizes the office “to make investigations and reports of existing conditions in the state that are fire hazards and to make reasonable orders for the alleviation of those situations as the state fire marshal deems necessary.” Section 10 further provides that:
  - “If the orders of the state fire marshal are not carried out by persons to whom they are directed, the office may institute proper proceedings under municipal ordinances or state laws to require compliance with the orders.”
  - It is not clear what is meant by “proper proceedings under municipal ordinances or state law to require compliance with the orders.” This language should be clarified to give the office authority to institute actions to enforce its orders in specified courts.

## **ALTERNATIVES**

SFM could be transferred from PRC to the Department of Public Safety.

JC/bb/je/aml