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FISCAL IMPACT REPORT

SPONSOR McQueen ORIGINAL DATE 3/7/17
LAST UPDATED _____ HB 502
SHORT TITLE Forfeiture of Svc Credit for Public Officials SB _____
ANALYST Esquibel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY17 | FY18 | FY19 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|----------------------------|------|----------------------|------------------------------|------------------|
| Total | | See Fiscal Implications | | | | |

(Parenthesis () Indicate Expenditure Decreases)

HB502 relates to HB501, Public Corruption Act.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the District Attorneys (AODA)

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

Educational Retirement Board (ERB)

Public Employees Retirement Association (PERA)

Secretary of State (SOS)

SUMMARY

Synopsis of Bill

House Bill 502 (HB502) proposes to amend the Public Employees Retirement Act by requiring the forfeiture of service credit of elected officials who are convicted of or plead guilty or nolo contendere to a corruption offense. A corruption offense is defined as a variety of felony offenses committed by elected officials. HB502 provides certain limitations to this penalty to account for the return of member contributions paid by the public official if the public official has not retired or has retired but has not received an amount in pension payments equal to the amount of member contributions paid by the public official during time served as a public official. HB502 will only affect service credit associated with service as an elected official.

The bill defines a "corruption offense" as a first, second or third degree felony conviction for:

- Fraud;
- Embezzlement;

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- Extortion;
- Forgery;
- Bribery of public officer or public employee;
- Demanding or receiving a bribe by a public officer or public employee;
- Bribery or intimidation of a witness or retaliation against a witness;
- Racketeering;
- A computer crime; or
- Money laundering.

The bill also defines a “corruption offense” as any conviction for:

- Perjury;
- Soliciting or receiving a kickback, bribe or rebate;
- Offering or paying a kickback, bribe or rebate; and
- Conspiracy to commit any of the crimes set forth in the subsection.

HB502 provides for the refund of any employee contributions on account to an elected official in the event of the service credit forfeiture.

HB502 does not apply to the Judicial Retirement Act or the Magistrate Retirement Act.

FISCAL IMPLICATIONS

The Administrative Office of the District Attorneys (AODA) notes HB502 adds significant consequences for “corruption offenses” committed by elected officials. This may make it more difficult to prosecute such crimes with more such offenses going to trial. If there are more trials, there will be more costs for the district attorneys.

SIGNIFICANT ISSUES

The Attorney General’s Office (AGO) notes HB502 does not mention the implications of a public official who receives a conditional discharge order pursuant to Sec. 31-20-13 for a corruption offense. A criminal discharge order is not an adjudication of guilt. [*See* NMSA 1978, 31-20-13.] A conditional discharge order may only be made available once, and this may present issues with respect to the application of this proposed bill in a situation where a probationer violates probation and the court then enters an adjudication of guilt. [*See Id.*]

The Administrative Office of the District Attorneys (AODA) notes the bill may be challenged as an ex post facto law, prohibited under both the United States and New Mexico constitutions. [U.S. Const. art. 1, § 10, cl. 1; N.M. Const. art. 2, § 19.] Penal laws cannot be applied retroactively to increase the penalty of crimes that have already been committed. The bill appears to have a retroactive effect. The bill looks at the date of conviction, not the date of the offense. A person who committed a “corruption offense” prior to the effective date of the bill would still be subject to the forfeiture if the conviction occurred after the effective date of the bill. It could be argued that the bill is not “penal,” but a civil or remedial bill. But given that the loss of benefits would be a direct result of a criminal conviction, it is possible that the courts would view the bill as punishing corrupt public officials. To avoid the ex post facto issue, the bill should be changed to clarify it applies only to crimes committed after its effective date.

An existing criminal sentencing statute, NMSA 1978, Section 31-18-15.4, provides that when a separate finding of fact by the trier of fact finds beyond a reasonable doubt that a felony offender is a public official and that the felony relates to, arises out of, or is in connection with holding elected office, the basic sentence may be increased by a fine not to exceed the value of the salary and fringe benefits paid to the offender after commission of the first act that was the basis for the felony conviction. Note that Section 31-18-15.4 does not expressly address service credits or retirement benefits.

HB502 defines “corruption offense” as one of the listed offenses committed by a public official during that public official’s time in office. Note that it does not require that the listed offense have any relationship to the elected official’s duties. That makes HB502 easy to administer, and does away with the need for special findings linking the crime to the public office. However, if the intent is to punish malfeasance in office, HB502 may go beyond that and punish behavior unrelated to the elected official’s duties.

The Public Employees Retirement Association (PERA) notes upon meeting the minimum service requirements of a state retirement plan, a member of a retirement plan acquires a vested property right with due process protections under both the New Mexico and the United States Constitutions.

PERFORMANCE IMPLICATIONS

The Administrative Office of the District Attorneys (AODA) writes the collateral consequences of HB502 are severe, and may result in more cases on “corruption offenses” going to trial and appeal.

ADMINISTRATIVE IMPLICATIONS

Because the provisions of the bill are placed in the Public Employees Retirement Act, it will be administered by the Public Employees Retirement Association. However, there is nothing in the bill that provides notice of a conviction to PERA.

The AODA notes under the provisions of HB502, district attorneys and courts would be wise to insist that defense counsel advise their elected official clients charged with “corruption offenses” about the consequences of HB502 before accepting a plea agreement. The collateral consequences of HB502 are severe, and appellate courts may conclude that a plea agreement was involuntary if the defendant was not fully informed of the consequences of that plea.

The ERB notes for reciprocity retirees who have been convicted of or plead guilty or nolo contendere to a corruption offense, as defined in this bill, ERB staff would need to coordinate with PERA staff to correctly determine retirement eligibility and final average salary under the Reciprocity Retirement Act.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

PERA notes 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 a court-ordered division of retirement funds as community property.

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

HB502 relates to HB501 which would create the Public Corruption Act and enact penalties for a public official who is convicted of or pleads guilty or nolo contendere to numerous criminal offenses. HB501 applies not only to elected officials, but also to a person campaigning for an office in an election covered by the Campaign Reporting Act or a person appointed to an office that is subject to an election covered by that act. HB501 repeals Section 31-18-15.4.

TECHNICAL ISSUES

The Public Employees Retirement Association (PERA) notes HB502 does not address the elected official's pension benefits prospectively. PERA recommends specific language regarding suspension of pension benefits in the event the pension is based solely on service credit accrued during service as an elected official.

HB502 does not provide that any portion of a pension that is subject to court-ordered child support or satisfaction of the community interest in the pension incident to a dissolution of marriage will not be affected by forfeiture.

HB502 does not address whether forfeited service credit may be repurchased at any point in the future.

HB502 provides for a refund of member contributions, but is silent regarding interest accrued by those contributions while they are in a member's account.

The Public Employees Retirement Association (PERA) suggests the following amendments:

- On Page 1, line 21, strike “associated with” and replace with accrued during the time served”;
- One Page 2, line 4, after the word “paid” insert “and associated interest credited to”;
- On Page 2, line 7, after the word “employment” insert “in a capacity other than as an elected official”;
- On Page 2, line 14, after the word “contributions” insert “and associated interest”;
- On Page 2, line 19 after the word “contributions insert “and associated interest”.

The Attorney General's Office suggests adding a citation to the Public Employees Retirement Act, NMSA 1978, Sections 10-11-1 to -142, Judicial Retirement Act, Sections 10-12b-1 to -19, and the Magistrate Retirement Act, Sections 10-12c-1 to -18.

The Administrative Office of the District Attorney (AODA) suggests adding “H. The provisions of this section apply to corruption offenses committed after its effective date.”

The Administrative Office of the Courts (AOC) reports HB502 does not provide definitions for “elected official” and “public official,” and these terms are not defined in Sections 10-11-2 and 10-11-2.1 NMSA 1978 of the Public Employees Retirement Act.

The Educational Retirement Board (ERB) notes HB502 uses the terms “elected official” and “public official” seemingly interchangeably and without a definition of either term.

OTHER SUBSTANTIVE ISSUES

The Administrative Office of the District Attorneys (AODA) indicates the impact of HB502 on an offender can be severe, and some elected officials will feel the impact of HB502 more than others. Its application is automatic—if an elected official is convicted of a corruption offense, his or her service credit as an elected official is forfeit. For a person whose career has been in elected office, taking away the service credit can be the equivalent of taking away that person’s pension. For a person who held an elected position for a short time, the financial impact may not be so significant.

The Educational Retirement Board (ERB) notes HB502 would only have a minor effect on the retirement benefits administered by ERB. Elected/public officials receive benefits under PERA. Pursuant to the Reciprocity Retirement Act, NMSA 1978, Section 10-13-1, *et seq.*, public employees, including elected/public officials who have earned service credit in both the PERA and ERB systems are permitted to combine service credit to determine eligibility for retirement benefits. The Reciprocity Act also allows members to use salary earned under one system to calculate the “final average salary” component of the pension benefit under both systems. As a result, if a corrupt public official (PERA member) with reciprocal service credit under both systems sought to retire under the ERB system, ERB would not recognize any PERA service credit or salary which had previously been forfeited under HB502 to determine the member’s eligibility for retirement and final average salary. As of this date, there are currently 1,341 ERB retirees who have reciprocal service credit with the PERA and 1,680 PERA retirees who have reciprocal service credit with ERB.

PERA reports currently, only members of the judicial and magistrate retirement systems are subject to a forfeiture of pension benefit provision. Under both the judicial and magistrate retirement systems, if a judge or magistrate is removed from office by the Judicial Standards Commission [Article 6, Section 32 of the Constitution of New Mexico], his or her only entitlement from the retirement fund is a refund of the member’s own contributions. The forfeiture provisions of the judicial and magistrate retirement systems only pertain to active members and cannot be exercised against a retired member already receiving pension benefits (The Judicial and Magistrate Retirement Acts bar retirees from returning-to-work with another state system.)

Many PERA retirees retire with reciprocal service credit under more than one state retirement system. Under current law, retired members may, subject to certain conditions, return to public employment or take office as an elected official.

POSSIBLE QUESTIONS

Are service credits or pension payments halted while a conviction is being appealed? If so, what happens if the conviction is overturned?

What impact does HB502 have on the rights of an innocent spouse? If the offender's pension has vested, and is subject to a divorce settlement, does HB502 void the rights of the spouse?

RAE/jle