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## F I S C A L   I M P A C T   R E P O R T

SPONSOR McSorely ORIGINAL DATE 3/6/2017 LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_  
SHORT TITLE Use of Force Review Board SB 450  
ANALYST Rogers

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		
\$0.0	\$100.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$0.0	\$100.0	\$100.0	\$100.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 214.

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of the Attorney General (OAG)

Administrative Office of the District Attorney (AODA)

#### Responses Not Received From

Administrative Office of the Courts (AOC)

### SUMMARY

#### Synopsis of Bill

SB 450 creates the Use of Force Review Board to review of all use of force incidents by law enforcement. At the conclusion of reviews, the Board will make a finding as to the justification of the use of force. If the finding is that the incident lacked justification, the Board will appoint a special prosecutor that shall bring the matter to a preliminary hearing.

The Board will consist of five members, each serving a four year term, including two retired judges appointed by the Supreme Court, one retired law enforcement officer appointed by the Secretary of the Department of Public Safety, one retired public defender appointed by the chief public defender, and one retired district attorney appointed by the director of the AODA. Each member shall receive no compensation other than per diem and mileage.

SB 450 defines a use of force incident as force utilized by a law enforcement officer resulting in death or great bodily harm.

The board is administratively attached to the Administrative Office of the Courts (AOC).

## **FISCAL IMPLICATIONS**

The appropriation of \$100 thousand contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of FY18 shall not revert to the general fund. LFC analysis views the appropriation as recurring as it assumes the Board will operate for more than one year.

It is not evident what costs the appropriation will be used to address except for the per diem and mileage allowances authorized by subsection E of this bill. All five members of the board are specifically required to be retired, meaning their service on the board would not adversely affect agency budgets. If the board elects to appoint a special prosecutor, as authorized in subsection F, it is unclear where the funds would come from within AOC's budget.

## **SIGNIFICANT ISSUES**

OAG explains “the drafters may wish to consider what discretion, if any, the special prosecutor would have in deciding to bring charges resulting from incidents deemed unjustified. The language of SB 450 appears to require the matter be brought to a preliminary hearing upon such a finding.”

The AODA provides the following analysis,

SB 450 would create a review board composed of two retired judges, one retired law enforcement officer, one retired public defender and one retired district attorney. “All incidents of use of force (by a law enforcement officer resulting in or causing great bodily harm or death of another person) shall be reported to the use of force review board.” “Upon receipt of notice of a use of force incident from a law enforcement agency, the board shall meet, conduct a review of the incident and make a determination as to whether the use of force in the incident was justified.”

SB 450 does not provide any guidance on when the notice must be made, or if it must be accompanied by any investigative reports or other documentation. It does not indicate when the review board must meet after receiving a report or what actions they can take to review the incident. It does not even state whether the decision making by the board would be to determine if the use of force was “justified” under criminal law or was justified under civil law. Cf., State v. Mantelli, 2002-NMCA-033 (Police officer prosecuted for voluntary manslaughter,) and Archuleta v. LaCuesta, 1999-NMCA-113 (Police officer sued for civil damages alleging federal civil rights violation [42 U.S.C. Sect. 1983] and New Mexico Tort

Claims Act violation [Sect. 41-4-1 to -27, NMSA 1978].)

SB 450 does not discuss or offer any guidance on how the review board would conduct their proceedings, and doesn't indicate whether they would have any legal advisors, investigators or support staff to assist them in evaluating what are always complicated and unique cases. See, e.g., Fancher v. Barrientos, No. Civ 11-11 LH/LAM U.S. Dist Ct.-D. NM (2012) (Qualified immunity operates to protect officers from the “sometimes hazy border between excessive and acceptable use of force.”), State v. Mantelli, , *supra* (Sect. 30-2-6, NMSA 1978, justifiable homicide by a public officer or employee, has evolved in response to United States Supreme Court decisions like Tennessee v. Garner, 471 U.S. 1 (1985).) The bill also does not indicate whether the board would, for example, have subpoena power or could take sworn testimony.

The bill does not indicate whether an officer with a use of force incident under review could have legal advisors or provide submissions to the board. See, Graham v. Conner, 490 U.S. 386 (1989) (The reasonableness of use of force must be judged from the perspective of the officer on scene, often forced to make a split-second decision, rather than with the 20/20 vision of hindsight.) Similarly, there is no guidance on whether any officer could be compelled to provide a statement to the board but doing so could complicate matters because of their constitutional rights against self-incrimination under the federal and state constitutions. See, Garrity v. New Jersey, 385 U.S. 493 (1967), State v. Chavarria, 2001-NMCA 095 (Public employees can be compelled to respond to questions about performance of their duties but only if the answers cannot be used against them in a subsequent criminal proceeding.)

There is no other membership criteria listed for the review board, besides “retired,” so the member judges could have previously been everything from a federal judge to probate judge in a rural county to a supreme court justice, or even have served in another state or jurisdiction. They may have had little or no training or experience with criminal law, let alone dealt with a use of deadly force incident involving a law enforcement officer. The other members of the review board may have also not had any experience or training involving deadly use of force by law enforcement officers. Similarly, as drafted, the bill would permit a retired law enforcement officer, public defender or district who served in another jurisdiction to be appointed.

SB 450 would require all the review board members to be “retired” but that description can have different meanings. The state judicial, magistrate and public employee retirement acts permit persons to “retire” with as little as five years of service if they are at least 65 years old and immediately begin collecting their pension, or they can leave public employment, stop working altogether and begin collecting a pension when their age and service years fit the formula. See, Sects. 10-11-1, et seq., 10-12B-1, et seq. and 10-12C-1, et seq. They can also retire from government service but continue working—either in a government or private job. It’s also possible under the bill to appoint someone who served for a limited period, perhaps not even enough to be vested in the state retirement system, as a judge, law enforcement officer, public defender or district attorney but are no longer working so would be considered “retired.” It’s also unclear if the bill would require the district attorney member to be someone who was an elected district attorney, or was an appointed assistant district attorney. Because of the relatively modest pay and difficult work, many elected district attorneys do not retire in that position.

SB 450 includes a provision that “If the board determines that the use of force was not justified, it shall appoint a special prosecutor to bring the matter to a public hearing,” but does not indicate who the prosecutor should be, how they should be paid, or even how they would be vested with prosecutorial authority. The \$100,000.00 proposed appropriation for use by the board could be quickly exhausted if legal counsel and/or investigators are utilized, even if they are state employees. Payments to a special prosecutor and for their use would exhaust the funds even more quickly.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

Relates to HB 214; the bill looks to create a Special Use of Force Unit within the Office of the Attorney General.

### **OTHER SUBSTANTIVE ISSUES**

The OAG explains “it is unclear the specific process for referring use of force incidents to the board. While this is required by SB 450, there is no time requirements for referrals from the date of the incident in question or who is ultimately responsible for making the referral (can the board accept notice from a line officer, only the chief or director, can others report these incidents?).”

The OAG also explains “instances of police misconduct are under the civil jurisdiction of the Law Enforcement Academy Board (LEAB). There is no reference to the LEAB procedures or discipline process in SB 450, and there is no legal barrier for the state to pursue parallel criminal and civil prosecutions for a single or related incident.”

TR/jle