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FISCAL IMPACT REPORT

SPONSOR Burt **ORIGINAL DATE** 2/06/2020
LAST UPDATED 2/17/2020 **HB** _____

SHORT TITLE Military Affairs Changes **SB** 175/aSJC

ANALYST Rabin/Iglesias

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY20	FY21	FY22	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	NFI	Up to \$1,000.0	Up to \$1,000.0	Up to \$3,000.0	Recurring	Appropriation Contingency Fund (General Fund Reserves)

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Department of Military Affairs (DMA)

New Mexico Attorney General (NMAG)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to Senate Bill 175 makes the following changes:

- Removes the exemption of rules promulgated by the adjutant general from the State Rules Act;
- Changes the broadening of the governor’s authority to order members of the national guard to assist in search and rescue missions, counter-drug operations, or similar operations to exclude “similar operations;”
- Changes the adjutant general’s authority to utilize the state defense force, while performing cadre duty, to “assist the national guard with training or other exercises that are not considered state-ordered militia duty” to “assist the national guard with training exercises or other cadre duty;” and,
- Removes the provision stating that nothing in the section of law addressing the Workers’ Compensation Act in relation to the state defense force and allowing the adjutant general to use members of the force to assist with training and exercises shall be construed as a waiver of immunity under the Tort Claims Act.

Synopsis of Original Bill

Senate Bill 175 makes several changes to Chapter 20 NMSA 1978, the statute governing military affairs and the New Mexico National Guard (NMNG).

The bill changes the structure of the Department of Military Affairs (DMA) and the powers of the adjutant general, including making the adjutant general of NMNG the commanding general of New Mexico and the deputy adjutant general the deputy commanding general of the state, elevating DMA to a cabinet-level department consisting of three military divisions and five civil divisions, and allowing the adjutant general to promulgate rules for the conduct of courts-martial and punishments under the Code of Military Justice that are consistent with the New Mexico Military Code and afford reasonable due process to criminal defendants. SB175 exempts the promulgation of such rules from the State Rules Act (this provision was removed by the SJC amendment).

SB175 also broadens the governor's ability to order members of the state militia (which includes the national guard and the state defense force) to assist in search and rescue missions, counter-drug operations, or similar operations not otherwise authorized (the SJC amendment removes the authority for "similar operations").

Additionally, this bill makes changes to the state defense force, allowing the governor to call it into service whenever deemed necessary to meet a major disaster, allows the adjutant general to use members of the force who are performing cadre duty (defined as the normal service and training of the force in anticipation and support of militia duty) to assist the National Guard with training or other exercises that are not considered state-ordered militia duty, and allows individuals over age 64 to serve in the state defense force (the SJC amendment replaces "other exercises that are not considered state-ordered militia duty" with "other cadre duties"). The bill clarifies that nothing in the section of law addressing the Workers' Compensation Act in relation to the state defense force and allowing the adjutant general to use members of the force to assist with training and exercises shall be construed as a waiver of immunity under the Tort Claims Act (this provision was removed by the SJC amendment).

SB175 also makes the adjutant general, rather than the governor, responsible for prescribing regulations for the uniform and insignia, and adds a new section of the Code of Military Justice (Article 12 of Chapter 20 NMSA 1978) that prohibits individuals subject to Chapter 20 from wrongfully wearing unauthorized "insignia, decoration, badge, ribbon, device, or lapel button" and provides specific punishments for doing so. The bill defines "wrongful" as "conduct... done without legal justification or excuse," specifies that "actual knowledge that the person was or is not authorized to wear the item in question is required," and clarifies that knowledge may be proved by circumstantial evidence. Individuals subject to Chapter 20 include members of the national guard not in federal service (in which case they are governed by the federal Uniform Code of Military Justice) and members of the state defense force when performing militia duty.

Additionally, SB175 adds a new section of the Code of Military Justice that prohibits sexual activities between recruits or trainees and recruiters or training leaders in positions of special trust, and provides for maximum punishments allowable for such an offense. The bill specifically states that consent is not a defense.

Finally, SB175 repeals Sections 20-4-12 (which governs military wills) and repeals two sections of the New Mexico Code of Military Justice: 20-12-57 (which prohibits sodomy), and 20-12-68 (which prohibits dueling).

The effective date of this bill is July 1, 2020.

FISCAL IMPLICATIONS

Under the provisions of SB175, the governor may order the national guard to assist in search and rescue missions or counter-drug operations. Under current law (Section 20-2-3(A) NMSA 1978), the governor may deploy the state militia in cases of active or imminent danger of insurrection, invasion, riot, or breach of the peace, as well as in cases of other emergencies (including any man-made or natural disaster causing or threatening widespread physical or economic harm that is beyond local control and requires the resources of the state). The governor may also order members of the national guard into state active duty for limited time periods to protect against certain cybersecurity threats (Section 20-2-3(B) NMSA 1978).

SB175 expands the purposes for which the governor may order national guard members into state active duty by adding a new provision to Subsection B of Section 20-2-3 NMSA 1978. As a result, this bill could significantly increase the scope of duties and number of operations for which the governor mobilizes the national guard. Additionally, while the definition of emergency used by Subsection A of Section 20-2-3 NMSA 1978 is broad, it appears that mobilizing the national guard under the provisions of this subsection would require the governor to declare an emergency. SB175 appears to broaden the governor’s authority to order members of the national guard into state active duty *without declaring an emergency*.

NMNG Expenditures for State Active Duty Operations
(in thousands)

Fiscal Year	Expenditures
FY11	\$ 1,481.4
FY12	\$ 1,397.6
FY13	\$ 605.1
FY14	\$ 444.5
FY15	\$ 1,035.6
FY16	\$ 743.2
FY17	\$ 132.4
FY18	\$ 1,005.4
FY19	\$ 265.3
Total:	\$ 7,110.5

Source: Department of Military Affairs

State active duty operations undertaken by the national guard and the state defense force are funded through the appropriation contingency fund, either through the provisions of Section 20-1-6(A) NMSA 1978, which provides for the state treasurer to pay vouchers and payrolls up to \$1 million out of unappropriated balances in the treasury (effectively, the appropriation contingency fund) for state militia operations, or through emergency appropriations/disaster allocations the governor may provide via executive order pursuant to Sections 12-11-23 through 12-11-25 NMSA 1978, which are funded through unappropriated money in the general fund (effectively, the appropriation contingency fund). If insufficient funds are available in the appropriation contingency fund, these operations would be funded through the operating reserve.

Historically, the number of national guard operations and their cost varies widely based on the number and type of emergencies or other issues requiring national guard mobilization. Between FY11 and FY19, the annual cost of state active duty operations averaged \$790.1 thousand, but ranged from \$132.4 thousand (in FY17) to \$1.5 million (in FY11).

Number and Cost of NMNG Search and Rescue Operations
(in thousands)

Fiscal Year	Number of Operations	Expenditures
FY11	10	\$ 162.9
FY12	15	\$ 181.2
FY13	14	\$ 149.4
FY14	17	\$ 202.1
FY15	14	\$ 200.6
FY16	8	\$ 158.4
FY17	6	\$ 62.0
FY18	5	\$ 41.8
Total:	89	\$ 1,158.4

Source: Department of Military Affairs

The national guard currently conducts search and rescue operations; the primary change in the authorization to conduct search and rescue operations provided by SB175 appears to be the power for the governor to mobilize the national guard for such operations without declaring an emergency. It is unclear if this would increase the number of search and rescue operations conducted by the national guard. Between FY11 and FY18, the national guard conducted 89 search and rescue operations, averaging 11 operations annually, but ranging from five (in FY18) to 17 (in FY14). The average cost of a search and rescue operation between FY11 and FY18 was \$13.3 thousand.

SB175 appears to specifically broaden the governor’s ability to order members of the national guard into state active duty *without declaring an emergency* (for additional

analysis of this distinction, see Significant Issues, below). The only funding mechanism currently available for such operations is that offered by Section 20-1-6(A) NMSA 1978, which is limited to \$1 million. As a result, the maximum fiscal impact of these provisions of SB175 is \$1 million.

The Department of Military Affairs (DMA) does not anticipate SB175 will have any additional operating budget impact.

SIGNIFICANT ISSUES

SB175 expands the governor’s authority to order members of the national guard into state active duty to include “search and rescue missions or counter-drug operations.” This expansion of the governor’s authority is added to a subsection focused on mobilizing members of the national guard to address cybersecurity threats; the reason for placing a very different provision in this section is unclear.

DMA states that domestic threats to national security and the increased use of the national guard forces for out-of-state deployments increase the potential for members of the state defense force to assist in times of need. The department reports that efficacy of the state defense force is currently impeded by the lack of flexibility in the regulations allowing them to work in cooperation and collaboration with NMNG and DMA. The state defense force is a volunteer force much like the New Mexico Mounted Patrol or the search and rescue teams that work with state police. Many of the volunteers are professionals such as doctors and lawyers who are looking for a way to continue serving within NMNG. DMA explains that this bill allows the adjutant general to task the state defense force while they are in cadre (or training) status to assist the national guard with training or other exercises which are not considered state-ordered militia duty.

DMA also adds that the changes proposed by SB175 are part of a larger evolution of New Mexico military justice to track with recent changes to the federal Uniform Code of Military Justice and Manual of Courts-Martial in 2019. The department states that these provisions ensure NMNG maintains their soldiers and airmen in accordance with the discipline proscribed by the United States Congress.

The Attorney General’s Office (NMAG) notes the following significant issues:

- **Section 2:** It is not clear what process or procedural rules would govern the promulgation of rules for the conduct of courts-martial and punishments. In the interests of transparency and clarity, a specific code or statute should be referenced as the guideline for those governing rules. Alternatively, a comprehensive process/procedure for the governing rules should be drafted and incorporated into the statute.
- **Sections 11 & 12:** The new sections do not include any guidelines regarding due process, which may potentially lead to a violation of one’s right to due process under the law.

TECHNICAL ISSUES

Article 5 of Chapter 20 NMSA 1978 offers two definitions of both “cadre duty” and “militia duty” in relation to the state defense force, in Sections 20-5-1(D) and 20-5-16(D). While the definitions do not seem to substantively conflict, there are minor discrepancies. These discrepancies exist under current law; however, SB175 makes minor, nonsubstantive changes to the definition of militia duty in Section 20-5-1(D), which creates additional discrepancies. Since SB175 makes changes to both sections, it may be desirable to align the definitions or remove the definitions in Section 20-5-16(D), as the definitions in Section 20-5-1(D) “apply to the duty statuses under which members of the state defense force serve,” which should encompass Section 20-5-16.

OTHER SUBSTANTIVE ISSUES

Disaster Allocations. There are two existing mechanisms for funding state active duty operations undertaken by the national guard and the state defense force. First, the state treasurer may pay vouchers and payrolls up to \$1 million out of unappropriated balances in the state treasury for militia operations, including nonemergency operations, pursuant to Section 20-1-6(A) NMSA 1978. Alternatively, the governor may issue executive orders declaring emergencies and allocating funds pursuant to Sections 12-11-23 through 12-11-25 NMSA 1978. Both methods of funding draw from unappropriated general fund monies—effectively, funds would be drawn from the appropriation contingency fund and, if funds in the appropriation contingency fund are insufficient, from the operating reserve. If there are insufficient funds available in the operating reserve, the governor may declare an emergency and enter into debt to suppress insurrection or provide for the public defense under the provisions of Article 9, Section 7 of the New Mexico Constitution; however, such a situation is unlikely to occur.

While expenditures for nonemergency operations are limited to \$1 million, the governor’s ability to allocate funding from the appropriation contingency fund and operating reserve via emergency declarations (“disaster allotments”) is virtually unlimited. Although Section 12-11-24 NMSA 1978 limits these allotments to \$750 thousand for “each eligible and qualified applicant,” the governor may issue several orders to address the same issue. For example, the governor issued six executive orders on July 10, 2019, authorizing a total of \$4.5 million dollars to the Forestry Division of the Energy,

10-Year History of Governor's Disaster Allotments
(in millions)

Fiscal Year	Allotment Amount
FY10	\$ 9.9
FY11	\$ 28.8
FY12	\$ 17.2
FY13	\$ 28.4
FY14	\$ 19.2
FY15	\$ 12.5
FY16	\$ 16.3
FY17	\$ 13.0
FY18	\$ 18.5
FY19	\$ 29.8
Total:	\$ 193.6

Source: LFC files

Minerals and Natural Resources Department to address issues related to wildfires, and authorized another \$1.5 million for the same purpose through two executive orders on September 3, 2019.

Over the past 10 years, the governor has allocated almost \$200 million in disaster allotments. In FY19, allocations totaled \$29.8 million, a significant increase over the 10-year average of \$19.4 million and a 61 percent increase over FY18 allotments.

SB175 specifically expands the governor's ability to order members of the national guard into state active duty for nonemergency operations, which would be funded pursuant to Section 20-1-6(A) NMSA 1978 and limited to \$1 million; Subsection E of Section 20-1-6 requires the governor to submit a report of expenditures of monies allocated under this section to the Legislature. It is notable that there is no similar report required for disaster allotments allocated pursuant to Sections 12-11-23 through 12-11-25 NMSA 1978.

Definitions. The following definitions may be useful when reading this bill and analysis:

- "**Militia**" means all the military forces of this state, organized and unorganized, whether active or inactive; but excludes the regularly organized police forces of the state or its political subdivisions and excludes the civil air patrol division. (Section 20-2-1(A) NMSA 1978)
- "**National guard**" means the New Mexico army national guard and the New Mexico air national guard. The national guard is federally recognized and has a dual state and federal character and mission. When used in Chapter 20 NMSA 1978 national guard shall refer to the national guard of New Mexico unless otherwise stated. (Section 20-2-1(A) NMSA 1978)
- "**New Mexico state defense force**" means that part of the militia of the state which is not federally recognized. It is exclusively a state entity. Its standing cadre is a component of the organized militia; its ranks are filled upon order of the governor from the unorganized militia. When used in Chapter 20 NMSA 1978, state defense force shall refer to the New Mexico state defense force. (Section 20-2-1(A) NMSA 1978)