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FISCAL IMPACT REPORT

ORIGINAL DATE 03/18/09

SPONSOR SRC LAST UPDATED HB

SHORT TITLE Retirement Benefit Forfeiture For Some Crimes SB 261/SRCS

ANALYST Aubel

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY09	FY10	FY11		
	Indeterminate*	Indeterminate*	Nonrecurring*	PERA Fund, ERB Fund, Magistrate Retirement Fund, or Judicial Retirement Fund

(Parenthesis () Indicate Revenue Decreases)

* Most likely minimal on an intermittent basis.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Office of the Attorney General (OAG)
 Public Employees Retirement Association (PERA)
 Administrative Office of the District Attorneys (AODA)

SUMMARY

Synopsis of Bill

The Senate Rules Committee Substitute for Senate Bill 261 provides for forfeiture of pension benefits from any state retirement system upon a finding that a defendant in a criminal proceeding has been convicted of a state or federal felony involving the use of public monies arising out of conduct related to a member or retired member's public employment.

PERA summarizes the provisions, as follows:

SRC Substitute for SB 261 affects retirement benefits accruing under the Public Employees Retirement Act (PERA), Judicial Retirement Act (JRA), Magistrate Retirement Act (MRA) and the Educational Retirement Act (ERA). The pension forfeiture legislation will cover all public employees, elected officials, judicial members, magistrates and legislators.

After forfeiture of a pension, SRC Substitute for SB 261 provides that a retirement system member's only entitlement shall be a refund of the member's own unexpended contributions, subject to the retirement system's compliance with prior court orders affecting the division of community property interests in retirement benefits or satisfaction of child support obligations.

SRC Substitute for SB 261 provides for forfeiture orders to be voided if the felony conviction at issue is overturned on final appeal. If a conviction is overturned, SRC Substitute for SB 261 provides that a former member may reinstate his or her forfeited service credit by paying the amount withdrawn plus compound interest from the date of withdrawal to the date of repayment at the rate set by the applicable retirement board.

SRC Substitute for SB 261 will apply prospectively and apply only to criminal acts committed after the effective date of the legislation.

The effective date would be 90 days after the end of the 2009 Legislative Session.

FISCAL IMPLICATIONS

Both the OAG and AODA report that additional staff will be necessary to prosecute these cases and to litigate the civil aspect of the forfeiture proceedings. AODA provides the following detail: "If there is a need to separate the prosecution of the criminal case from the civil forfeiture proceeding in order to prevent the prosecutors of the criminal action from becoming privy to otherwise non-discoverable information under the rules of criminal procedure, additional staff would be needed to litigate the civil forfeiture proceeding. Further, there will be a need for more public defenders and staff to represent indigent defendants in both proceedings." However, the AODA has suggested the number of public employees convicted of felonies is small. Thus, the possible fiscal impact to AODA and OAG is not considered material for FY10 and FY11.

SIGNIFICANT ISSUES

The primary policy decision is whether forfeiture of a pension account is appropriate when a felony is committed by public officers, elected officials and public employees arising out of conduct related to their public employment. Many states -- including California, Florida, Michigan and Pennsylvania -- have enacted anti-corruption legislation that includes forfeiture of retirement benefits specific only to felonies relating to the misuse of public monies, such as bribes, extortion, theft of public money, embezzlement of public money, and forgery.

The AOC compares the original bill to the substitute bill, as follows:

The change in wording of the predicate crime elements is important in that the original wording, "arising from conduct related to," was similar to wording used in the Tort Claims Act and Workers' Compensation Act that has been the subject of considerable judicial interpretation. The substitute wording, requiring proof of misuse of public money and that the crime was merely "related to" the public employment, probably resolves this issue to a great extent. If the crime involves misuse of public money, that defines how it would arise out of the public employment. Also, the class of actions that may be "related to" public employment is much broader than the class of actions "arising out of" public employment.

The substitute's requirement that a court resolve child support and community property issues before forfeiture addresses a significant issue in the original bill. That is, the original would have potentially deprived family members of benefits the law considers to be theirs, especially upon dissolution of marriage. The substitute will allow these estranged family members an opportunity for a court to provide a fair share of the perpetrator's retirement even though the perpetrator will end up with nothing.

Similarly, the substitute's specification that retirement service credit or payments be suspended during appeal will resolve a substantial difficulty that the original bill would have caused. The original bill, which would have required forfeiture immediately upon entry of judgment and sentence, would have required the relevant retirement associations to rebuild an employee's account with lost service credit, perhaps lost tax penalties, etc., if the employee succeeded in being exonerated on appeal. Awaiting final resolution will avoid these consequences.

PERA notes the following issues:

It is not clear under what jurisdiction the forfeiture court would issue orders purporting to divide a community property interest in retirement benefits. Under Section 10-11-136, such an order can only be issued in a proceeding for dissolution of marriage or legal separation. The substitute appears to permit a division without dissolution of marriage. PERA's tax-exempt status as a qualified plan under 26 USC 401(a) places strict limits on when retirement benefits may be subject to legal process. Section 10-11-135 is intended to enforce these limits. Federal law clearly allows an exception for a division of a community interest incident to divorce, but a division of retirement benefits without divorce would appear to violate federal law. The substitute also raises potential problems related to overlapping jurisdiction where an existing court, whether in-state or out-of-state, already exercises jurisdiction over community property and/or child support issues. It is also unclear how a spouse, former spouse, custodial parent or minor child would invoke the jurisdiction of the forfeiture court to issue community property and child support orders since none are parties to the forfeiture proceeding instituted by the district attorney or attorney general.

In light of the slow pace of criminal proceedings, spouses and custodial parents should have ample time to seek and obtain court orders under existing Sections 10-11-136 and 136.1 prior to entry of the forfeiture order, therefore, there appears to be no necessity to require the court presiding over the forfeiture to take up these ancillary issues.

ADMINISTRATIVE IMPLICATIONS

PERA will be required to comply with the notice requirements of SB 261 and will be required to promulgate rules concerning the administration of forfeiture proceedings as they apply to pension benefits payable, refunds of member contributions, and compliance with prior domestic relation and child support orders.

The AOG notes that "the bill seems to require the same prosecuting entity (Attorney General or District Attorney) to initiate both the felony complaint and the pension forfeiture proceeding. However, this is not entirely clear. It is conceivable that a District Attorney would initiate a felony prosecution without initiating a pension forfeiture proceeding. It is therefore possible that the Attorney General would be required to initiate the pension forfeiture proceeding."

RELATIONSHIP

PERA notes the following relationships to SB 261:

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 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.

The Judicial Retirement Act [NMSA 1978, 10-12B-7] allows for court ordered division of retirement funds as community property and legal process to satisfy child support obligations.

The Magistrate Retirement Act [NMSA 1978, 10-12C-7] allows for court ordered division of retirement funds as community property and legal process to satisfy child support obligations.

TECHNICAL ISSUES

The OAG provided the following technical comments:

The substitute bill defines "state system" to mean "a retirement program provided for in the Educational Retirement Act, the Public Employees Retirement Act, the Magistrate Retirement Act or the Judicial Retirement Act." It does not include the Volunteer Firefighters Retirement Act, NMSA Section 10-11A-1 et seq. This omission could raise "equal protection" issues, as that class of members or retirees would be treated differently from those participating in other retirement systems.

The bill only addresses circumstances in which an appeal is taken from the court finding, order of forfeiture, and/or conviction. It does not provide for circumstances in which a court enters an order of forfeiture of pension, the state retirement system receives that order and suspends service credit or pension benefits, and then the court sets aside its order or the conviction. It does not provide for circumstances in which a defendant is granted a pardon.

The provisions in the substitute bill are unclear and inconsistent regarding whether they contemplate an appeal of the "court finding" that the defendant is a member of a retirement system who has been convicted of a felony arising out of the misuse of public money and related to their public employment; the court "order" based upon those findings; the criminal conviction, any one of those rulings, or all three. See Section 1E referring to the "order" not being appealed, or not being upheld on final appeal; and

Section 1F providing for voiding the forfeiture order if either the “court finding” or the “conviction” is overturned on appeal; and Section 1G, referring to an appeal from the “court finding”.

It is unclear whether the substitute bill contemplates a civil appeal from the court finding, and/or order, or whether an appeal of the conviction forming the basis for those findings and order is sufficient. The Rules of Appellate Procedure may be different for criminal conviction appeals and civil appeals. For example, NMRA 12-304 addresses free process on appeal for criminal cases; and NMRA 23-114 governs free process in civil cases.

The substitute bill provides for “suspension” of a member’s service credit pending a final appeal. Presumably the member would not be required to continue to contribute to the retirement system during the time of this suspension. However, the substitute bill does not amend provisions in other state laws making membership in and contributions to the applicable retirement plan a condition of employment. See for example NMSA Section 10-11-3A.

The bill does not provide for the payment of interest on suspended retirement benefits, or repurchase of suspended service credit, if they are reinstated after the court finding, order, or conviction is overturned on appeal or otherwise set aside.

Because the bill would require forfeiture of a member’s or retired member’s right to receive a pension, and requires refund of contributions, but does not contain any provisions of discharge from employment as a result of the described felony conviction, it is conceivable that a convicted member who is not retired would continue to work for a public entity covered by one of the state retirement plans without being required to pay additional contributions to that plan during their employment. This would also conflict with state laws making membership in and contributions to the applicable retirement plan a condition of employment.

It is unclear whether this bill requires disenrollment of the member from participation in the Retiree Health Care Plan if they were receiving insurance benefits under that plan prior to conviction. A condition of participation in that plan is that a person be retired from one of the state retirement systems. See NMSA Section 10-7C-4E. If a member is convicted of a felony arising out of the misuse of public money and related to their public employment, and the court orders “forfeiture” of pension benefits, presumably that person would no longer be eligible for retiree health care insurance. If the conviction or finding is overturned on appeal, and that order is voided, there is no provision for payment of medical expenses incurred by the member or their spouse or dependents during the time after conviction and final appeal which may have been covered by retiree health care insurance.

The bill does not require the state retirement systems to provide information to the Attorney General or District Attorney regarding a member or retiree’s status or provide any procedure for acquiring that information. It does not amend confidentiality provisions existing in some statutes prohibiting the disclosure of information in a member’s files. See, for example, NMSA Section 10-11-130I prohibiting disclosure of any information in a member or retiree’s file without that person’s release and consent.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Members and retired members of state retirement plans would remain members or retirees, regardless of whether they have been convicted of a felony arising from conduct related to mispending funds in their public employment. Members of the Judicial Retirement system would continue to be subject to the forfeiture provisions of the Judicial Retirement Act [NMSA 1978, Section 10-12B-17]. Members of the Magistrate Retirement system would continue to be subject to the forfeiture provisions of the Magistrate Retirement Act [NMSA 1978, Section 10-12C-16].

MA/svb