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FISCAL IMPACT REPORT

ORIGINAL DATE 02/16/09
 LAST UPDATED 03/06/09 **HB** _____

SPONSOR Harden

SHORT TITLE Consideration of Criminal History in Hiring **SB** 459/aSPAC/aSJC

ANALYST Peery-Galon

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		Minimal	Minimal	Minimal	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

- Public Education Department (PED)
- New Mexico Corrections Department (NMCD)
- Workforce Solutions Department (WSD)
- State Personnel Office (SPO)
- Attorney General’s Office (AGO)
- Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to Senate Bill 459 clarifies agency “of the state or any of its political subdivision”.

Synopsis of SPAC Amendment

The Senate Public Affairs Committee amendment to Senate Bill 459 removes the term “regulatory” board on page 1, line 25 and page 2, line 5 from the Criminal Offender Employment Act.

Synopsis of Original Bill

Senate Bill 459 amends Section 28-2-3 NMSA 1978 of the Criminal Offender Employment Act by stating a regulatory board, department or agency shall not make an inquiry regarding a conviction on an initial application for employment and shall only take into consideration a conviction after the applicant has been selected as a finalist for the position. The proposed legislation also adds clarifying language to expand on the definition of a “regulatory” board.

FISCAL IMPLICATIONS

The Judicial Branch personnel policies currently follow what the AOC understands to be the implicit meaning of the proposed legislation. If this understanding is correct, there will only be a minimal administrative cost for statewide update, distribution and documentation of statutory changes.

SIGNIFICANT ISSUES

SPO reported he Senate Public Affairs Committee amendment, by removing the term “regulatory” from the proposed legislation, would still allow regulatory boards from inquiring into a conviction on the initial application for employment, but would prohibit the SPO from asking a question regarding a conviction in the initial application for employment and waiting until the applicant has been selected as a finalist for the position. If the proposed legislation passes SPO would still need to change State Personnel Board rules in Section 1.7.5.10 NMAC – Applications.

NMCD noted the Senate Public Affairs Committee amendment was apparently done because the term regulatory board is not needed in the proposed legislation because a regulatory board handles applications for licensure and not applications for employment. This amendment does not change the intended purpose or scope of the original bill, or its effects on state agencies.

PED noted the State Personnel Board’s established hiring practices and hiring rule would have to be changed. Currently the State Personnel Board’s rule states at Section 1.7.5.10 NMAC:

An applicant’s application shall be rejected if the applicant has been convicted of a felony or a misdemeanor and the provisions of the *Criminal Offender Employment Act [NMSA 1978, Sections 28-2-1 to 28-2-6]* permit such rejection.

PED stated the proposed legislation would seem to raise issues of public safety and administrative economy to consider a person as a viable candidate for public employment knowing that convictions for certain offenses should disqualify that applicant from public employment. The proposed legislation would prohibit the agency from looking into or asking a job applicant about self-reported convictions; it would also restrict background or reference checks on an applicant for a position about any known or reported convictions.

NMCD reported the Criminal Offender Employment Act does not apply to law enforcement agencies. The Corrections Department is a law enforcement agency, so the proposed legislation would have no impact on the department. As a law enforcement agency, the Corrections Department has the discretion to hire or not hire convicted felons. For example, the department would probably not ever hire a convicted felon as a warden, but would hire one who is a qualified substance abuse counselor. However, by statute, no convicted felon can work as a correctional officer for the department.

NMCD reported “banning the box” or not allowing any inquiry into criminal convictions on application forms is a controversial proposal. Within the Corrections Department, there are employees in favor of and against this idea. On the one hand, “banning the box” helps promote employment for convicted felons. Convicted felons absolutely need to be able to work, or some of them may commit new crimes. Employment is vital in the offender’s reentry into his or her

community. On the other hand, it is certainly reasonable for public and private employers to immediately know whom they are considering for hiring, especially in this day when employers are often sued and held responsible for the criminal and negligent acts of their employees. The controversy surrounding this idea has caused some individuals to propose more of a middle ground: criminal convictions over five years old cannot be inquired about in job applications.

WSD noted the proposed legislation may result in additional expenditure of human resources in recruiting, screening, interviewing, and selecting potential employees for positions where convictions may ultimately bar employment.

SPO reported this process could potentially mislead applicants who have criminal convictions to believe that the criminal conviction question is not going to be asked of them when applying for employment or licensure with a regulatory board. By asking the conviction question once the applicant has been deemed a finalist for a position, a meaningful discussion could occur to determine if the conviction was recent and/or related to the position the employee is applying for. This would prevent interviewers from automatically not considering an individual based solely on a conviction. Asking about a conviction up front may deter an applicant from continuing with the application process saving the employer or regulatory board time and resources. However, this may deter an otherwise qualified applicant from continuing through the application process and obtaining employment.

SPO noted the State currently has a question in place as part of the application process. Not asking the question on the application would mean that the State Personnel Office in conjunction with the agency would have to devise standard operating procedures to obtain the information during the interview process. This could be problematic in the event that the conviction question was inadvertently not asked. The employer could potentially face a negligent hiring claim if the employee that was hired and later commits serious acts of violence toward another employee or the public or engages in theft.

AOC reported the Judicial Branch's Personnel Rules generally permit the recruitment of individuals with criminal backgrounds as part of the Equal Employment Opportunity provisions. The application form currently asks, "Have you even been convicted of a felony or larceny? ___ Yes ___ No If yes, give circumstances and dates," and includes the parenthetical, "Conviction will not necessarily disqualify an application from employment. Each case is considered on its own merit."

AOC stated that regarding the recommendation for appointment to an employment position with the Judicial Branch, the Personnel Rules at Sec. 4.07 D state that after the offer is extended, background and credit checks shall be completed at the discretion of the Administrative Authority [the AOC, the employing Court, etc.]. Further, the Personnel Rules at Sec. 4.04 B(6) direct that an application shall be rejected if the applicant is in violation of the Criminal Offender Employment Act.

The Drug Policy Alliance noted that even though the State Personnel Office job applications allows individuals to provide an explanation for their conviction, many people with former convictions applying for the job are intimidated and are discouraged from even applying for the position because of the question. The Drug Policy Alliance reported that a recent study shows that in nearly 50 percent of cases, employers were unwilling to consider equally qualified applicants on the basis of their criminal record. Another major survey reflected that 40 percent of employers will not even consider a job applicant for employment once they are aware that the individual has a criminal record.

The NM Criminal Offender Employment Act specifically excludes people applying for jobs with law enforcement agencies. The Drug Policy Alliance reported other public job positions that require an added level of security, such as position working with children or the elderly, will in no way be compromised by this proposed legislation.

ADMINISTRATIVE IMPLICATIONS

PED reported that state agencies would have to alter their hiring and background and reference check practices to comply with this bill if enacted.

WSD noted state board, department and agency forms, websites and practices will need to be changed if the proposed legislation passes. For instance every person applying for a job through the State Personnel Office answers a question as to prior convictions at the time of the application. Other agencies and/or departments may have this question in the written application as well.

SPO reported each employer in the state, including state agencies, that currently asks about a conviction at the start of the hiring process may need to change their practice and procedures to not ask about convictions until the final stages of the interview process.

RELATIONSHIP

Senate Bill 459 has a relationship with House Memorial 26, House Bill 210 and House Bill 370.

OTHER SUBSTANTIVE ISSUES

Drug Policy Alliance noted that in 2007 House Memorial 41 task force produced a comprehensive report titled “Barriers to Employment for Individuals with Criminal Convictions.” One of the recommendations of the report is to “improve the State Personnel Office application process.”

TECHNICAL ISSUES

AGO stated the reference to “regulatory board” is unneeded in the bill because a “regulatory board” handles applications for licensure and not applications for employment.

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