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## FISCAL IMPACT REPORT

ORIGINAL DATE 02/13/13  
 SPONSOR Candelaria LAST UPDATED 02/14/13 HB \_\_\_\_\_  
 SHORT TITLE Tax Assessment Hearing Officers SB 367  
 ANALYST Boerner

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

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Attorney General’s Office (AGO)

Taxation and Revenue Department (TRD)

### SUMMARY

#### Synopsis of Bill

This bill seeks to establish a new “Office of Tax Protest and Hearings” (Office) to provide for independent hearing officers to hear tax assessment protests. The Office would be attached to the Taxation and Revenue (TRD) for administrative purposes in accordance with the Executive Reorganization Act (ERA). The Office is to be run independently from the TRD with respect to decision-making and policy-making. The bill would also establish a chief hearing officer (Chief) as the chief executive of the Office. The Chief would be appointed by the Governor with the consent of the Senate and would hold office at the pleasure of the Governor. The Chief and hearing officers in the Office would be required to be active members in good standing of the State Bar of New Mexico, have five years experience as an attorney in tax law and complete an appropriate course of instruction or training for hearing officers.

The office would be required to:

- (1) handle formal protests filed by taxpayers who may be disputing tax liabilities, refund denials, failures to grant or deny refund claims or other actions taken by the TRD pursuant to the Tax Administration Act and other applicable tax statutes;
- (2) hold all administrative hearings pursuant to the Tax Administration Act and other tax statutes; and
- (3) provide independent and impartial hearing officers.

The bill provides for the transfer of all personnel, property and contracts to the new proposed Office from the current Protest Office and the hearings bureau of the TRD relating to hearings and actions of the Department pursuant to the Tax Administration Act and other tax statutes. All contracts of the Protest Office and the hearings bureau of the TRD relating to hearings and actions of the Department pursuant to the Tax Administration Act and other tax statutes would be binding and effective on the Office.

## **FISCAL IMPLICATIONS**

The new Office of Tax Protest and Hearings would inherit all personnel, property and contracts from the current Protest Office and the Hearings Bureau (only what is related to hearings and actions of the TRD pursuant to the Tax Administration Act). However,

- It is not clear where the new office will be physically located. Relocation to a new space independent of the TRD could potentially result in new or increased lease costs (as well as one-time costs associated with the move).
- It is assumed that the information technology used by the current Hearings Bureau and Protest Office of the TRD will be transferred to the new office; however, it is not clear that the new Office would also have the necessary IT support staff.
- It is not clear if the staff transferred from the Hearings Bureau of the TRD will be sufficient for all the administrative functions required of a new independent Office of Tax Protest and Hearings. The new Office may require additional FTE for financial and administrative support functions.

## **SIGNIFICANT ISSUES**

Currently, the Hearings Bureau of the TRD (within the Office of the Secretary) holds all administrative hearings under the Tax Administration Act and other tax statutes, the New Mexico Motor Vehicle Code, the DWI Implied Consent Act, and the New Mexico Parental Responsibility Act. Upon request it hears other administrative and regulatory matters over which the Secretary has jurisdiction.

The Protest Office processes and resolves formal protests filed by taxpayers who dispute tax liabilities, refund denials, failure to grant or deny refund claims or other actions taken under the provisions of New Mexico's Tax Administration Act (only a fraction of tax protests end up with a scheduled hearing).

The TRD argues that the employees of the Protest Office, currently part of the TRD Legal Services Bureau, serve as witnesses in the hearings before the hearing officers of the TRD Hearings Bureau; therefore, locating both hearing officers and witnesses within the same Office of Tax Protest and Hearings negates the independence of hearing officers that the bill seeks to ensure.

Further, the bill only addresses the tax hearing officers within the Hearings Bureau; the TRD has 11 hearing officers of which only four currently handle tax hearings in addition to other hearings under the Motor Vehicle Code such as implied consent hearings. In 2011, the Hearings Bureau scheduled 92 tax hearings and in 2012 scheduled 86 tax hearings. The Chief Hearings Officer estimates that if a hearing officer was handling only tax cases, a hearing officer could handle approximately 50 tax hearings per year which would require 1.5 FTE hearings officers and one administrative employee. Therefore, the TRD argues that moving a small number of hearing

officers out of the Hearing Bureau will reduce the efficiency and increase the cost of the hearing functions left at the TRD and for the new Office of Tax Protest and Hearings.

### **Performance Data for the Bureau and Protest Office Currently within TRD**

For FY12 the TRD reported that it surpassed the target number of tax protest cases to be resolved, 750, by employing a number of internal strategies such as employing motivational tools and introducing effective and efficient working methods. The beginning inventory of 1,128 of protest cases on July 1, 2011 was reduced to 794 cases as of June 31, 2012. The Department also reports few data tracking errors with respect to requests for hearings. Nevertheless, the number of cases in protest at the Department has consistently been over 1,000 cases for many years.

The TRD notes that it has no control over the number of protests that are filed. The number of protests filed is primarily dependent on department initiatives and actions; an increase in the number of assessments mailed by the TRD results in an increase in the number of protests filed. Likewise, if the number of audits performed by the TRD is increased, the number of resulting protests will also usually increase.

### **ADMINISTRATIVE IMPLICATIONS**

The Attorney General's Office (AGO) reports that there are no apparent major legal impediments to the bill. While the number and type of hearings are not likely to change, the new Office may need to adopt rules to organize the Office and conduct hearings. A specific grant of statutory authority for rulemaking in SB 367, therefore, might be advisable. This is because the new Office's authority to engage in rulemaking is unclear. The bill states in Section 1 (A) that:

[t]he office is attached to the TRD for administrative purposes *only* in accordance with the Executive Reorganization Act. The office shall retain decision-making and policymaking autonomy separate from the TRD...(emphasis added).

While the Office is to retain decision-making and policy-making authority, there is no specific grant of rulemaking authority nor is there a reference to any other existing rulemaking authority. This is important because the bill states that the Office would be attached to the Department for administrative purposes only in accordance with the ERA. NMSA 1978, § 9-1-7 sets forth the criteria upon which administratively attached agencies function. It provides that:

- A. An agency attached to a department for administrative purposes only shall:
  - (1) exercise its functions independently of the Department and without approval or control of the Department;
  - (2) submit its budgetary requests through the Department; and
  - (3) submit reports required of it by law or by the governor through the Department.
- B. The Department to which an agency is attached for administrative purposes only shall:
  - (1) provide, if mutually agreed, the budgeting, record-keeping and related administrative and clerical assistance to the agency; and
  - (2) include the agency's budgetary requests, as submitted and without changes, in the departmental budget.
- C. Unless otherwise provided by law, the agency shall hire its own personnel in accordance with the Personnel Act [10-9-1 NMSA 1978].

While the important power of personnel authority is addressed in subsection C, there is a conspicuous absence of any mention of rulemaking authority. A specific grant of rulemaking authority, or reference to existing rulemaking authority, would remove any uncertainty and is consequently advisable. The rulemaking authority to which reference is made here is for the orderly conduct of the business of the Office and its hearing process.

## **TECHNICAL ISSUES**

A specific grant of statutory authority for rulemaking in this bill is advisable.

## **ALTERNATIVES**

The AGO points out that if furthering the decisional independence of administrative law judges/hearing officers (ALJs/hearing officers) is a goal of the Legislature, this bill is a step in that direction. However, the Legislature may wish to consider an overall central panel of administrative law judges/hearing officers to hear all administrative matters of state government rather than adopting a piece-meal approach to the establishment of multiple ALJ/hearing officer panels.

A central panel of hearing officers is widely considered to be consistent with notions of good government. The national trend over the past several decades has been toward the creation of central panels of administrative law judges/hearing officers (in some other states hearing officers are referred to as administrative law judges or ALJs). At present there are 26 state central panels and 4 major city central panels of hearing ALJs/hearing officers. Central panels are useful in improving the state's ability to provide fair and efficient hearings to affected members of the public and for realizing fiscal efficiencies by housing hearing officers in one agency. By hearing cases outside of the administrative context of the regulating board or agency, the affected members of the public are likely to have more confidence in a neutral determination by a hearing officer who is not subject to potential undue influence and who will exercise decisional independence. A central panel also allows for the uniform training and supervision of hearing officers as well as the uniform application of best practices in hearing and deciding cases. In sum, three of the many positive attributes of a central panel are decisional independence, uniformity of training and resource efficiency.

CEB/svb