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## FISCAL IMPACT REPORT

ORIGINAL DATE 1/28/10

SPONSOR Beffort LAST UPDATED \_\_\_\_\_ HB \_\_\_\_\_

SHORT TITLE Freeze Means Freeze Act SB 215

ANALYST Varela

### APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY10	FY11		
	NFI		

(Parenthesis ( ) Indicate Expenditure Decreases)

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

	FY10	FY11	FY12	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Total</b>		Indeterminate	Indeterminate			

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

State Personnel Office (SPO)  
 Department of Public Safety (DPS)  
 Department of Transportation (DOT)  
 Public Education Department (PED)  
 Department of Health (DOH)

### SUMMARY

#### Synopsis of Bill

SB 215 creates the Freeze Means Freeze Act.

Section 2 of the Act delineates definitions including agency, board, classified employee, exempt employee, exemption appointment, hiring freeze, hiring freeze exemption and technical occupation group.

Section 3 requires the State Personnel Board to promulgate rules setting forth the criteria for making an exemption appointment for both exempt and non-exempt employees. The rules must include the job classifications for which an exemption appointment may be made and will be limited to exemption appointments including transfers from exemption appointments to non-exemption appointments, which fulfill a critical role in the areas of health, safety or the generation of revenues for the state. Exemption appointments must not be made for positions that are administrative or clerical, unless the appointment is made to fill an existing position that was vacated within ninety days prior to the appointment. Positions that are funded solely with federal funding are exempt from the provisions of SB215. SB215 requires a written determination to be included in the personnel file of an exemption appointment. SB215 permits no blanket exceptions to the hiring freeze for positions in a technical occupation group, or for all positions within an agency. And finally, Section 3 requires agencies to promulgate rules specifying the conditions and procedures under which an exemption appointment may be requested.

Section 4 of SB215 requires that the State Personnel Board immediately promulgate and adopt emergency rules related to the hiring freeze and forward those rules to the State Auditor for approval. If the emergency rules are to be in effect longer than 90 days, the board must give notice and hold a hearing to adopt the emergency rule as a rule.

Section 5 of SB215 requires that the State Personnel Board publish all personnel position classifications, including at a minimum each position's classification number and the qualifications for each position, in the New Mexico Administrative Code.

## **FISCAL IMPLICATIONS**

There is no appropriation associated with this bill. SPO reports operational costs related to establishing the provisions set forth in the bill. DPS reported operational costs as well but was unable to quantify.

## **SIGNIFICANT ISSUES**

SPO reports the following:

SB215 substantially alters the definition of exempt employee from that contained in Subsection S of 1.7.1.7 NMAC (“*Exempt service*” means all positions in the executive branch of state government exempt from the classified service by law.)

SB215 substantially alters the definition of classified service from that contained in Subsection G of 1.7.1.7 NMAC (“*Classified service*” means all positions in the executive branch of state government which are not exempt by law.)

SB215 uses the definition “technical occupation group”. This is similar to an outdated term that was removed several years ago from the State Personnel Board rules contained in NMAC. It has since been replaced with the definition “classification” in Subsection H of 1.7.1.7 NMAC and all references have been updated to reflect this definition (“*Classification*” means a job that is occupationally and quantifiably distinct.).

The definition of “classified employee” used in Section 2 of SB215 conflicts with the definition of “employee” as used in the State Personnel Board rules (Subsection N of

1.7.1.7 NMSA) and the definitions of “employee” and “probationer” as used in the Personnel Act (§10-9-3 NMSA). As used in this bill, the definition of classified employee would consider all employees in the classified service serving a probationary period to be exempt employees. There is currently a difference between a probationary employee and an exempt employee.

SB215 requires the State Personnel Board to promulgate rules pursuant to the Freeze Means Freeze Act on exemption appointments to a hiring freeze. This bill would require the State Personnel Board to enforce rules to entities it is not authorized to govern. The rules set by the State Personnel Board would apply to “both exempt and non-exempt” positions. §10-9-4 NMSA of the Personnel Act identifies exceptions to the coverage of the Personnel Act. The Legislative and Judicial branches of government as well as the State Police, Educational Institutions, members of boards and commissions and heads of agencies appointed by the governor, and directors of department divisions are exempt and not under the coverage of the State Personnel Board.

It is unclear as to the meaning of the term “non-exempt employees” on line 8 of page four. This bill defines a “classified employee” and an “exempt employee”, but typically in the human capital profession, the term “non-exempt” refers to whether or not an employee is exempt from the overtime provisions of the Fair Labor Standards Act.

This bill states that hiring freeze exemptions for “both exempt and non-exempt” positions are to be approved by the State Personnel Board and are limited to those positions that fulfill a critical role in health, safety, generation of revenue for the state. This bill also states that exemption appointments shall not be made for positions that are administrative or clerical, unless the appointment is made to fill an existing position that was vacated within ninety days prior to the appointment. This could be feasible for many administrative and clerical positions, but many administrative or clerical positions are critical and/or revenue generating, such as DWS employment counselors, drivers license clerks at MVD, intake social workers at CYFD, vital statistics clerks at DOH, etc.

This bill requires that documentation regarding the exemption appointment shall be kept in the selected candidates personnel file. The request for exemption is based on filling a position so it would seem appropriate that the exemption documentation also be placed in the position file.

The bill states that agencies shall not receive a blanket exemption to a hiring freeze. Although this can be done, it may not be an efficient use of limited resources to provide individual exemptions to, for example, 1,382 correctional officer positions, 981 highway maintenance workers, 928 social and community service workers, 630 family assistance analysts, or 421 registered nurses. Note: As written Section 5 of this bill would require over 20,000 new rules to be published in the NMAC for state positions.

This bill exempts those positions that are solely federally funded. It is unclear as to why solely federal funded positions are exempted, but not partially federally funded positions or positions from other funding sources such as enterprise, self generating, or grants that are not supported by the General Fund.

This bill prohibits an employee from being transferred from an exemption employment

position to another position during the hiring freeze unless the transfer is critical to health, safety or state-revenue-generation activities. Exemptions to the hiring freeze are related to the position, not the employee. If law was established to prohibit an employee who is filling a position from being able to apply for another position solely because they are currently occupying a position that was exempted by a hiring freeze, there may be potential liability. The purpose of the Personnel Act is to establish a system of personnel administration based solely on qualification and ability. It would be a violation of the Personnel Act and, under certain conditions, the Federal Equal Employment Opportunity law to not allow an otherwise qualified employee the opportunity to apply for a state position.

This bill requires all agencies to promulgate rules specifying the conditions and procedures under which an exemption appointment may be requested to fill a position in that agency; the exemption appointment must be in compliance with the rules set forth by the State Personnel Board and by the agency's rules.

This bill requires that the State Personnel Board immediately adopt and promulgate emergency rules according to which exemption appointments may be made, along with restrictions and safeguards for positions eligible for exemption appointments and must comply with the provisions of the Freeze Means Freeze Act. Although there are no rules currently in NMAC, the executive has established processes to administer and monitor the hiring freeze. Each request for exemption to the hiring freeze hire must be reviewed by the Department of Finance and Administration to ensure budget availability. For classified positions, the request must contain justification as to why the exemption is necessary and include the key elements of the Governor's executive plan to reduce state spending.

This bill requires that any emergency rules be transmitted to the State Auditor for approval. If approved, the emergency rules may be adopted and promulgated without the notice and hearing required of other rules and shall take effect immediately. This violates the provisions of the Open Meetings Act and rule making processes administered by the Records and Archives department. This would deny the citizens of New Mexico, or any other interested party, from having the opportunity to comment on rules being adopted that may impact them. Currently, the State Personnel Office always provides notice of meetings as required by the Open Meetings Act, as required by 1.7.13.8 NMAC – Notice and Comment and adheres to the rule making process established by Records and Archives. Emergency meetings may be called by the Board Chair only in unforeseen circumstances to address issues relating to health, safety and welfare or to protect the Board from financial loss.

This bill states that if an emergency rule will be in effect for more than ninety (90) days, the State Personnel Board shall give notice and hold a hearing to adopt the emergency rule as rule. This conflicts with 1.7.13.11 NMAC which provides a timeframe of only one hundred and twenty (120) days.

This bill adds new language to amend the Personnel Act to require the State Personnel Board to publish all position classifications, including at a minimum each position's classification number and the qualifications for each position, in the NMAC. The State Personnel Office already maintains this information and publishes it on its website. The

direct link to the website is: <http://www.spo.state.nm.us/compensation.html>. This website contains a document titled Classification and Pay Listing, which lists all State Personnel Board approved classification titles, job codes, assigned pay bands, alternative pay bands and the pay band minimum, midpoint and maximum rates in an hourly and annual format. This document is published every six months and filed with Records and Archives.

Currently the SPB adopts all job descriptions, which include content, but not individual position numbers. For each of these classification titles a job description is published on the website that contains the classification title, classification code, pay band assignment, occupational description, nature of work, distinguishing characteristics, recommended experience and education standards, statutory requirements, conditions of employment, default FLSA status and information relating to coverage of a bargaining unit. State Personnel Board rules regarding classification are published in 1.7.3 NMAC – Classification. All documents are maintained in accordance with recordkeeping rules (NMAC), but not individually published in register. As written, Section 5 of this bill would require over 20,000 new rules to be published in the NMAC for state classified positions.

## **PERFORMANCE IMPLICATIONS**

This would have a significant impact on the ability of the State Personnel Office to provide services as required by the Personnel Act. The entire agency would be consumed in the rule-making and exemption process. If resources at the State Personnel Office are diverted toward the rule-making and exemption process, and the agency is not able to provide its statutorily required oversight, subsequently impacting services provided by other agencies to New Mexico citizens.

## **ADMINISTRATIVE IMPLICATIONS**

SPO states that SB215 requires the State Personnel Board to promulgate rules relating to the current hiring freeze. The formal rule making process outlined by NMAC regulations can take four to six months for a hiring freeze that is intended to be temporary in nature. However, an emergency rule can be accomplished. Once the economy recovers and the hiring freeze is over, agencies will be actively recruiting to fill vacant positions. There will be numerous un-necessary rules in the NMAC.

## **TECHNICAL ISSUES**

The definition of “agency” used in Section 2 of the bill conflicts with the definition of “agency” used in the State Personnel Board rules (Subsection A of 1.7.1.7 NMSA).

The definition of “classified employee” used in Section 2 of the bill conflicts with the definition of “employee” as used in the State Personnel Board rules (Subsection N of 1.7.1.7 NMSA) and the definitions of “employee” and “probationer” as used in the Personnel Act (§10-9-3 NMSA). As used in this bill, the definition of classified employee would consider all employees in the classified service serving a probationary period to be exempt employees. There is currently a difference between a probationary employee and an exempt employee.

The definition of “exempt employee” used in Section 2 of the bill conflicts with the Personnel Act (§10-9-3 NMSA)

**AMENDMENTS**

SPO suggests the following amendment:

Strike section 5 of SB215 in its entirety. This section would affect the ability of the State Personnel Office to effectively and efficiently administer a classification plan for all positions in the classified service as required by the Personnel Act.

PTV/mew