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FISCAL IMPACT REPORT

ORIGINAL DATE 02/13/11

SPONSOR Eichenberg LAST UPDATED _____ HB _____

SHORT TITLE Administrative Hearings Act SB 104

ANALYST Hoffmann

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	FY12		
	None		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	\$10.0 to \$20.0	\$163.0to \$201.0	\$163.0 to \$201.0	\$336.0 to \$422.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Relates to SB67, SB30 and HB109

SOURCES OF INFORMATION

LFC Files

Responses Received From

Taxation and Revenue Department (TRD)
 Regulation and Licensing Department (RLD)
 Energy, Minerals and Natural Resources Department (OSE)
 Office of the State Engineer (OSE)
 Department of Health (DOH)

SUMMARY

Synopsis of Bill

Senate Bill 104 proposes to create the “Administrative Hearings Office” which would be administratively attached to the Attorney General’s Office. The purpose of the office would be to consolidate hearing officers and hearing functions of all executive agencies as single function of government.

An agency head would be allowed to hear a permitting or adjudicatory matter without delegation or assignment to a hearing officer.

The office would be headed by a chief hearing officer appointed by the Attorney General for a term of six years after confirmation by the senate. The bill would make the chief hearing officer of the Taxation and Revenue the interim chief hearing officer. Except for the interim chief hearing officer, the chief hearing officer would need to have been admitted to practice in New Mexico for at least twelve years with ten years of experience in administrative law.

The proposed act would not apply to hearings that are governed by federal law. Also excluded would be hearings heard by officers who do not fall under the Personnel Act.

The office would be created on July 1, 2011 by the transfer of existing hearing officers, hearing examiners and support staff from all executive agencies. All property and equipment, appropriations and money attributable to the transferred positions would be transferred to the Administrative Hearings Office. All transferred hearing officer and hearing examiner positions would be classified as hearing officers regardless of the minimum qualifications included in the bill (admitted to practice law in New Mexico for at least seven years, five years experience in administrative law).

The EMNRD notes this bill is based on a model act for state central hearing agencies which provides for an independent state agency to house administrative law judges and hearing officers. The model act was first adopted by the American Bar Association in 1997 and last year was incorporated into 2010 Revised Model State Administrative Procedure Act which was adopted by the Uniform Law Commissioners.

FISCAL IMPLICATIONS

Because agencies that hear cases related to federal law, the scope of SB104 is narrower than that of SB67, and the estimated fiscal impact on the general fund is smaller.

Based on agency analyses, an assumption of a staff of 15 and the above considerations, the estimated range of additional operating budget impact assumes start-up costs of \$10 to \$20 thousand. Office space rental is estimated at \$138 to \$176 thousand annually based on 5,500 ft² at \$25 to \$32 per ft². Utilities including electricity, gas, water, sewer, phone and internet might add another \$25 thousand annually. Attrition of the original hearing officers will also increase operating costs due to the requirement for experienced attorneys.

The EMNRD state the concern that while the bill is intended to have a neutral impact on costs for administrative hearings, there could be an unintended cost to the Oil Conservation Division of Energy, Minerals and Natural Resources Department (OCD). Currently, OCD has 4 employees who act as hearing examiners as part of their job responsibilities and one administrative assistant who provides support for the hearings. If all of these positions were transferred to the AHO, then OCD will need to retain other personnel to perform the agency functions other than administrative hearings that these personnel now perform. The OCD hearing examiners spend about 50% of their time on non-hearing related work, and that our hearings administrator spends 40% of her time on non-hearing related work. The estimated annual impact is 50% of the salary and benefits, and associated direct costs, for four hearing examiners, and 40% for one administrative assistant.

SIGNIFICANT ISSUES

This bill would create a new state agency at a time when both the governor and legislature have been seeking to reduce the size of government as well as consolidate its functions as cost saving measures due to significantly reduced revenues.

The RLD offered the following comments.

The concept behind SB104 is the product of a Task Force that was formed to negotiate the Administrative Procedures Act. The Task Force started with rulemaking procedures and also negotiated a pilot program for Administrative Hearings Officers. The Task Force was comprised of industry representatives, community group representatives and state agencies. The Task Force negotiated bill only covered 3 agencies; Taxation and Revenue Department, Energy Minerals and Natural Resources Department and Environment Department with other agencies having the option to participate. The reason it was not applicable to all agencies was because each agency utilizes hearing officers differently and the Office of Administrative Hearings Officers would not work for every agency. It was decided to start as a pilot program, then expand it to other agencies as statutes and rules were changed.

For the Regulation and Licensing Department, AGD has 4 Hearing Officer positions, all of which are non-attorneys. Pursuant to NMSA 1978, §60-6B-2F, K and L, the Alcohol and Gaming Division is required to conduct public hearings on the issuance or transfer of liquor licenses within 30 days of receipt of the application. These hearing officers do not conduct adjudicatory hearings of any kind – they review and process liquor license applications for new licenses and for transfer of ownership & location. AGD processes approximately 250 to 500 applications per year. AGD's hearing officers are assigned applications to review and to determine the completeness of the information provided. They send out the required posting request to the Department of Public Safety and issue a Notice of Deficient Documents if the application is incomplete. They send the applicant a Notice of Hearing and require proof of publication prior to conducting the hearing. A record of the hearing is made. Once they are satisfied that the application is primarily complete, they issue a recommendation to the Director for approval or disapproval of the application and ensure that once granted preliminary approval it is sent to the local option district for a second public hearing as required by Section 60-6B-4. AGD's hearing officers are responsible for seeing their assigned applications through the process from receipt to issuance.

Transfer of AGD's hearing officers to the Administrative Hearing Office would substantially slow the process of issuing and transferring liquor licenses and adversely affect economic development. The review of the license applications requires specialized knowledge of the Liquor Control Act and the facts surrounding particular licenses including liens, bankruptcies, pending citations, unpaid fees, proximity to churches and schools, quota requirements, etc., and should remain under the direct control of the agency which must make the final determination as to whether to issue the license or not. The conduct of the hearing is only one piece of the process and it is critical to the public health and safety that these particular hearing officers remain with the Alcohol and Gaming Division and that the Division retain control of the application processing in order to ensure that the applications are processed in accordance with State law which is

not allowable under Section 7 A of SB 104. While there is an exception in Section 7 F for an agency head who hears the permitting or adjudicatory matter without delegation to a hearing officer, the amount of hearings conducted by AGD makes this impractical. One person cannot effectively take over the functions conducted by four hearing officers.

Similar to explained for the AGD, the Boards and Commissions Division currently hearing officers are selected from within the Board or a disinterested employee within the Regulation and Licensing Department. The Boards and Commissions Division frequently has hearings for license revocation for professions under the Uniform Licensing Act. It will be more expensive to have the Administrative Hearings Office conduct the hearings that previously were conducted by in-house employees at no expense.

The TRD comments that combining all hearing officers under one office would help to address the criticism sometimes made of the Taxation and Revenue Department's hearing officers that they lack independence and objectivity. On the other hand, hearing officers not attached to the Department may be less likely to respond to urgent priorities of the Department. Also, since the cases heard by the Department's hearing officers require a great deal of subject matter expertise, there is some risk that this would be lost in a centralized hearing office.

The Oil Conservation Division of the EMNRD claims there is a potential loss of hearing officer expertise. The OCD Hearing Examiners hear cases involving significant technical information on oil and gas activities and therefore, by necessity, must have extensive experience and knowledge of the regulated industry. To be effective, the new hearing office must be able to employ and assign knowledgeable hearing officers to any matter under the Oil and Gas Act. At OCD, many contested cases involve arcane issues of petroleum geology, engineering, or environmental science, and the agency has traditionally hired petroleum engineers as hearing examiners. The bill provides [Section 4.H(4)] for "giving preference to hearing officers with subject matter expertise," the concept of assigning hearing examiners from a collective pool necessarily means that examiners will sometimes (probably not infrequently) be assigned to matters about which they know nothing.

The Office of the State Engineer shared the following concerns about SB67.

The New Mexico Water Code and reviewing courts recognize the expertise of the State Engineer and the unique nature and importance of the administrative hearings conducted by the OSE. Section 72-2-12 of the water code provides that the State Engineer may conduct a hearing himself, he may appoint a hearing examiner who he determines is knowledgeable in the water laws of the state, water engineering and administrative hearing procedures to do so, and he may limit the powers and duties of an appointed hearing examiner to particular issues or to the performance of particular action. The hearing examiner makes a report and recommendation to the State Engineer and the State Engineer makes the decision. Section 72-2-13 provides for discovery and procedures consistent with the Rules of Procedure for the district courts of New Mexico. The Rules of Evidence applied in nonjury civil cases generally apply (72-2-17). Appeals from State Engineer decisions are de novo. Nonetheless, reviewing courts recognize the State Engineer's expertise, especially with regard to the technical factual determinations made in the context of disputed applications. See e.g., *Lion's Gate Water v. John D'Antonio*, 2009-NMSC-057, ¶ 24, 147 NM 523, 532 (acknowledging the water code's grant of

broad powers to the State Engineer, “especially regarding water rights applications” in order to “employ his or her expertise in hydrology and to manage those applications through an exclusive and comprehensive administrative process. . .”); *Stokes v. Morgan*, 101 NM 195, 202, (1984) (recognizing that the special knowledge and experience of the State Engineer should be accorded deference). The purpose of SB 67 appears inconsistent with the legislature’s recognition of the high degree of expertise water decisions require, its creation of the position of state engineer, its grant of authority to the State Engineer, and its intended deference to be accorded the special knowledge and experience of the state engineer by reviewing courts.

Additionally, the State Engineer has incorporated a successful Alternative Dispute Resolution (ADR) component within its administrative hearing process. SB 67 does not address how the State Engineer’s ADR process would fit within the consolidated context, nor does it address certain fundamental procedural matters such as how matters would get docketed at the administrative hearing office and assigned and appeal after decision.

The DOH comments that SB104 was introduced on behalf of the Government Restructuring Task Force. The most significant difference between SB104 and the earlier proposed SB67 is that under SB104, agencies that contract for hearing officers (rather than employ hearing officers) would not be impacted by the Act, and those agencies would be able to continue contracting for their hearing officers. Agencies that employ hearing officers (such as Human Services Department and Tax and Revenue Department) would be required to transfer those employees and hearing officer support staff to the Administrative Hearings Office. The Department of Health (DOH) does not employ any of its administrative hearing officers, and as such, DOH would apparently not be impacted.

PERFORMANCE IMPLICATIONS

The OCD of EMNRD notes consolidation of the hearing functions of different agencies could expedite hearing and disposition of cases if agencies now have a substantial backlog. However, OCD currently has the ability to hear cases within 30 days from filing and render decisions within 30 to 60 days after hearing. A consolidated agency might not be able to meet these timeframes.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill largely duplicates, but in some particulars conflicts with, SB67. The principal difference is that under SB67 the Administrative Hearings Office would be attached to the General Services Department, rather than to the Office of the Attorney General, and the Chief Hearing Officer would be appointed by the Governor rather than the Attorney General. Also this bill excludes cases heard by an officer not under the State Personnel Act and hearings conducted pursuant to federal law. SB67 does not provide these exclusions.

SB104 would allow an agency head to request that rule making proceedings be subject to the act. SB30, Rulemaking Requirements, acknowledges such action and could create a two conflicting processes once a hearing officer is involved.

HB109 proposes to allow applicants aggrieved by a decision by the OSE to either request a hearing or take the matter to district court without a hearing.

TECHNICAL ISSUES

The RLD observes that Page 2, line 17-22 requires that all hearings for which a hearing officer is required be conducted by the office. Then it states that the Act does not apply to hearing heard by officers who do not fall under the Personnel Act. It may be intended to exempt the State Personnel hearing officers, but the double negative in the sentence makes it apply only to State Personnel hearing officers, in contradiction of the first sentence of the subsection.

ALTERNATIVES

The RLD suggests that as negotiated by the Task Forces, narrow SB 104 to pilot program that covers 3 agencies; Taxation and Revenue Department, Energy Minerals and Natural Resources Department and Environment Department with other agencies having the option to participate.

JCH/svb