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FISCAL IMPACT REPORT

ORIGINAL DATE 02/17/13
 SPONSOR HAFC LAST UPDATED 03/14/13 HB CS/CS/483/aSJC
 SHORT TITLE Public Defender Commission SB _____
 ANALYST Jorgensen

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$52.0	\$127.0	\$77.0	\$256.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General's Office (AGO)
 Public Defender Department (PDD)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee amendment to the House Appropriations and Finance Committee substitute for the House Judiciary Committee substitute for House Bill 483 provides for the following:

- Strike Section 2, Coverage of Service, which delineates all the positions exempt from the State Personnel Act, with an effect of eliminating exempt employees in the Public Defender Department;
- Specify that the Speaker of the House shall appoint one, instead of two members of the Public Defender Commission;
- Specify that the majority floor leaders of each chamber shall appoint one member of the Public Defender Commission instead of the Senate majority leader appointing two members;
- Add that the President Pro Tempore shall appoint one member of the Public Defender Commission;
- Change the initial appointments to the Public Defender Commission from May 1, 2013 to July 1, 2013, and clarify that if a positions remains vacant on July 1, 2013, the supreme court shall fill the vacancy;
- Change the date the commission shall hold its first meeting from June 1, 2013 to September 1, 2013;

- Require the Public Defender Department to coordinate with the State Personnel Office when implementing standards for the minimum experience, training and qualifications for appointed, contract and staff attorneys in both adult and juvenile cases;
- Strike the requirement to develop a separate and independent public defenders personnel act with an independent system of personnel administration wherein no employee would be an exempt or at-will employee except for the chief, deputy chief, appellate defender and district public defenders; and
- Strike Section 13, Compensation--Private Practice of Law by Attorneys Employed by the Department Prohibited—that would have prohibited Public Defender Department attorneys from receiving remuneration for privately practicing outside of their department duties, while providing for the allowance for pro-bono work.

Synopsis of Original Bill

The House Appropriations and Finance Committee substitute for the House Judiciary Committee substitute for House Bill 483 detaches the Public Defender Department (PDD) from the New Mexico Corrections Department and creates a commission to oversee the operation of the PDD, as required under the recently passed constitutional amendment.

The commission will have eleven members: one appointed by the Governor, three appointed by the Chief Justice of the Supreme Court, three appointed by the Dean of the University of New Mexico School of Law, two appointed by the Speaker of the House of Representatives, two appointed by the Majority Floor Leader of the Senate. The initial appointments to the commission must be made by May 1, 2013 and the Supreme Court will fill any vacancies. The bill provides that a member of the commission may be removed by the commission for malfeasance, misfeasance or neglect of duty. Members must resign immediately if their professional status changes so that they are ineligible to serve on the commission.

Qualifications for members of the commission include significant criminal defense or juvenile defense experience or to have demonstrated a commitment to quality indigent defense representation or to working with and advocating for the population served by the department. Those ineligible to serve include current prosecutors, current public defenders, current judges, current elected officials, or people who currently contract with the department. HB 483CS requires that an individual member of the commission shall not interfere with the discretion, professional judgment or advocacy of a public defender, a public defender office, a public defender contractor or an assigned counsel in the representation of a public defender client.

HB 483CS makes the chief public defender and district public defenders exempt from the Personnel Act. The bill provides that the chief public defender must be an attorney licensed in New Mexico, or will be licensed within a year, must have been actively practicing law for the past five years, must have a minimum five years criminal defense experience, must have management or executive experience.

The chief will be appointed to a four-year term with approval of two-thirds of the commission members. The chief may be reappointed for subsequent terms and may be removed by the commission provided that notice of hearing and an opportunity to be heard given to the chief prior to removal from office.

Section 16 of the bill requires that the act take effect immediately.

FISCAL IMPLICATIONS

The table above reflects cost estimates provided by the PDD. The PDD anticipates the need for \$50 thousand to hire one staff position to serve as commission coordinator and support, \$10 thousand for commissioner's per diem and mileage expenses, \$50 thousand to contract with an outside entity to develop policies and procedures (non-recurring), and \$17 thousand to maintain a contract to keep policies and procedures up-to-date.

Based on this, the first year cost will be \$25 thousand for a support staff position for six months, \$10 thousand for commission travel and meeting expenses, and \$17 thousand for contracts to develop policies and procedures for a total of \$52 thousand in FY13. In FY14 costs will increase to reflect \$50 thousand for the FTE position, \$10 thousand for travel expenses, and \$67 thousand for contractual services for a total of \$127 thousand. In FY15 and subsequent fiscal years, the cost of the commission will be \$50 thousand for staffing, \$10 thousand for travel, and \$17 thousand for contracts for a total recurring cost of \$77 thousand.

SIGNIFICANT ISSUES

The House Judiciary Committee substitute for HB 483 listed criteria necessary for the commission to remove the chief. Those criteria were incompetence, neglect of duty, and malfeasance while in office. The House Appropriations and Finance Committee substitute for HB 483 does not provide criteria for removal of the chief beyond the need for notice of hearing and an opportunity to be heard being given to the chief.

HB 483 gives the commission authority to develop policies and procedures regarding the status of current and future employees. If the employment status of current employees is altered by the commission, there could be legal challenges. Existing vested PDD employees may have a contractual interest in the continuation of their positions as classified, as did those at the Attorney General when their system changed over twenty years ago. The PDD employees who are presently classified (non-probationary) have a property right in that classification under state law. This is significant because the Fifth Amendment precludes taking property without compensation, and this is applicable to the states through the Fourteenth Amendment. *Chicago B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 235-42 (1897). Our Supreme Court has affirmed that New Mexico's sovereign immunity does not bar suits under the takings clause. *See Manning v. N.M. Energy, Minerals & Natural Resources Dept.*, 2006-NMSC-027, 140 N.M. 528, 144 P.3d 87. *See Gonzales v. City of Albuquerque*, 849 F.Supp.2d 1123, 1149 -1150 (D.N.M., 2011). This might be noted in the bill so the Commission does not enact personnel rules that would create litigation against the department by its own employees.

NCJ/blm:svb