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FISCAL IMPACT REPORT

SPONSOR Roybal Caballero **ORIGINAL DATE** 2/12/2016
LAST UPDATED _____ **HB** 322

SHORT TITLE AG Special Excessive Force Unit **SB** _____

ANALYST Rogers

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		
\$0.0	\$1,500.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY16	FY17	FY18	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	\$0.0	\$1,500.0	\$1,500.0	\$3,000.0	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)
 Administrative Office of the District Attorneys (ADOA)
 Attorney Generals' Office (AGO).
 Department of Public Safety (DPS)

SUMMARY

Synopsis of Bill

House Bill 322 proposes that a new division, called the excessive force division, within the AGO be created that would have original (“exclusive”) jurisdiction with regard to the investigation and prosecution of any and all “alleged excessive force cases by law enforcement officers in the state.” HB 322 requires that all excessive force cases be presented by way of preliminary hearing, expressly forbidding presentation to a grand jury.

HB 322 would appropriate \$1.5 million to the AGO in order to create and fund the excessive force division. The Office of the Attorney General would be responsible for sufficient allocation

of resources to the excessive force division with the directive to “ensure the swift and competent investigation and prosecution of excessive force cases.” The appropriated funds are nonrecurring.

FISCAL IMPLICATIONS

The AGO estimates that the \$1.5 million to create the excessive force unit would roughly fund one administrative assistant, six investigators, one supervising investigator, three attorneys, and one supervising attorney.

The AGO states that the appropriation would only fund the specialized unit for one fiscal year. It would be impossible, on already scarce resources, to fund the specialized unit past fiscal year 2017 without a recurring fund especially since the Act is extremely broad in what it considers to be excessive force.

While costs at the AGO will rise, the AODA believes their costs may fall to the extent cases are moved from the local district attorney offices to the AGO.

SIGNIFICANT ISSUES

The AGO states that section 4 of the Act limits the discretion of a prosecutor by requiring that the excessive force case be presented to a district court via a preliminary hearing. The way the section currently reads, it might be interpreted to require that all excessive force cases be presented, even where the prosecutor does not believe there is probable cause to present the case. Forcing a prosecutor to present a case where probable cause does not exist could result in claims that the prosecutor acted in an unethical manner. There are also situations where a prosecutor may feel that it is in the interest of justice to present a case to a grand jury. Also, cases of simple assault or battery (misdemeanor offenses) may be more appropriately handled by a magistrate or metropolitan court.

The AGO also explains that the Act also completely removes the authority of an elected district attorney to prosecute a case that occurs in his or her jurisdiction. Current law generally permits elected district attorneys to use their discretion and decide whether to prosecute a case and, if they elect not to, ask the AGO if they would accept the declined case. The AGO then uses its discretion in deciding whether to accept the case.

The AOC references the New Mexico Constitution, Article VI, Section 21 which states “district judges and other judges or magistrates designated by law may hold preliminary examinations in criminal cases.” The district courts have a rule, New Mexico Rules Annotated (NMRA) 5-302, that governs preliminary examinations in their courts. The widely used routine is to have the magistrates conduct such hearings, but there is no legal impediment to requiring them to be held in the district courts.

The AODA explains that HB 322 removes discretion in the handling of excessive force cases, requiring the investigation and prosecution to be done by the AGO and requiring the determination of probable cause in a public preliminary hearing, rather than by grand jury. HB 322 also dictates the internal structure of the attorney general’s office, requiring establishment of a new division and unit.

PERFORMANCE IMPLICATIONS

The bill creates a new division within the AGO. It would also increase the criminal caseload tremendously by purporting to give the AGO “exclusive” jurisdiction over all violent crimes committed by law enforcement while working in official capacity.

The AODA will need to establish a procedure for referring excessive force cases to the attorney general.

TECHNICAL ISSUES

The AGO explains that Section 2 of HB 322 defines an “excessive force case” as “a case that arises out of an action taken by a law enforcement officer while the officer was acting in the officer’s official capacity.” Section 2 also provides a non-exhaustive list of examples including the catchall language “any other allegation of the use of excessive force brought against a law enforcement officer.” This definition could be construed as overly broad. The drafters may wish clarify the definition. Most law enforcement agencies have use of force reports that are not necessarily excessive in nature. The current definition, specifically subsection A, leaves open the possibility that a justified law enforcement action must proceed to a preliminary hearing.

TMR/jle/jo