F I S C A L I M P A C T R E P O R T

SPONSOR SRC **ORIGINAL DATE** 02/23/11 **LAST UPDATED** 03/01/11 **HB**

SHORT TITLE Administrative Hearings Act **SB** 67 & 104/SRCS

ANALYST Hoffmann

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY11	**FY12**		
$0.0	$0.0		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY11	**FY12**	**FY13**		
$0.0	$0.0	$0.0		

(Parenthesis ( ) Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total	$20.0 to $30.0	$243.0 to $305.0	$223.0 to $285.0	$486.0 to $620.0	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HB 66
Conflicts with HB 109 and SB 30

SOURCES OF INFORMATION
LFC Files

Responses Received From
Attorney General's Office (AGO)

The AGO provides a disclaimer on its analysis. "This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Opinion letter. This is a staff analysis in response to the agency's, committee's or legislator's request."

Taxation and Revenue Department (TRD)
General Services Department (GSD)

State Personnel Office (SPO)
Regulation and Licensing Department (RLD)
Energy, Minerals and Natural Resources Department (EMNRD)
Public Regulation Commission (PRC)
Office of the State Engineer (OSE)
Human Services Department (HSD)
Department of Health (DOH)
Environment Department (NMED)
Commission on Public Records (CPR)
New Mexico Department of Transportation (NMDOT)
Public Education Department (PED)

SUMMARY

Synopsis of Bill

The Senate Rules Committee substitute for Senate Bill 67 and Senate Bill 104 proposes to create the "Administrative Hearings Office" which would be administratively attached to the General Services Department. The office would be headed by a "Chief Hearing Officer" appointed by the Governor with the advice and consent of the senate for a term of four years.

The purpose of the office would be to consolidate the adjudicatory hearings function of all executive agencies, with the exception of the Public Regulation Commission, as single function of government.

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 five years, with at least three years experience in administrative law). Hearing officers would be subject to the Personnel Act.

The interim Chief Hearing Officer would be appointed by the Governor from among current chief hearing officers who are licensed to practice in New Mexico. The qualifications for the Chief Hearing Officer include admission to practice law in New Mexico for at least twelve years, with at least ten years experience in administrative law. The Chief Hearing Officer could only be removed for malfeasance, misfeasance or neglect of duty.

The chief and other hearing officers would take the oath of office required by the New Mexico Constitution, and be required to sign a code of conduct adopted by the office. The chief and other hearing officers would be prohibited from practicing law privately.

The authority of the Chief Hearing Officer to enter into contracts is under caution to be circumspect with regard to hiring contract attorneys as hearing officers.

Every administrative hearing would be conducted as provided by the law applicable to the case being heard. Except for the rules relating to discovery, the technical rules of evidence and the Rules for Civil Procedure for the District Courts would not apply to administrative hearings before the chief or hearing officers. The rules relating to discovery would only apply to the

parties to the hearings.
An agency would not be allowed to take any further action on a case, except as a party litigant, once the office accepts a request for a hearing officer. However, an agency would still be allowed to modify or terminate the proceeding prior to the issuance of a final decision or recommendation by the hearing officer.

A rulemaking proceeding may be subject to the proposed Act at the request of an agency head. The Act would not apply if an agency head hears the "permitting or adjudicatory" matter without delegation or assignment to a hearing officer.

The new office would be created effective July 1, 2011. All agency hearing officers, hearing examiners and support staff for those positions would become employees of the office.

FISCAL IMPLICATIONS

Correctly identifying hearing officers and hearing examiners in agencies, along with their support staff could be challenging because some employees who conduct hearings may have other job classifications and perform other duties. This could result in a similar difficulty in estimating equipment and appropriations that would be subject to transfer. The PED did not provide an estimate of their current cost for contract attorneys functioning as hearing officers (see below).

Based on agency analyses, an assumption of a staff of 25 and the above considerations, the estimated range of additional operating budget impact assumes start-up costs of $20 to $30 thousand. Office space rental is estimated at $188 to $240 thousand annually based on 7,500 ft^2 at $25 to $32 per ft^2. Utilities including electricity, gas, water, sewer, phone and internet might add another $35 thousand annually. Attrition of the original hearing officers will also increase operating costs due to the requirement for experienced attorneys.

Depending on the number of positions transferred, the administrative workload increase to the General Services Department might drive requirements for additional resources there.

The Taxation and Revenue Department reports it has 10 hearing officers, including the Chief Hearing Officer and five support staff that would be impacted by this legislation.

The GSD states that its administrative services division of GSD may be required to hire additional staff in order to accommodate services for the new employees. No estimate of the general fund impact was given.

The Regulation and Licensing Department's Alcohol & Gaming Division (AGD) reports that they would be required to transfer funding in the amount of $176,000 for the four hearing officers to the Administrative Hearings Office. This would reduce the agency's FTE from 16 to 12. Additionally, AGD currently has funds in Contractual Services for contract hearing officers that would be transferred. The RLD further notes that currently for the Boards and Commissions Division 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. 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 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 HSD finds the fiscal impact would be the transfer of $641.9 in budget of which 60% are Federal Funds. In order for the agency receiving this program to receive the federal funds in the HSD budget an approved cost allocation plan would need to be submitted and approved by the Federal Division of Cost Allocation. There are also 9 FTE associated with this budget.

The PED reports that in some areas efficiency could decrease and costs increase if the bill is passed. The PED employs due process hearing officers who preside over special education challenges of denial of services are specially trained in special education and their contract fees and training expenses are paid for out of the federal Individuals with Disabilities Education Act ("IDEA") Part B funds. With respect to these attorneys, the IDEA grant only permits expenditures from the federal grant to be used for administering Part B of the Act and for monitoring, enforcement and complaint investigation. See 34 CFR 300.704. Since these attorneys are only permitted to work on matters relating to Part B of the IDEA, consolidating them in the AG's Office would achieve no savings to the general fund, especially given that the state would have to pay health and retirement benefits since they would now be state employees under this bill. Also, they could perform no other duties except those permitted by the federal IDEA grant. To use them for other state purposes and pay them from the IDEA grant might be

considered "supplanting," which would result in the state having to reimburse the US Department of Education the federal funds used contrary to the grant. Although the source of funding for these hearing officers is Part B of IDEA, these funds are actually in possession of school districts who pay for the services of these hearing officers that are appointed by the Public Education Department (PED).

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. It would potentially add to the complexity of the proposed process in HB66 for combining the Department of Finance and Administration with the General Services Department.

For the AGO there are no significant legal issues presented by this bill. The bill does not change any substantive or procedural rules. Instead, this bill simply seeks to create efficiencies of scale and create more independent decision-making by consolidating hearing officers into one independent office, thus shielding the hearing officers from the influence of agencies.

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.

According to the RLD, the bill, as written, could have unfavorable unintended consequences if current job positions are misclassified or the term "hearing" is interpreted too broadly. For example, the Regulation and Licensing Department, the AGD has 4 Hearing Officer positions, all of which are non-attorneys. Pursuant to NMSA 1978, §60-6B-2F, K & L, the AGD 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. Including these functions in an administrative hearings office may not produce the intended results for the new office.

The scope of the hearings to be included under this bill may need to be clarified. According to the PRC, it is likely that the bill, if approved, could contravene Article XI, Section 2 of the New Mexico Constitution which gives certain exclusive regulatory authority to the PRC.

The EMNRD Oil Conservation Division (OCD) reports the following potential impact.

> For OCD, 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 5.A(3)] 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.
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> Added to this concern is the requirement that all newly hired hearing officers be lawyers (Section 6). This provision would exclude many candidates with professional subject matter expertise. OCD typically utilizes two hearing examiners, one a lawyer and one a petroleum engineer. The requirement that all hearing officers be lawyers would exclude many candidates who would have practical and technical knowledge for cases before the OCD.

The HSD added the following to the discussion of SB67.

> A combined agency would allow an independent review eliminating current perceptions by citizens and legal aid groups that hearings are not completely fair and are influenced by the agency that pays the salary of the hearing officer.
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> The Human Services Department (HSD) has three divisions that all require an administrative hearings process: Medical Assistance Division, Income Support Division, and Child Support Enforcement Division. Hearings for the Medical Assistance Division are not required to be conducted solely within HSD, but it is important to note that the decision of the hearing officer must not be "final" in order to comply with 42 CFR 431.10(e). The CFR ***does*** allow other state agencies or offices to perform services for the Medicaid agency, but not render final decisions. The CFR clarifies that if the state allows other offices or agencies to perform services, the state ***may not*** delegate it's authority to change or disapprove any administrative decision with respect to the application of policies, rules and regulations issued by the Medicaid agency. Thus, if the bill is passed as currently proposed, the independent administrative hearing office decisions must be reviewed and approved by the Medicaid Director to comply with CFR regulation.
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> A similar process applies to the programs administered by the Income Support Division in that the decisions rendered by the fair hearings bureau are recommendations that are submitted to the Director of the Income Support for a final decision.
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> The Child Support Enforcement Division administrative hearings are conducted by an Administrative Law Judge that renders a final decision.
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> Federal law outlines specific requirements for maintaining a grievance system for managed care and fair hearing rights for Medicaid recipients. See 42 CFR §§431.200 and

> 438.400. These requirements include strict timeframes for member notification and completion of fair hearing processes. The timeframes must be met to avoid potential risk for imposition of federal sanctions by the Centers for Medicare and Medicaid Services (CMS) for violating due process rights for Medicaid recipients. The language of the bill (Section 7(A)) implies that the requests for hearings are generated by the "requesting agency" and that the new administrative hearing office will "accept" requests for a hearing officer. An acceptable process is not described at all in the bill and implies that the office could reject a request for a hearing. It also does not describe how hearings are requested by someone other than a requesting agency.

The Department of Health offered the following comments.

> The DOH states that currently it contracts with outside counsel to perform as hearing officers in DOH administrative adjudicatory hearings and rule hearings. The only exceptions to this consist of Medicaid eligibility-related cases that are heard by Human Services Department's Fair Hearings Bureau, and personnel-related cases that are heard by the State Personnel Office and the Human Rights Commission, etc. Amounts paid for hearing officer's billings are paid out of individual divisions' budgets, as certain divisions (such as Epidemiology) are more likely to conduct adjudicatory hearings than other divisions, because of their licensing role; and certain divisions tend to promulgate rules more frequently than others.
>
> If enacted SB67 would require new hearings officer to get up to speed on fairly particularized hearings standards, which may vary considerably from one subject area to another; for example, Emergency Medical Services (EMS) licensing cases involve a confluence of licensing standards applicable under the Uniform Licensing Act (ULA), and standards applicable under the EMS Licensing Act, which in some cases may apply standards that are actually contrary to those identified in the ULA. There could be a significant learning curve for incoming hearing officers depending on the subject matters.

The NMDOT conducts administrative proceedings to resolve bidding disputes and to consider construction claims brought against the NMDOT by contractors. Many claims involve significant amounts of money. The contracts under which the claims are brought are very technical in nature, and require significant engineering and construction expertise to render an informed and appropriate decision. The NMDOT has concerns that such expertise would not be available within the administrative hearing office, and that a lack of such knowledge could result in erroneous findings on construction claims matters. With regard to resolving bidding disputes, NMDOT's current hearing process expeditiously resolves such disputes so that contracts may be let in a timely manner. Disputes are typically resolved within days of a bidder's complaint. Referring bidding disputes to an outside agency may risk quick resolution of such claims and may result in the cancellation of procurements as NMDOT is required to award contracts within 30 days of bid openings.

The PED expressed concern that the bill does not address the various requirements for hearing cases that are likely to be different among the agencies. Timelines are often statutory but must at least be regulatory. Also, due process requirements differ between the agencies, and again, may be statutory. It is unclear if the state, through one administrative hearing office, has the capacity to accommodate all administrative hearing requirements, which may be a patchwork of different timelines and requirements, some federal and some state mandated.

The PED reports that it is required to and does hire several attorneys under contract to serve as due process hearing officers across the state to preside over special education challenges of denial of services. By federal regulations, [section 34 Code of Federal Regulation 300.511] they must be impartial. These same federal regulations require that PED keep a list of the persons who serve as hearing officers and that the list include a statement of the qualifications of each of those persons. The current IDEA hearing officers each have on average 10 years of experience, but they are all contract hearing officers with other legal employment or law practices and it is doubtful they would agree to work full-time for an Administrative Hearings Office. It is important to note that the bill states that hearing officers shall "devote themselves full time to the duties of the office and shall not engage in the private practice of law." The bill also discourages the office from using contract attorneys as hearing officers "[t]o better manage resources and limit costs to the office." Thus, it may be unlikely that under the bill these experienced hearing officers could be used for special education due process hearings and the state would lose the expertise of these hearing officers. Such a result does not promote efficiency.

ADMINISTRATIVE IMPLICATIONS

The Commission on Public Records reports that a number of states have a "central panel" of hearing officers; however, the size and authority of the central panel varies greatly from state to state. It appears that this bill would create one of the more comprehensive central panels in the United States. Many states require that only a few agencies or types of hearings be conducted by the central panel. This bill would require all, except those heard directly by an agency head, to be conducted by the central panel. There is a debate regarding the value of creating a central panel. Some observers claim that by removing the hearings from the individual agencies, a central panel ensures the neutrality of the hearing officers. Other observers claim that an inherent weakness of a central panel is the lack of subject expertise which is found in the administering agencies.

The SPO identified the following administrative impacts.

> Paragraph A of Section 7 of SB67 requires that every administrative hearing is to be conducted according to the applicable law of the case being heard. This language would ensure that all disciplinary appeals pursuant to the Personnel Act and Board Rules would be conducted pursuant to such authority/law. However, it is still unclear how these hearing officers would be authorized to be managed under the Administrative Hearings Act and to fully comply with its governing authority, the Personnel Act and Board Rules.
>
> There will be some cases heard, but not yet written (and no final decision made) on July 1, 2011 (effective date of bill). Will those cases remain with the previous agency, or will those cases be transferred to the new agency? According to Paragraphs B and C of Sections 8, those unwritten decisions apparently will be transferred to the new agency. That raises the question of who will then write the decisions for those cases that have been transferred. Ordinarily, it would seem most appropriate for the hearing officer who brings the cases with him or her to ultimately write those final decisions, but the administrative impact is not fully known.
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> At the State Personnel Office, the hearing officers have a working relationship with the State Personnel Board, appearing at Board meetings as warranted. Through trial and error (and close work with the Board), a Recommended Decision format has been

> developed which is comprehensive, yet understandable and preferred by the Board. It is unknown whether this relationship and the preferred Recommended Decision format would be negatively impacted by the creation of a separate administrative hearings office.

The HSD states that most of the programs administered by HSD are federally funded and must adhere to strict performance measures as determined by the federal agencies. The new administrative hearings office will have to monitor and adapt to changes in federal regulations that could change how hearings are administered and decisions made.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

House Bill 109 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.

House Bill 66 proposes combining the Department of Finance and Administration with the General Services Department.

TECHNICAL ISSUES

The OSE points out that language at section 6 A of SB 67 & 104 CS concerning applicability of rules of evidence conflicts with section 72-2-17 of the water code which provides that the rules of evidence in nonjury civil trials shall generally apply.

The OSE also states that Section 3(A) should refer to "executive state agency" to be consistent with the use of the term in Section 2.

The apparent intent of the bill is to resolve certain disputes more efficiently. It might be helpful for the bill to include an operational definition of an "administrative hearing" in the context of the Act in order to clarify the jurisdiction of the office.

The TRD identified the following technical issues.

> There might be an Equal Protection problem by requiring only the practice of law in New Mexico and not just admitted to practice law in any state.
>
> Section 6, starting on page 4, subsection (B) states "When the office accepts a request for a hearing officer, the requesting agency shall take no further action with respect to the matter, except as a party litigant." The definition of "the matter" could create confusion if, for example, the TRD has issues in more than one tax program with a particular taxpayer. To clarify, this language could state that no further action will be taken, unless otherwise provided by law.

The CPR observes there may be some questions on decisions versus recommendations. Senate Bill 67 establishes that each hearing would be conducted as provided by the law applicable to the case being heard. This implies that some decisions made by the hearing officers would not be final because the laws frequently make the agency head the final arbiter. In those cases, presumably the hearing officers would make a recommendation and the agency head would choose to accept or reject that decision.

The SPO identified potential conflicts as follows.

> It is unclear how agencies would request a hearing officer or how one may be appointed. Paragraph B of Section 6 of SB67 states that "when the office accepts a request for a hearing officer…" It does not specify how or when an agency would be required to request a hearing officer. Additionally, Paragraph D of the same section, SB67 states that unless otherwise provided, all hearings shall be conducted by the office. It seems contradictory to have language that requires that an agency must request a hearing officer but then require that all hearings must be conducted by the office. Furthermore and specifically in regards to the Personnel Act, the Personnel Board is the only authority that is authorized to designate a hearing officer to hear a disciplinary appeal. As stated above, SB67 creates a conflict with the Personnel Act and Board Rules.

JCH/svb:bym