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FISCAL IMPACT REPORT

SPONSOR Payne **ORIGINAL DATE** 02/09/11
LAST UPDATED 03/03/11 **HB** _____
SHORT TITLE Forfeiture of Public Official Benefits **SB** 259/aSJC
ANALYST Aubel

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
		NFI				PERA Fund, ERB Fund, Magistrate Retirement Fund, or Judicial Retirement Fund

(Parenthesis () Indicate Expenditure Decreases)

Might conflict with Senate Bill 247 and House Bill 378

SOURCES OF INFORMATION

LFC Files

Responses Received From

Office of the Attorney General (OAG)
 Educational Retirement Board (ERB)
 Public Employees Retirement Association (PERA)
 Administrative Office of the District Attorneys (AODA)
 Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee (SJC) amendment makes the following changes to SB 259, as described by ERB:

Page 2, line 15, after the word "pension", in the paragraph requiring the district attorney or attorney general to file for an order of forfeiture in the adjudication of a public official for a felony offense that relates to, arises out of, or is in connection with the offender's holding elected office.

Page 3, line 10, after "pension", in the paragraph providing that the court may order forfeiture of the right to a pension and other retirement benefits if the state provides by clear and convincing evidence that the felony an elected official was convicted of relates to, arises out of, or is in connection with that official's holding elected office.

Page 3, line 17, after "pension", in the paragraph providing that upon receipt of a court order, a state pension system shall suspend a forfeited member's service credit or if the member is retired, that member's pension.

SIGNIFICANT ISSUES

ERB provides a detailed analysis of the amendment, as follows:

The Senate Judiciary Committee's amendments appear intended to make a forfeiture order effective only as to the portion of service credits earned or pension benefits received after the first act in the commission of a felony occurred. That date would have to be established during the judicial proceeding. This would have the effect of allowing a public official convicted of a crime related to, arising out of or in connection with holding office to receive a portion of the pension, while forfeiting a portion. However, it should be noted that the amendments also can be read to create a retroactive, rather than a partial, forfeiture.

If the intent was to create a partial forfeiture, the amendments leave some ambiguity. The amendments described above should have included the words "earned or received" before the phrase "after the commission of the first act that was the basis for the felony conviction." In addition Subsection (C), paragraphs (1), (2), and (3) should have been amended to clarify that the service and the pension benefit subject to forfeiture were the service credit earned or the pension benefit received after the commission of the first act that was the basis for the felony conviction. As Subsection (C) currently reads, it appears that all the service credits of non-retired member and the entire right to a pension benefit of retired member are forfeit, rather than just a portion of the service credit or pension benefits.

In addition, in the case of a retired member receiving a benefit, a partial forfeiture retroactive to the date on which the first act in the commission of the felony occurred gives rise to additional issues. The state pension system is to cease paying benefits upon receipt of a forfeiture order and refund any unexpended accumulated member contributions. However, if the order is to be given retroactive effect, this raises the question of the state pension system recovering benefits paid after the date on which the first act in the commission of a felony occurred but before the forfeiture order was issued. The cost of recovering those benefits could be greater than the amount, if any, that was recovered.

In addition, if benefits that had been paid were recovered, it could have the effect of increasing the unexpended accumulated contributions to be refunded to retired member convicted of a felony. During pendency of judicial proceedings, benefits would continue to be paid, which in turn would reduce, if not entirely eliminate, the retired member's unexpended accumulated contributions. If benefits were to be recovered, any part of them that were the member's contributions should be restored to the member's account,

which would increase the amount that would be refunded to the member. If the amendments are not intended to require a state pension system to recover benefits paid during the period between the time that the first act in the commission of a felony occurred and the date on which the forfeiture order was issued, SB 259a should be amended to clarify that.

If partial forfeiture is intended, rather than recovering benefits paid between the date on which the first act in the commission of a felony occurred and the issuance of a forfeiture order, SB 259a should be amended to provide for recalculation of the pension and offsetting the excess amount previously paid against the recalculated pension until the excess amount paid are recovered.

In the case of member who is not receiving a pension, the member's service credit earned after the first act in the commission of the felony would be forfeit and the member contributions related to that service credit would be refunded.

ADMINISTRATIVE IMPLICATIONS

The amendment would, therefore, have the following administrative implications summarized by ERB:

Agency staff resources would be expended in determining the portion of member contributions that would be subject to forfeiture, refunding those contributions and in calculating and reprogramming member accounts to reflect the reduced service credit or pension benefits. In addition, substantial resources and cost could be expended in seeking recovery of pension benefits paid between the date that the first act in the commission of a felony occurred and the date on which a forfeiture order was received.

SB 259a would result in the ERB modifying its retirement software and account systems to deal with partial forfeitures of pension benefits and the retroactive effect of the forfeiture. Even though such forfeitures should not frequently occur, the systems must be modified to properly deal with them. The ERB is not able to estimate the cost of re-writing the software but expects it to be significant and to involve a significant amount of staff time.

AMENDMENTS

To address its concerns, ERB proposes the following amendments:

If the intent of SB 259a is a forfeiture of only service credit earned or pension benefits received after the commission of the first act that was the basis for a felony conviction, the bill should be amended as described below. If the intent of the SB 259a is still a complete forfeiture of service credit and pension benefits, the bill should be amended to delete the Senate Judiciary Committee amendments.

1. Insert "earned or received" as follows:
 - On page 2, line 15, between the words "pension" and "after"; and,
 - On page 3, line 10, between the word "pension" and "after";

1. On page 3, line 17, after the “any”, insert “portion of the”.
2. On page 3, line 17, after "pension", insert “attributable to service credit earned”.
3. As a result of the amendments proposed in #2 and #3 above, line 17 would read: “retired member, shall suspend any portion of the pension attributable to service credit earned after the commission of the first act that was the basis for the felony conviction.”
4. 2. On page 3, line 23, after “credit”, insert “earned after the commission of the first act that was a basis for the felony conviction”.
5. 3. On page 4, line 3 after “contributions”, insert “received after the commission of the first act that was a basis for the felony conviction”.
6. 4. On page 4, line 5, strike “cease paying a pension and shall refund any unexpended accumulated member contributions to the forfeited member”, and insert in lieu thereof “recalculate the pension of the forfeited member based on the service credit earned prior to commission of the first act that was the basis for the felony conviction, and shall offset against that recalculated pension the amount of any pension paid in excess of the recalculated pension until such excess payment has been recovered, at which time the state system shall resume paying the recalculated pension; provided however, that the forfeited member may repay the entire amount of the excess payment within sixty days of being informed of such amount in lieu of the amount being offset against the recalculated pension.”

Synopsis of Original Bill

Senate Bill 259 is anti-corruption legislation that amends the Criminal Sentencing Act relating to penalties for public officials convicted of a felony relating to, arising out of, or connected to his or her elected office. First, it allows a fine to be imposed as part of the sentence equal to the salary and fringe benefits that the convicted elected official received in that position. Second, it sets forth conditions under which the elected official may also have his or her pension forfeited.

The bill lays out the procedure for the pension plans to follow in carrying out the order of forfeiture and how to proceed if the conviction is overturned and the forfeiture voided.

The bill defines "public official" as a person holding office covered by the Campaign Reporting Act and applies to crimes committed on or after July 1, 2011.

FISCAL IMPLICATIONS

AODA provides the following detail: “Any time a new law is created, it increases the work responsibilities of law enforcement, prosecutors, public defenders and the court system. Since there is no funding attached to his bill, these different groups will have to stop handling a certain number of crimes currently in the system in order to free up the time needed by the above systems to properly enforce this law.”

However, it is anticipated that the number of cases brought under this law will be minimal with little fiscal impact as described by AODA.

Potential savings are possible for the pension plans due to forfeited pensions, but the amount is indeterminate and intermittent, and most likely minimal over the long run. The legislative intent of the bill appears to focus on creating a deterrent to elected official misuse of public money or otherwise commit a felony, which also could conceivably have fiscal implications that remain indeterminate.

PERA and ERB expect no fiscal impact to their respective funds.

SIGNIFICANT ISSUES

The primary policy decision is whether a fine or a forfeiture of a pension account is appropriate when a felony is committed by elected officials arising out of conduct related to their public employment. Many states -- including California, Florida, Michigan and Pennsylvania -- have enacted anti-corruption legislation that includes forfeiture of retirement benefits specific only to felonies relating to the misuse of public monies, such as bribes, extortion, theft of public money, embezzlement of public money, and forgery.

AOC provides additional background on this issue:

The National Association of State Retirement Systems compiled an analysis of selected state policies governing the termination or garnishment of public pensions in December 2010. New Mexico was included in the 41 states for which state policies were described. Of the 41 states included in the compilation, 23 have some provision for the forfeiture or revocation of a public employee's pension due to a variety of felony convictions, most related to the individual's employment. In at least one state, the forfeiture, of all or part of the pension or retirement benefit, can be made due to "misconduct....which renders the member's service or part thereof dishonorable." Four states included in the report allow pension benefits to be garnished for various types of restitution.

AOC concludes that, based on this report, SB259as proposed is "consistent with similar policies in other states and seems to fall somewhere in the middle in terms of defining the type of criminal act that could result in pension forfeiture."

OAG notes that the "bill is careful to comply with State v. Nunez, 129 N.M. 63 (1999) which held that, because forfeiture of property, such as money allegedly associated with the crime, was punishment, a second a separate forfeiture proceeding would therefore violate the double jeopardy guaranteed by the New Mexico Constitution and the state's double-jeopardy statute."

Most of the responding agencies raised the issue of how SB247 would impact property rights, both of the vested member subject to the legislation or family members. There appears to be a difference of opinion regarding the issue of the members' property rights. ERB explains its point of view as follows:

The New Mexico Constitution states that upon meeting the minimum service requirements of a "retirement plan created by law for employees of the state or any of its political subdivisions or institutions, a member of a plan shall acquire a vested property right with due process protections under the applicable provisions of the New Mexico and United States constitutions." N.M. Const. art. xx, § 22 (D). There may be a question whether the pension and other retirement benefits of a retiree or member whose interests

in those benefits vested prior to effective date of SB 259, could be forfeited pursuant to the act. This issue might be resolved by an amendment providing that SB 247 either would apply to (1) all members whose pension rights have not vested as of the effective date of the act, or (2) all members first hired after the effect date of the act.

However, PERA seems to indicate that the bill provides for due process as required:

Upon meeting the minimum service requirements of a state retirement plan, a member of a retirement plan acquires a vested property right with due process protections under both the New Mexico and United States Constitutions. SB 259 provides the defendant member of the retirement system with due process protections under a forfeiture proceeding, which includes the right to counsel.

On the other hand, respondents appear in agreement that the bill could potentially deprive family members of their property rights, as explained most thoroughly by ERB:

An additional issue relates to the community property interest that a spouse has in a pension from a state retirement system in cases where a spouse remained in a marriage. A spouse of a member or retiree of a state pension system who was subject to a forfeiture order might challenge forfeiture of the *entire* pension on the basis that it is in effect a taking of the non-convicted spouse's community property interest in the pension.

ERB and AOG raise a concern over the vagueness of certain language in the bill, as described:

ERB: SB 259 uses the phrase “a felony offense that relates to, arises out of or is in connection with the offender’s holding of an elected office...” The broad nature of that phrase language could result in much litigation over whether (1) the standard provides adequate notice of the types of acts that might result in forfeiture or (2) a particular felony is sufficiently “related” to public employment to justify forfeiture. SB 259 should be amended to specify the felonies that will result in forfeiture. Examples of felonies that could be specified include, without limitation, embezzlement, theft of public property, forgery involving official documents or records, offering or accepting a bribe, etc. In the alternative, SB 259 could be amended to establish a direct link between the public employment and the felony. For example, forfeiture might be based upon demonstrating that holding public employment or a public position was essential to commission of the felony; e.g. “but for” being in a position of public employment, the member or retiree could not have committed the felony.

AOG: SB 259 is potentially unconstitutionally void for vagueness when it defines the underlying crime as a “felony offense that relates to, arises out of or is in connection with the offender's holding of an elected office”. As the US Supreme Court has held, due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, for “no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” United States v. Harriss, 347 U.S. 612, 617 (1954). See also Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). Accordingly, it is unclear what “relates to, arises out of or is in connection with” means.

AODA also finds certain sections could be improved for greater clarity:

Section 2 (A): This section provides for the civil penalty of forfeiture of the public official's pension if the official is convicted of a felony that "relates to, arises out of or is in connection of the offender's holding of an elected office". It is a little confusing about how the forfeiture will be handled. The first part of this section states "If, in the adjudication of a public official". This makes it sound like the case has been tried and a finding has been made by the trier of fact; yet this section goes on to state that the attorney general of district attorney shall file for an order of forfeiture of pension and that it is to then be tried as part of the criminal case. If this bill wants the criminal and forfeiture proceedings to be tried together, then the word "adjudication" should be removed. Possible new language: "If, in the evaluation of a case involving a public official allegedly committing a felony offense ...". That would then make it clear that the two proceedings are to proceed together. Another issue: in which court is the request for forfeiture filed? It is a civil matter; but this bill wants it to be tried with the criminal case; so is the request for forfeiture filed in the civil court or the criminal court? If in the criminal court, is it given a criminal case number or a civil case number?

ERB raises a final issue related to the pension as a property right:

SB 247 does not address the issue of whether pension rights would be restored in the event a convicted member or retiree is subsequently pardoned and, if so, how that would be accomplished. This also involves the question of calculating the cost of repurchasing service credit. The bill should be amended to address this issue.

ADMINISTRATIVE IMPLICATIONS

Both ERB and PERA will be required to comply with the forfeiture requirements of SB 259. Also, both pension plans would need to promulgate rules concerning the administration of forfeiture proceedings as they apply to pension benefits payable, refunds of member contributions and compliance with prior domestic-relation and child-support orders.

CONFLICT, RELATIONSHIP

Two other bills provide anti-corruption provisions.

Senate Bill 259 might conflict with House Bill 378, which appears to be more extensive in its punitive reach, including pension forfeiture, mandatory jail time and banishment from lobbying or obtaining a state contract.

Senate Bill 259 seems similar but might conflict with Senate Bill 247, as most fully described by ERB:

SB 247 – "Relating to Retirement benefits: Providing for the Forfeiture of Certain Rights and Benefits Under the State Retirement Systems Upon Conviction for Certain Crimes" does not contain a provision for felony enhancement but does contain several identical provisions regarding pension forfeiture for public officials.

Specifically, SB 247 imposes pension forfeiture on those engaged in “public employment” which SB 247 defines as persons who are employed as elected or appointed officials. The similarities between SB 247 and SB 259 include the following: the district attorney or the attorney general are required to pursue forfeiture proceedings against the offender; state retirement systems shall, upon entry of a forfeiture order, suspend service credit if the person is a member and pension payments if the person is a retiree; if either the forfeiture order or the conviction is not appealed or either is upheld on final appeal, state retirement systems shall revoke service credit if the person is a member and terminate pension payments if the person is a retiree and,; state retirement systems shall restore service credit and pension payments where a forfeiture order is overturned on final appeal.

In addition to the stated similarities, slight differences also exist. The most notable are as follows: provision in SB 247 for forfeiture proceedings outside of the criminal matter where the felony prosecution occurs outside of state district court; a provision in SB 259 for addressing community property interests and or child support obligations where an order settling community property interests or child support obligations is entered not only prior to the forfeiture order, but also simultaneously and in conjunction with the forfeiture order.

One potential issue that occurs when comparing the two bills is that provisions of SB 259 do not seem to be applied in the case of an elected official entering a “no contest” plea whereas SB 247 clearly includes this possibility in its provisions.

PERA provides a complete list of related statute:

The Judicial Retirement Act [NMSA 1978, Section 10-12B-17] provides for the forfeiture of pension benefits if a member is removed from office pursuant to the provisions of Article 6, Section 32 of the Constitution of New Mexico.

The Magistrate Retirement Act [NMSA 1978, Section 10-12C-16] provides for the forfeiture of pension benefits if a member is removed from office pursuant to the provisions of Article 6, Section 32 of the Constitution of New Mexico.

The Public Employees Retirement Act [NMSA 1978, Section 10-11-136] allows for a court-ordered division of retirement funds as community property.

The Public Employees Retirement Act [NMSA 1978, Section 10-11-136.1] allows for legal process to satisfy child-support obligations.

The Judicial Retirement Act [NMSA 1978, 10-12B-7] allows for a court-ordered division of retirement funds as community property and legal process to satisfy child-support obligations.

The Magistrate Retirement Act [NMSA 1978, 10-12C-7] allows for a court-ordered division of retirement funds as community property and legal process to satisfy child-support obligations.

TECHNICAL ISSUES

In case of a voided order, the bill specifies that the attorney general shall notify the respective retirement plan for reinstatement. The AODA suggests that the district attorneys should also be required to make notification in case they are the prosecuting attorney. However, ERB suggests that “there may be much less chance for failure to notify or failure to serve if one entity is responsible for all matters regarding service and notification to the state retirement system.”

ERB points out another possible technical issue, as follows:

SB 259 does not address the issue of whether pension rights would be restored in the event a convicted member or retiree is subsequently pardoned and, if so, how that would be accomplished. This also involves the question of calculating the cost of repurchasing service credit. The bill should be amended to address this issue.

OTHER SUBSTANTIVE ISSUES

The AODA explains the exceptions for pension forfeiture provided in Section 2 (C):

There are two exceptions spelled out in this section. If there is a prior order to the forfeiture order in this section, which addresses community property interests and child support obligations, the retirement system shall comply with those court orders. The second exception recognizes that if a defendant is receiving a pension due to previous employment, then returns to work for the state while still receiving the pension, that pension shall not be revoked; unless the crime the defendant was convicted of involves actions that were taken during that first employment.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Elected officials convicted of a felony related to, arising out of or in connection with the elected official’s position would not have their pensions affected nor would they be, as a result of the felony, subject to a felony enhancement in the form of a fine.

MA/mew:svb