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FISCAL IMPACT REPORT

ORIGINAL DATE 03/09/11
 LAST UPDATED 03/13/11 **HB** _____

SPONSOR SPAC

SHORT TITLE CYFD Employees Of Good Moral Character **SB** CS/574/aSJC

ANALYST Haug

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
Total		NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

State Personnel Office (SPO)

Children, Youth and Families Department (CYFD)

Attorney General (AGO)

SUMMARY

Synopsis of SJC Amendment

The Senate Judiciary Committee Amendment to Senate Public Affairs Committee Substitute for Senate Bill 574 makes the following amendments:

- Inserts language into subsection B of section 1 that narrows the scope of the prohibition of an employee, staff member or volunteer, or their superiors, that have direct unsupervised contact with department clients to convictions of a felony offense “that is directly related to the job duties of the employee”.
- Strikes the word “dismissal” in subsection C of section 1, and inserts the language “increased supervision or disciplinary action”.
- Inserts new language in subsection C of section 1 relating to a substantiated allegation of abuse or neglect as determined by CYFD, specifying that its investigation shall justify “just cause”, stating that upon appeal of a disciplinary action to the State Personnel Board pursuant to this section, the State Personnel Board shall defer to the record of the administrative hearing affirming a substantiated allegation of abuse or neglect, if one exists, in determining whether the action taken by the agency was with just cause. This replaces original language stating that CYFD’s decision shall be binding on the State Personnel Board, and that the State Personnel Board’s designated hearing officer shall not

have appellate jurisdiction over CYFD’s findings or conclusions in subsection C of section 1.

The Senate Judiciary Committee amendment for the Senate Public Affairs Committee substitution for SB 574 has addressed and satisfied the concerns of the State Personnel Office. In its current form, there is not a need to make changes or amendments to the *Personnel Act* (§10-9-1 NMSA 1978).

Synopsis of Original Bill

Senate Public Affairs Committee substitute for Senate Bill 574 would add a new section to the Children, Youth and Families Department Act, Section 9-2A-1 through 9-2A-24 NMSA, prohibiting employment of all prospective or current employees, staff members and volunteers and their superiors who have direct unsupervised contact with children who have been the subject of a substantiated allegation of child abuse or neglect. Further the bill would bar convicted felons from being in such employment with CYFD if employee has or will have direct unsupervised contact with children. It also amends CYFD duties under Section 9-2A-8 NMSA to include the ability to background check all such persons.

The bill provides significant exceptions to the normal handling of personnel rights of an employee dismissed as a result of a substantiated allegation of abuse or neglect as determined by CYFD. These include limits on the personnel board’s hearing officer appellate jurisdiction over the CYFD’s findings or conclusions, elimination of any right to progressive discipline prior to discipline under this bill, and discovery using records that are otherwise confidential pursuant to the Abuse and Neglect Act.

FISCAL IMPLICATIONS

Senate Public Affairs Committee Substitute for Senate Bill 574 contains no appropriation and according to CYFD has no fiscal implication since the department already carries out fingerprint-based records checks on all categories of personnel identified by this bill.

SIGNIFICANT ISSUES

The SPO reports:

The Senate Public Affairs Committee substitute for Senate Bill 574 raises several issues including violations of an individual’s due process rights, including the right to appeal to the State Personnel Board. The substitute violates the State Personnel Act and the State Personnel Board rules and regulations. In order for the proposed legislation to be enacted in its present form, the State Personnel Act and the Personnel Board Rules and Regulations would have to be amended. Further, this would also be in violation of the collective bargaining agreements for those positions that are union represented.

The Senate Public Affairs Committee substitute for Senate Bill 574 requires that a “substantiated allegation of abuse or neglect” shall constitute just cause and is binding on the State Personnel Board and its hearing officers. This language is in direct conflict with the State Personnel Act and violates the employee’s due process and appeal rights. Section 10-9-18 of the State Personnel Act provides an appeal right to employees who are dismissed, demoted, or suspended. Section F of the State Personnel Act requires the State Personnel Board to determine if the action taken by the agency was with or without just cause. *See §10-9-18(F) NMSA 1978.* This substitution bill strips the State Personnel

Board from its authority to make that determination and violates the employees' right to a full appeal. Furthermore, subsection E of this substitution bill allows for the redaction of indentifying information in confidential records protected under the Abuse and Neglect Act concerning the individual(s) that brought forth such evidence or allegations. This may potentially violate the employee's individual right to call and examine witnesses, cross-examine witnesses and impeach any witness pursuant to Personnel Board Rule 1.7.12.18 NMAC. This may also potentially make public the confidential records protected under the Abuse and Neglect Act in the event of an appeal.

The word "substantiated" referred to throughout the new material relating to the allegation of abuse or neglect is ambiguous and subjective. It is unclear as to what will substantiate allegations or evidence brought against an individual and how that information constitutes "just cause" for discipline.

The AGO states:

There is some constitutional question whether unlimited felony conviction is overly broad as any felony conviction would bar employment in these CYFD positions. However, several states (at least 5) have laws prohibiting the employment of felony convicts in any state employment, not just those positions dealing with children, as here.

This bill would trump the Criminal Offender Employment Act, 28-2-1 to 28-2-6 NMSA, which generally promotes the employment of convicted persons after they have served their time and only bars employment with the state/public entity if the felony (or misdemeanor conviction involving moral turpitude) conviction directly relates to the employment position.

The CYFD reports:

This bill conflicts with the Criminal Offender Employment Act (NMSA 28-2-1 – 28-2-6), which prohibits employers from discriminating against criminal offenders and ex-convicts. The Act states that departments "may take into consideration a conviction, but the conviction shall not operate as an automatic bar to obtaining public employment or license or other authority to practice the trade, business or profession." (NMSA 28-2-3)

Senate Bill 574 reads, "no employee, staff member or volunteer at the department who has direct unsupervised contact with department clients or the superiors of an employee, staff member or volunteer at the department who has direct unsupervised contact with department clients shall have been convicted of a felony offense by a court of this state, any other state or the United States." (page 2, lines 8-14)

By automatically prohibiting persons who have been convicted of a felony offense from having direct client contact as a CYFD employee, the Department would in fact be considering a felony conviction to be an "automatic bar" from employment. In this way, the bill conflicts with the Criminal Offender Employment Act.

Children, Youth and Families Department employees currently undergo a background check (in accordance with NMSA 9-2A-8.1), the clearance level of which depends on the employee's level of contact with clients; the more direct the level of contact, the higher the clearance level.

TECHNICAL ISSUES

The SPO notes:

The Senate Public Affairs Committee substitute for Senate Bill 574 is in direct conflict with the State Personnel Act, thus requiring significant changes and amendments to the Act.

ALTERNATIVES

The SPO suggests:

Regarding the Senate Public Affairs Committee substitute for Senate Bill 574, strike the language that requires that the department's determination of a substantiated allegation of abuse or neglect to be binding upon the State Personnel Board and its designated hearing officers. Strike the language that eliminates the appellate jurisdiction of the State Personnel Board over the department's findings or conclusions, thereby removing the language that violates employees' due process rights and conflicts with the Personnel Act.

GH/svb:bym:mew