

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website (www.nmlegis.gov) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

SPONSOR Nunez ORIGINAL DATE 2/20/15
LAST UPDATED _____ HB 292
SHORT TITLE Administrative Hearings Act SB _____
ANALYST Malone

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		(\$1,080.5)	(\$1,080.5)	(\$2,161.0)	Recurring	TRD
		\$1,080.5	\$1,080.5	\$2,161.0	Recurring	DFA

(Parenthesis () Indicate Expenditure Decreases)

Conflicts with SB 346 (also amending Section 7-1-3 NMSA 1978), SB 212 (also amending Section 13-1-22 NMSA 1978), SB 269 (also amending Section 66-5-19 NMSA 1978), HB 61 (also amending Section 66-8-111.1 NMSA 1978) and HB 120 (also amending Sections 66-8-111.1 and 66-8-112).

Substantially related to SB 356, which also establishes an independent hearings office.

SOURCES OF INFORMATION

LFC Files

Responses Received From

Taxation and Revenue Department (TRD)
Administrative Office of the Courts (AOC)
Attorney General's Office (AGO)
Department of Finance and Administration (DFA)
Economic Development Department (EDD)
Commission of Public Records (CPR)

SUMMARY

Synopsis of Bill

House Bill 292 enacts the "Administrative Hearings Office Act" (AHOA), creating the "Administrative Hearings Office" ("office") as administratively attached to the Department of Finance and Administration (DFA), pursuant to Section 9-1-7 NMSA 1978, and separate from the Taxation and Revenue Department (TRD). AHOA moves the hearings bureau of TRD to DFA. The bill establishes a chief hearing officer who is appointed by the governor with the advice and consent of the senate. The bill creates several sections related to powers and duties of the chief hearing officer and code of conduct for hearing officers. The bill also creates

procedures for tax protests, motor vehicle administrative hearings, and amends several definitions. A detailed description of the bill is found in attachment 1.

The effective date of the Act is July 1, 2015.

FISCAL IMPLICATIONS

The bill establishes that the costs of the Administrative Hearing Office would transfer directly from the current hearings office within TRD to DFA, so cost associated with this bill should be minimal.

SIGNIFICANT ISSUES

1. Section 9-1-7 NMSA 1978 sets forth the criteria upon which administratively attached agencies function. It provides that:
 - a. An agency attached to a department for administrative purposes only shall:
 - i. exercise its functions independently of the department and without approval or control of the department;
 - ii. submit its budgetary requests through the department; and
 - iii. submit reports required of it by law or by the governor through the department.
 - b. The department to which an agency is attached for administrative purposes only shall:
 - i. (1) provide, if mutually agreed, the budgeting, record-keeping and related administrative and clerical assistance to the agency; and
 - ii. (2) include the agency's budgetary requests, as submitted and without changes, in the departmental budget.
 - c. Unless otherwise provided by law, the agency shall hire its own personnel in accordance with the Personnel Act [10-9-1 NMSA 1978].
2. TRD and DFA note that creating an Independent Hearing Office increases public confidence in the protest process by removing any perception/appearance of a conflict of interest - that the hearing officer deciding the case is also an employee of TRD. The departments also believe the bill will help the State improve its score given by the Council on State Taxation (COST), which in turn will assist the State in recruiting and attracting more businesses to the State. The state's current grade is a B, and an independent hearing office could help obtain an A.

PERFORMANCE IMPLICATIONS

EDD remarks that the bill would have a positive impact on EDD's and the New Mexico Partnership's retention and recruiting performance. The appearance of a conflict of interest inherent in the existing structure is often highlighted by businesses that have tax hearings before TRD.

ADMINISTRATIVE IMPLICATIONS

The new Independent Hearing Office will require human resources, IT, and Financial Services/Purchasing support from DFA, as it does not have any staff dedicated to those functions

now or under the proposed legislation.

TRD notes that the Hearings Bureau currently uses hearing space provided by TRD in the various county Motor Vehicle Division (MVD) field offices or TRD offices to conduct Implied Consent Act hearings, which are required to occur in the county of incident under Section 66-8-112 NMSA 1978. The new Independent Hearing Office will need to continue to use those designated hearing spaces, and thus will need to work out a memorandum of understanding with TRD/MVD.

AOC notes that some provisions of the AHOA and amendments to existing statutes may affect the courts and have the potential to increase caseloads in the courts.

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

Conflicts with SB 346 (also amending Section 7-1-3 NMSA 1978), SB 212 (also amending Section 13-1-22 NMSA 1978), SB 269 (also amending Section 66-5-19 NMSA 1978), HB 61 (also amending Section 66-8-111.1 NMSA 1978) and HB 120 (also amending Sections 66-8-111.1 and 66-8-112).

Substantially related to SB 356, which also establishes an independent hearings office.

TECHNICAL ISSUES

1. The Hearings Bureau currently has two dedicated offices in Santa Fe and Albuquerque, which would transfer under the temporary provision. Additionally, two hearings officers use office space in an MVD field office (Clovis) and TRD Audit and Compliance Office (Las Cruces) as their duty stations. It is less clear whether this office space in Clovis and Las Cruces would be covered by the temporary provision, or whether a separate memorandum of understanding would have to be worked out for the continuing usage of that space.
2. The definition of “hearing officer” does not require the hearing officer to be a licensed attorney. This will either need to be addressed in the bill or through regulations by DFA after the bill is enacted.
3. The SB 356 amendment to Section 7-1-4.2 may be clarified through the insertion of a comma, so it is easier to tell if the language provides for “the right to be represented or advised by counsel or other qualified representatives” or “the administrative hearings office in accordance with the provisions of the [AHOA];” or instead is referring to “administrative actions with the department” or the office.
4. CPR suggests amending paragraph E, Section 20 by deleting “state records center and archives” and replacing with “state records administrator”.

OTHER SUBSTANTIVE ISSUES

SB 356, also introduced this session, is a substantially similar bill. Unlike HB 292, SB 356 permits TRD as well as a taxpayer to request a written ruling on a contested question of evidence in a matter in which the taxpayer has filed a written protest and for which the protest is pending.

(HB 292 Section 3 v. SB 356 Section 6).

Also, unlike SB 356, HB 292 amends Section 9-11-6.2 NMSA 1978, as follows:

- Permits an interested person to petition the secretary to request the promulgation, amendment or repeal of a rule and to accompany the petition with data, views and arguments in support of the petition. Requires the secretary, within 30 days after the petition is submitted, to deny the petition in writing, stating the reasons for the denial, or initiate rulemaking proceedings.
- Permits an interested person adversely affected by a rule promulgated by the secretary or, by an action of the secretary to promulgate, amend or repeal a rule or deny a petition requesting the secretary to promulgate, amend or repeal a rule, to appeal to the court of appeals for relief. The appeal is to be on the record made at a hearing before the secretary and is required to be taken to the court of appeals within 30 days after the date of the secretary's action.
- Provides that on appeal of a rule or an action made by the secretary pursuant to Subsection I, the court shall set aside the rule or the secretary's action only if it is found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law.
- After a hearing and a showing of good cause by the appellant, a stay of the rule or the secretary's action being appealed may be granted, pending the outcome of the judicial review. The stay of the rule or the secretary's action may be granted by the secretary on application for a stay or, if the secretary denies a stay within 90 days after receipt of the application, by the court of appeals.

Additionally, SB 356 amends Sections 13-1-22 and 40-5A-6, which HB 292 does not. Section 13-1-22 places the power to rule on the grant or denial of a resident business or resident veteran business preference with regard to the provision of false information to TRD with the office rather than TRD. Section 40-5A-6 permits a proceeding pursuant to the law governing suspension and revocation of a license granted by a board, for failure to comply with a judgment and order for support or subpoena or warrants relating to paternity or child support proceedings, to be conducted by the office, in addition to a board.

ALTERNATIVES

AGO observes that there exist other agencies that maintain a degree of attachment to its hearings bureau/officers that pose identical concerns. The AGO suggests that one option is to create an independent Administrative Hearings Office charged with conducting all, or at least a greater proportion of, adjudications conducted throughout state government.

CEM/bb

Attachment 1
Summary of HB 292

The AHOA contains the following new provisions:

- Section 2: provides that the head of the office is the “chief hearing officer,” (“chief”), to be removed only for malfeasance, misfeasance or abuse of office, and appointed by the governor for a term of 6 years, except that the initial term begins on July 1, 2015 and ends on December 31, 2015, with the opportunity for the officer to be reappointed to successive terms. HB 292 provides that the initial chief shall be the person who is the chief of the Hearings Bureau of the TRD on July 1, 2015. (Subsection B) HB 292 also provides for the powers and duties of the chief, and clarifies that employees of the office, except the chief, are subject to the provisions of the Personnel Act. (Subsection C)
- Section 3: requires the chief to adopt and promulgate a hearing officer code of conduct and to periodically evaluate each hearing officer’s performance. HB 292 requires that the chief ensure each hearing officer has decisional independence, except to permit the chief to consult with a hearing officer about a genuine question of law and review with a hearing officer any issue on appeal addressed by an appeals court. Under the AHOA, the office is required to hear all tax protests pursuant to the Tax Administration Act, and property tax protests pursuant to the Sections 7-38-22 and 7-38-23 NMSA. The office is also required to conduct all adjudicatory hearings pursuant to the Motor Vehicle Code, and all driver’s license revocation hearings pursuant to the Implied Consent Act. HB 292 requires the office to make and preserve a complete record of all proceedings and to maintain confidentiality regarding taxpayer information as require by Section 7-1-8 NMSA 1978. The AHOA provides that in a hearing conducted pursuant to the Tax Administration Act, Section 13-1-22 NMSA 1978 and the Motor Vehicle Code, the Rules of Evidence and the Rules of Civil Procedure for the District Courts do not apply. With regard to the Rules of Evidence, HB 292 provides that the hearing officer may require reasonable substantiation of statements or records tendered, the accuracy or truth of which is in reasonable doubt, to rule on the admissibility of evidence. The AHOA permits a taxpayer to request a written ruling on a contested question of evidence in a matter in which the taxpayer has filed a written protest and for which the protest is pending. The office is required to issue a copy of its written ruling to the TRD at the time the ruling is issued to the taxpayer. With regard to the Rules of Civil Procedure, the AHOA requires a hearing officer to conduct a hearing to allow the ample and fair presentation of complaints and defenses, as the circumstances justify, to render a decision in accordance with the law and evidence presented and admitted. The AHOA permits a taxpayer to request a written ruling on a contested question of procedure in a matter in which the taxpayer has filed a written protest and for which the protest is pending. The office is required to issue a copy of its written ruling to the TRD at the time the ruling is issued to the taxpayer. The AHOA permits a hearing officer to administer oaths and issue subpoenas for the attendance of witnesses and the production of documents.
- Section 4: prohibits a hearing officer from engaging or participating in any way in the enforcement or formulation of general tax policy other than to conduct hearings, and from engaging in ex-parte communications concerning the substantive issues of any matter that has been protested while the matter is pending.
- Section 5: lists the procedures for tax protests filed pursuant to Section 7-1-24 NMSA 1978.
- Section 6: lists the procedures for motor vehicle administrative hearings (a dispute of the

denial of or failure to either allow or deny a license, permit, placard or registration provided for in the Motor Vehicle Code). Clarifies that a court is without jurisdiction to entertain a proceeding in which a person calls into question the application of the Motor Vehicle Code to that person, except as a consequence of the appeal by that person to the district court from the action and order of the hearing officer.

The AHOA amends the following existing statutory provisions:

- Section 7-1-3: provides definitions for “hearing officer” and “taxpayer.”
- Section 7-1-4.2: provides to taxpayers the right to be represented or advised by the office in accordance with the AHOA at any time in administrative actions with TRD, in addition to counsel or other qualified representatives, and provides the right to seek review of any findings or adverse decisions relating to determinations during audit or protest procedures in accordance with Section 7-1-24 and the AHOA.
- Section 7-1-8.3: permits a TRD employee to reveal a decision and order made by an officer pursuant to the AHOA with respect to a protest filed with the Secretary on or after July 1, 1993, and any written ruling on questions of evidence or procedure made by a hearing officer pursuant to the AHOA, provided that the taxpayer requesting the ruling shall not be revealed.
- Section 7-1-8.4: permits a TRD employee to reveal to the office information in relation to a protest or other hearing regarding the taxpayer that is a party to the action. This restriction shall not prevent revelation of TRD policy or interpretation of law arising from circumstances of a taxpayer that is not a party. The office is required to maintain confidentiality regarding taxpayer information as required by Section 7-1-8 NMSA 1978.
- Section 7-1-22: grants jurisdiction to the court of appeals of an appeal by the taxpayer from the order of a hearing officer, rather than from the action and order of the Secretary, as specified in Section 7-1-24.
- Section 7-1-24: clarifies that hearings conducted on protests are pursuant to the AHOA.
- Section 7-1-25: amends to clarify that appeals to the court of appeals are from a hearing officer’s decision and order rather than from the Secretary’s.
- Section 7-1-26: provides that a person claiming a refund may elect to pursue no more than one remedy, including: (1) directing a written protest to the secretary containing specific details of circumstance, an allegation of indebtedness, a demand for a refund, and recitation of the facts of the claim for refund; (2) commence a civil action in the district court for Santa Fe County.
- Section 7-1-29.1: clarifies that an “administrative proceeding” includes actions before the office. Provides that with regard to the awarding of costs and fees, the taxpayer shall not be treated as the prevailing party if, prior to July 1, 2015, TRD, or, on or after July 1, 2015. The hearing officer finds that the position of TRD in the proceeding was based upon a reasonable application of the law to the facts of the case.
- Sections 7-38-21 and 7-38-22: permit a property owner to protest the value or classification of the owner’s property by filing, as provided in the Property Tax Code, a petition of protest with the office.
- Section 7-38-23: requires the chief to designate a hearing officer to conduct a protest hearing conducting pursuant to the provisions of the Property Tax Code, with the hearing officer’s order to be in the name of the chief.
- Section 7-38-28: permits a property owner to appeal an order made by a hearing officer by filing an appeal pursuant to Section 39-3-1.1 NMSA 1978.
- Section 9-11-6.2: restricts directives issued by the Secretary as orders to written

statements of the Secretary or a delegate of the Secretary, rather than also of a hearing officer. Permits an interested person to petition the secretary to request the promulgation, amendment or repeal of a rule and to accompany the petition with data, views and arguments in support of the petition. Requires the secretary, within 30 days after the petition is submitted, to deny the petition in writing, stating the reasons for the denial, or initiate rulemaking proceedings. Permits an interested person adversely affected by a rule promulgated by the secretary or, by an action of the secretary to promulgate, amend or repeal a rule or deny a petition requesting the secretary to promulgate, amend or repeal a rule, to appeal to the court of appeals for relief. The appeal is to be on the record made at a hearing before the secretary and is required to be taken to the court of appeals within 30 days after the date of the secretary's action. Provides that on appeal of a rule or an action made by the secretary pursuant to Subsection I, the court shall set aside the rule or the secretary's action only if it is found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law. After a hearing and a showing of good cause by the appellant, a stay of the rule or the secretary's action being appealed may be granted, pending the outcome of the judicial review. The stay of the rule or the secretary's action may be granted by the secretary on application for a stay or, if the secretary denies a stay within 90 days after receipt of the application, by the court of appeals.

- Section 66-2-11: recognizes the authority or requirement of the office to give notice under the Motor Vehicle Code or any other law regulating the operation of vehicles, in addition to the TRD.
- Section 66-2-17: restricts the subject matter of the section to administrative hearing procedure for hearing conducted pursuant to the AHOA, removing all reference to appeals from the Secretary's decision and order and exhaustion of administrative remedies.
- Section 66-4-3: clarifies that the TRD's action refusing a license for just cause or to cancel or suspend a license or use of a temporary registration permit, demonstration permit or transport permit for violation of the Motor Vehicle Code shall be taken only after a hearing before the office. An aggrieved party may file an appeal in the district court.
- Section 66-5-19: provides that the Motor Vehicle Division ("division" of the TRD may, upon receiving satisfactory evidence of any violation of restrictions on a license, suspend the license, but clarifies that the licensee is entitled to a hearing as upon a suspension under Sections 66-5-1.1 through 66-5-47 NMSA 1978 and as provided in the AHOA.
- Section 66-5-30: requires the division to immediately notify the licensee in writing, upon the authorized suspension of the license of a person, of the licensee's right to a hearing before the office and to notify the office, which shall schedule the hearing as required by statute. Clarifies that the hearing shall be held as provided in the AHOA, with the hearing officer required to rescind the order of suspension or continue, modify or extend the suspension of the license or revoke the license.
- Section 66-5-204: permits an owner of a motor vehicle registered in NM to appeal a decision of the Secretary under the Mandatory Financial Responsibility Act to the office within a specified time period, and a person who continues to be aggrieved after the hearing officer's decision to appeal that decision in the district court pursuant to Section 39-3-1.1 NMSA 1978.
- Section 66-5-236: requires the TRD to notify a person that the person may request a hearing before the office on the suspension of a motor vehicle registration.

- Section 66-8-111.1: requires immediate service of written notice of revocation and of right to a hearing before the office pursuant to the Implied Consent Act on a person who refused to permit chemical testing or on a person who submits to a chemical test the results of which indicate an unlawful alcohol concentration in the person's blood or breath.
- Section 66-8-112: clarifies that requests for a hearing regarding the revocation or denial of a license or privilege to drive be made pursuant to the AHOA, with the office setting dates for hearings, and having the authority to postpone or continue any hearing on its own motion or upon application and for good cause shown, for a specified time period. Provides the office with the authority to administer oaths and issue subpoenas for the attendance of witnesses and the production of relevant documents, at hearings on license or driving privilege revocation or denial. Requires the office to enter an order sustaining the revocation or denial of the license or privilege to drive upon specified finding by the office's hearing officer. Permits a person adversely affected by an order of the office to seek timely review in the appropriate district court. Requires that the results of a hearing for a person under 18 years old be forwarded by the office to the person's parent, guardian or custodian.

HB 292 enacts a temporary provision for the transfer of personnel, functions, appropriations, money, property, contractual obligations, statutory references and rules.

HB 292 repeals Section 7-1-24.1 NMSA 1978, governing disputing liabilities, conduct of hearing and hearing officers under the Tax Administration Act, Section 7-1-1 NMSA 1978 et. seq.

DIVISION	BUREAU	BUREAU NAME:	Position #	Job Title	Grade	LOC	EMPLOYEE NAME	Date	Grade	COMP RATE	HOURLY RATE	
1000000000	1140000000	Hearing Officers Bureau	1196	GEN I	90	103	VanDuzen,Brian		90	1.07	41,097	3,780
1000000000	1140000000	Hearing Officers Bureau	1203	PARALEGL& LGL ASST-A	60	103	Griego,John		60	0.89	16,887	5,778
1000000000	1140100000	Hearing Officers	1201	LAWYER SUPERVISOR	85	201	Buchanan,David A		85	1.12	37,51	3,780
1000000000	1140100000	Hearing Officers	32010	LGL SUP WKR, AO-B	45	201	VACANT ***05-01-2008					5,023
1000000000	1140100000	Hearing Officers	2000	LAWYER-O	75	201	Kircher,Jane Robertshaw		75	1.23	32,178	11,056
1000000000	1140100000	Hearing Officers	50679	LAWYER-O	75	201	Baldwin Gellin,Lauren	30-Jun-15	75	1.24	32,452	3,780
1000000000	1140100000	Hearing Officers	23209	LAWYER-O	75	201	Lopez,Victor S.		75	1.29	33,609	6,893
1000000000	1140100000	Hearing Officers	10109225	LAWYER-O	75	201	VACANT ***..					
1000000000	1140100000	Hearing Officers	10100385	LAWYER-O	75	103	Gallejos,Ignacio V.		75	1.06	77,81	3,780
1000000000	1140100000	Hearing Officers	1993	LAWYER-A	80	103	VACANT ***07-05-2014					3,780
1000000000	1140100000	Hearing Officers	70185	LAWYER-O	75	703	Jacquez,Richard M.		75	1.12	29,257	-
1000000000	1140100000	Hearing Officers	10100228	LAWYER-O	75	201	Giron,LaDonna		75	1.13	29,459	6,893
1000000000	1140100000	Hearing Officers	10101583	LAWYER-A	80	501	Hoxie,Dee Dee		80	1.11	32,775	3,780
1000000000	1140200000	DWI Scheduling	2737	LINE II	70	103	Rivera,Breanna L.		70	0.97	22,532	11,158
1000000000	1140200000	DWI Scheduling	23210	LGL SUP WKR, AO-A	55	103	Whitchurch,Kelly A.		55	1.12	19,385	14,724
1000000000	1140200000	DWI Scheduling	10103639	OFFICE CLRK, GEN-A	40	103	Rodriguez,Samantha V		40	1.07	13,524	14,724
											858,216	98,929

858,216
98,929

12,200

4,660

10,036

16,800

800

1,632

5,600

13,400

14,400

4,780

1,000

920

3,000

~~1,046,373~~

Total

546400

Metro Court
Albuquerque

16097

Hadley Center

7,093

LAS CRUCES

Central parking 3,800

WINESS S

1,080,563

8,000 Certified males

BASED on FY16 Request