

LFC Requester:	
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AGENCY BILL ANALYSIS
2017 REGULAR SESSION

WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:

LFC@NMLEGIS.GOV

and

DFA@STATE.NM.US

{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}

SECTION I: GENERAL INFORMATION

{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}

Check all that apply: Date Feb. 21, 2017
Original Amendment Bill No: SB 450
Correction Substitute

Sponsor: Cisco McSorley Agency Code: 264
Short Title: Law Enforcement Use of Force Review Board Person Writing: Gary Cade
Phone: 505-507-7752 Email: cadeabq@gmail.com

SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY17	FY18		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total						

(Parenthesis () Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to:
Duplicates/Relates to Appropriation in the General Appropriation Act

SECTION III: NARRATIVE

BILL SUMMARY

Synopsis: SB450 would create a five-member board to review use of force incidents by law enforcement officers that resulted in great bodily harm or death to another person to determine whether the use of force was justified or should be referred for prosecution.

FISCAL IMPLICATIONS

Unknown.

SIGNIFICANT ISSUES

SB 450 would create a review board composed of two retired judges, one retired law enforcement officer, one retired public defender and one retired district attorney. “All incidents of use of force (by a law enforcement officer resulting in or causing great bodily harm or death of another person) shall be reported to the use of force review board.” “Upon receipt of notice of a use of force incident from a law enforcement agency, the board shall meet, conduct a review of the incident and make a determination as to whether the use of force in the incident was justified.”

SB 450 does not provide any guidance on when the notice must be made, or if it must be accompanied by any investigative reports or other documentation. It does not indicate when the review board must meet after receiving a report or what actions they can take to review the incident. It does not even state whether the decision making by the board would be to determine if the use of force was “justified” under criminal law or was justified under civil law. *Cf., State v. Mantelli*, 2002-NMCA-033 (Police officer prosecuted for voluntary manslaughter,) and *Archuleta v. LaCuesta*, 1999-NMCA-113 (Police officer sued for civil damages alleging federal civil rights violation [42 U.S.C. Sect. 1983] and New Mexico Tort Claims Act violation [Sect. 41-4-1 to -27, NMSA 1978].)

SB 450 does not discuss or offer any guidance on how the review board would conduct their proceedings, and doesn’t indicate whether they would have any legal advisors, investigators or support staff to assist them in evaluating what are always complicated and unique cases. *See, e.g., Fancher v. Barrientos*, No. Civ 11-11 LH/LAM U.S. Dist Ct.-D. NM (2012) (Qualified immunity operates to protect officers from the “sometimes hazy border between excessive and acceptable use of force.”), *State v. Mantelli*, *supra* (Sect. 30-2-6, NMSA 1978, justifiable homicide by a public officer or employee, has evolved in response to United States Supreme Court decisions like *Tennessee v. Garner*, 471 U.S. 1 (1985).)The bill also does not indicate whether the board would, for example, have subpoena power or could take sworn testimony.

The bill does not indicate whether an officer with a use of force incident under review could have legal advisors or provide submissions to the board. See, *Graham v. Conner*, 490 U.S. 386 (1989) (The reasonableness of use of force must be judged from the perspective of the officer on scene, often forced to make a split-second decision, rather than with the 20/20 vision of hindsight.) Similarly, there is no guidance on whether any officer could be compelled to provide a statement to the board but doing so could complicate matters because of their constitutional rights against self-incrimination under the federal and state constitutions. See, *Garrity v. New Jersey*, 385 U.S. 493 (1967), *State v. Chavarria*, 2001-NMCA 095 (Public employees can be compelled to respond to questions about performance of their duties but only if the answers cannot be used against them in a subsequent criminal proceeding.)

There is no other membership criteria listed for the review board, besides “retired,” so the member judges could have previously been everything from a federal judge to probate judge in a rural county to a supreme court justice, or even have served in another state or jurisdiction. They may have had little or no training or experience with criminal law, let alone dealt with a use of deadly force incident involving a law enforcement officer. The other members of the review board may have also not had any experience or training involving deadly use of force by law enforcement officers. Similarly, as drafted, the bill would permit a retired law enforcement officer, public defender or district who served in another jurisdiction to be appointed.

SB 450 would require all the review board members to be “retired” but that description can have different meanings. The state judicial, magistrate and public employee retirement acts permit persons to “retire” with as little as five years of service if they are at least 65 years old and immediately begin collecting their pension, or they can leave public employment, stop working altogether and begin collecting a pension when their age and service years fit the formula. See, Sects. 10-11-1, et seq., 10-12B-1, et seq. and 10-12C-1, et seq. They can also retire from government service but continue working—either in a government or private job. It’s also possible under the bill to appoint someone who served for a limited period, perhaps not even enough to be vested in the state retirement system, as a judge, law enforcement officer, public defender or district attorney but are no longer working so would be considered “retired.” It’s also unclear if the bill would require the district attorney member to be someone who was an elected district attorney, or was an appointed assistant district attorney. Because of the relatively modest pay and difficult work, many elected district attorneys do not retire in that position.

SB 450 includes a provision that “If the board determines that the use of force was not justified, it shall appoint a special prosecutor to bring the matter to a public hearing,” but does not indicate who the prosecutor should be, how they should be paid, or even how they would be vested with prosecutorial authority. The \$100,000.00 proposed appropriation for use by the board could be quickly exhausted if legal counsel and/or investigators are utilized, even if they are state employees. Payments to a special prosecutor and for their use would exhaust the funds even more quickly.

PERFORMANCE IMPLICATIONS

ADMINISTRATIVE IMPLICATIONS

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

TECHNICAL ISSUES

OTHER SUBSTANTIVE ISSUES

ALTERNATIVES

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

Status quo.

AMENDMENTS