

LFC Requester:	Jon Clark
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**AGENCY BILL ANALYSIS
2015 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:
Original **Amendment**
Correction **Substitute**

Date February 17, 2015
Bill No: HB 456

Sponsor: Rep. Nate Gentry
Short Move fire marshal from
Title: PRC

Agency Code: Attorney General's Office - 305
Person Writing Tannis L. Fox, AAG
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SECTION II: FISCAL IMPACT

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Nonrecurring	Fund Affected
FY15	FY16		

(Parenthesis () Indicate Expenditure Decreases)

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY15	FY16	FY17		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY15	FY16	FY17	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

This analysis is neither a formal Attorney General’s Opinion nor an Attorney General’s Advisory Letter. This is a staff analysis in response to an agency’s, committee’s, or legislator’s request.

BILL SUMMARY

Synopsis:

HB 456 is a comprehensive bill that removes the state fire marshal from the Public Regulation Commission (PRC), and establishes its own office along with establishment of a state fire board (“board”). HB 456 establishes divisions within the state fire marshal office; gives the office rulemaking, investigatory, and adjudicatory functions relating to enforcement of the newly created “State Fire Marshall Act” and “Fire Protection Fund Act”; and gives the office authority to determine the needs of municipalities and county fire districts for money in the fire protection fund.

FISCAL IMPLICATIONS N/A

SIGNIFICANT ISSUES

1. Section 5 gives the board authority to hear administrative appeals of orders and modifications of the state fire marshal and to hear appeals from the state fire marshal's determinations, but does not give the board authority to promulgate rules to set forth procedures for these hearings. The board needs authority to promulgate such rules to ensure that the proceedings conform to any due process requirements.

2. Similarly Section 33 gives the board authority to hear appeals from municipalities and county fire districts affected by the state fire marshal's determination of needs, but does not give the board authority to promulgate rules to set forth procedures for these hearings. Further, HB 456 directs the board to “review the determination of the state fire marshal in such informal and summary proceedings as it deems proper.” The board needs authority to promulgate procedural

rules for the hearings and to ensure that the proceedings conform to any due process requirements.

3. a. Section 7 provides that the state fire marshal’s “office may adopt or revise rules to carry out the provisions of the State Fire Marshal Act and the Fire Protection Fund Act,” and provides further that the state fire “board shall approve rules before they are promulgated.” Section 7 provides for a public hearing on proposed rules before the state fire marshal’s office, but does not provide for the process by which the board approves the rules. The process by which the board approves rules should be set forth and the process should provide for public participation (to comply with due process) or the board should be given the authority to promulgate rules to set forth the process (with provision for public participation).

b. Similarly, Section 17 gives the state fire marshal authority to adopt and revise certain rules, and provides for approval of the rules prior to adoption by the board, but does not set forth the process by which the board approves the rules. Again, the process by which the board approves rules should be set forth, and the process should provide for public participation (to comply with due process) or the board should be given the authority to promulgate rules (with provision for public participation).

4. In circumstances “where a fire or explosion or attempt to cause a fire or explosion has occurred, or which at the time is burning,” Section 12 of HB 456 allows the state fire marshal and others to “in their discretion, take full control and custody of buildings and premises described in this subsection, and place someone in charge of the buildings and premises as they deem proper until their examination and investigation is completed.” This section should be amended to provide for a hearing before full control and custody is taken if there is time for a hearing beforehand or for a hearing within a reasonably short time period after full control and custody is taken if there is not time for a hearing beforehand in order to provide for due process for taking possession of a person or entity’s property.

5. Section 19.B authorizes “a fine not to exceed five hundred dollars (\$500). Each day the violation continues constitutes a separate offense.” Similarly, Section 22 authorizes “a fine of not more than five hundred dollars (\$500). Each day the violation continues constitutes a separate offense.” The intent of these provisions appears to authorize a fine of \$500 per day per violation. However, because these sections set a maximum of \$500 per violation, it is possible to interpret the provisions as setting a \$500 maximum. To clarify, the provisions could be amended to provide that violations are punishable by “a fine of not more than five hundred dollars (\$500) per day per violation.”

PERFORMANCE IMPLICATIONS N/A

ADMINISTRATIVE IMPLICATIONS N/A

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP None identified.

TECHNICAL ISSUES

1. Section 17 gives the state fire marshal authority to promulgate rules, but does not provide for approval of the rules by the board. The other rules provisions in HB 456 provide for board approval of rules, and it is possible the omission for Section 17 is unintentional.

OTHER SUBSTANTIVE ISSUES

1. Section 7 of HB 456 gives the state fire marshal's "office" the authority to adopt or revise rules. Generally, the authority is given to the head of an executive agency, and not to the agency in general, so that it is clear with whom the responsibility for adopting and revising rules lies. Section 16 of HB 456, for example, gives rule making authority to the "state fire marshal", not to the "office." HB 456 should be amended, also, to address this inconsistency. Moreover, often, the boards or commissions that oversee executive agencies are given the rulemaking authority.

2. Section 7 requires 20 days' notice of proposed rules to persons who have requested notice of proposed rules, and requires the proposed rules to be posted on the fire marshal's website. Posting of the proposed rules on the website is the only notice to the general public that is required.

- a. HB 456 should clarify how many days' notice should be given for the website posting.
- b. To provide greater public notice, HB 456 could require notice of the public hearing and proposed rules to be published in the New Mexico register.

3. Section 7 provides that, "Any interested person may appear and present testimony at the hearing on proposed rules." HB 456 could be clarified to allow persons to submit written comment prior to or during the hearing (in lieu of testimony), to submit written information at the hearing, and/or to cross-examine witnesses. As an example, language from the Water Quality Act providing for such public participation, states:

"At the hearing, the [board] shall allow all interested persons reasonable opportunity to submit data, views or arguments orally or in writing and to examine witnesses testifying at the hearing."

NMSA 1978, § 74-6-6(D).

4. Section 10 authorizes the office "to make investigations and reports of existing conditions in the state that are fire hazards and to make reasonable orders for the alleviation of those situations as the state fire marshal deems necessary." Section 10 further provides that:

"If the orders of the state fire marshal are not carried out by persons to whom they are directed, the office may institute proper proceedings under municipal ordinances or state laws to require compliance with the orders."

It is not clear what is meant by "proper proceedings under municipal ordinances or state law to require compliance with the orders." This language should be clarified to give the office authority to institute actions to enforce its orders in specified courts.

ALTERNATIVES None identified.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The state fire marshal will remain a division within the PRC without the expanded authority authorized by HN 456.

AMENDMENTS

See sections on Significant Issues, Other Substantive Issues, and Technical Issues above.