

MINUTES

MONTANA SENATE 54th LEGISLATURE - REGULAR SESSION

SUBCOMMITTEE ON JUDICIARY

Call to Order: By CHAIRMAN SENATOR LORENTS GROSFIELD, on
February 13, 1995, at 7:00 AM

ROLL CALL

Members Present:

Sen. Lorents Grosfield Chair (R)
Sen. Larry L. Baer (R)
Sen. Sue Bartlett (D)
Sen. Al Bishop, (R)
Sen. Linda J. Nelson (D)

Members Excused: None.

Members Absent: None.

Staff Present: Greg Petesch, Legislative Council
Judy Keintz, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Subcommittee Business Summary:

Meeting: SB 115, SB 136

CHAIRMAN GROSFIELD stated the three items left to discuss would
be: gifts, advisory opinions, and the revolving door provisions.

SENATOR BARTLETT asked if postemployment activities had been
discussed.

Mr. Petesch commented that was included in present law, Section
2-2-201(1) states that a former employee may not, within 6 months
following termination of employment, contract or be employed by
an employer who contracts with the state or any of its
subdivisions involving matters with which the former employee was
directly involved during employment. That is the issue currently
being litigated with the Department of Commerce former auditors.

SENATOR BARTLETT commented that in SB 115 there was an interest
in preventing legislators who leave office from lobbying the next
session of the legislature. She wondered how this was enforced.

Mr. Petesch answered that the contract which the former employee and the government entity entered into is voidable. When the issue arose involving Science and Technology this past summer, the Finance Committee became interested in a situation in which the former executive director went to work for the entity which received a fairly significant investment from the Science and Technology Alliance. The Department of Commerce reviewed the issue and declined to void the contract stating it could work a hardship on the company or the executive director. Private action was brought by people who were not awarded a contract involving former Department of Commerce local government auditors. Private parties can bring an action to void the contract.

SENATOR BARTLETT commented that because of the retirement incentive, at one point there were numerous employees leaving strategic positions. The agency then turned around and immediately contracted with them for some assistance.

Mr. Petesch stated that in that bill itself there was specific provision that allowed a contract with the former agency if they made a finding that it was an essential service. This was limited to a certain number of hours per year.

SENATOR BARTLETT stated that 2-2-201(c) states what former employee does not include. She has no problem with someone terminated due to a reduction in force. This covers other involuntary termination not involving violation of the provisions of this chapter. If someone is terminated because they are incompetent, they should not be excluded from the prohibition of contracts for six months.

CHAIRMAN GROSFIELD stated there was a similar issue in 2-2-105. **SENATOR BAER** had this in his bill. It states that a public employee may not, within the months following termination, obtain appointment in which they would take direct advantage unavailable to others. The first provision was for six months. SB 136 states 12 months. If a person is fired, should he be able to go to work for the outside agency?

Mr. Petesch commented that SB 115 had a provision which covered negotiating for employment. You cannot use your current job to negotiate for employment. This is touched on in current law but is much more explicit in SB 115.

CHAIRMAN GROSFIELD questioned how the panel felt about a legislator becoming a lobbyist after resignation or retirement.

Mr. Jacobson stated the Commission felt very strongly about this. It was felt that a legislator's influence with their fellow colleagues would be much greater than other lobbyists because they had just sat through all the caucus meetings and they knew the thinking of various individuals and where their pressure points were. This is the same logic behind other postemployment

restrictions for other employees up to one year not to become involved in matters which they were directly involved with for the state. This is a controversial area.

SENATOR BAER commented that they are primarily worried about wrongful use of insider information. Everything a legislator does is public. There doesn't seem to be the same situation between a department person and a legislator. If there is an advantage by a former legislator knowing current legislators, we may be reaching too far.

SENATOR BISHOP asked **SENATOR BARTLETT** what time period she had in mind.

SENATOR BARTLETT commented that according to SB 115, their real concern was to have someone lobby the next regular session after they left office.

SENATOR NELSON stated that a legislator who comes back to lobby is very knowledgeable. They may know a lot about people but they also know the issues and that would be a plus for the person who hired them as a lobbyist.

SENATOR BARTLETT stated that if a lobbyist knows that he is not going to run again and this person wants to lobby when leaving office, they could shape some things this session to curry favor with potential principals. She questioned whether there is any federal prohibition for members of Congress.

CHAIRMAN GROSFIELD stated that the legislators he knows who have lobbying jobs didn't know who they were going to work for until close to session time or even after session time.

SENATOR NELSON stated that if the public sees this as improper, we should look at this.

SENATOR BAER commented that they have already eliminated a lot of improprieties which the public has identified.

CHAIRMAN GROSFIELD suggested one way to address this situation would be to leave it at six months after the end of your office. If the legislator lost in the primary, he could still be a lobbyist.

SENATOR BARTLETT believed that in the public eye part of what they are tired of is seeing this as a closed system whereby the special interest groups have more influence than the general public.

CHAIRMAN GROSFIELD clarified by leaving this at the next regular session.

Mr. Petesch commented that SB 115 applied the restriction to public officials. Should this be applied to these people as well. This would mean a department director.

SENATOR BARTLETT commented that the committee defined a "public officer" as any state officer or any elected officer of any subdivision of the state.

Mr. Petesch stated they would use "state officer" for this restriction which is defined in (8). This would be elected officials and department directors.

CHAIRMAN GROSFIELD asked if this should go to public employees.

The committee decided to use "state officers".

SENATOR NELSON thought this should also include public employees.

The committee decided to use "public employees" as well.

Mr. Petesch commented they may wish to put something in regarding negotiating for employment. This would be in 2-2-102(4)(c) in the definition of private interest. This is found in 2-2-105, "A public officer, legislator or public employee may not: . . . (b) accept a gift . . . or a substantial economic benefit . . ." this could be a promise of employment. "(i) that would tend improperly to influence a reasonable person . . . to depart from . . . the person's public duties;" would include the negotiation for offer of employment. That is how it is dealt with currently. With some of the clarifications which have been added, it is stronger than it was. In terms of enforcement, a penalty has not been provided. This could state that they may not be registered as a lobbyist.

SENATOR BARTLETT asked **Mr. Argenbright** who had to register as a lobbyist?

Mr. Argenbright stated if part of the person's salary includes the duty of lobbying, that person would have to register. If you are simply reimbursed for expenses, the threshold is \$1,000 during the calendar year.

CHAIRMAN GROSFIELD next referred to advisory opinions. They have set up an Ethics Committee for each House. If a legislator is worried about a conflict in a vote, he could ask the Ethics Committee to make a ruling. This would amount to an advisory opinion with regard to a vote. Public officers and public employees can go to their own legal counsel. A "right to call an investigation on your own conduct" is more complex. There you are assuming that you could ask a question confidentially before acting in order to find out if there is a potential problem. Education has also been provided for which should clarify a number of issues.

SENATOR BARTLETT stated the training would lead to a multiple of questions. If the avenue for public employees is to go to their agency legal services or counsel, there will be a fairly broad disparity between responses. There is unlikely to be very much consistency in how the provisions are applied.

CHAIRMAN GROSFIELD commented that they discussed developing a consistent set of rules.

Mr. Petesch stated that was in Section K. The Department of Administration Personnel Division is to foster programs for ethical conduct. (4) deals with model rules of conduct and a pamphlet covering ethics standards.

CHAIRMAN GROSFIELD posed the question that if a concern came up which was not included in the model rules, should the Department of Administration develop a rule with regard to that issue and add it to the model rules?

Mr. Jacobson stated the biggest fear in the area of advisory opinions is that politics could be involved. There will not always be clean cases. Five, ten or twenty percent of the matters will be purely political and anytime an advisory opinion authority is granted to an entity which is controlled by politics, you will get a political result. That is why they suggested an independent group which would be as politically balanced as possible. That is the heart of the problem.

CHAIRMAN GROSFIELD commented that should not come up very often. The commission concept has advantages; however, the committee seems to be leaning away from that approach because of the large fiscal note. They would have to rely on the education and the integrity of the people involved. He wouldn't have a problem with offering some alternative places to go if a person was worried about politics. If you worked for DNRC and were worried about politics, you might go to the Attorney General's Office or maybe the Department of Administration.

SENATOR BARTLETT stated if they considered a commission and limited their role to advisory opinions and contested case hearings, she would be interested in seeing how much that would reduce a fiscal note.

CHAIRMAN GROSFIELD asked if this would only be for public employees and public officers.

SENATOR BARTLETT commented her largest barrier to legislators going to an ethics commission is that it would have to be attached to the Executive Branch and that would be a separation of powers issue. It is not desirable from a public perception point of view for all of the legislative mechanisms to stay within the legislature. However, in reality given the separation of powers issue, that is more appropriate. To make it work, public officers, who would be the top statewide elected people

and department directors, would need to go to the ethics commission. This would pull it out of their own agencies and gives them someone independent from their agency to go to for an advisory opinion or a contested case hearing. Public employees may be able to work this out within their agency and having an appeal right to the Commission so that the bulk of the work would be taken care of within the agency.

CHAIRMAN GROSFIELD stated that a public officer or a director of a department, who is a political appointee, could talk to their own people quietly and ask what would happen. If they do something that gets them into trouble, they are in the full light of the public and the press would become involved.

SENATOR BAER stated lawyers can call any member of the Commission on Practice and they usually get a brief advisory opinion over the phone. We don't need to build a large bureaucratic commission to handle these problems. The Supreme Court, in creating the State Bar of Montana, has provided for a small group of people who serve part time on the Commission on Practice. This is informal and works very well.

Mr. Jacobson commented the Bar Association is in the process of hiring bar counsel to deal with this sort of problems. They are looking for someone who is trained in that area and is available to answer questions because they have found that a voluntary basis consumes a lot of time. You really need someone who has a specialty and understanding of all these things who is independent of politics.

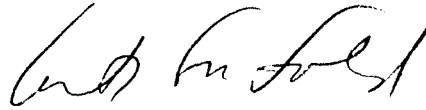
SENATOR NELSON stated she feels it would be difficult to get people to serve on this commission. Who would be knowledgeable enough without extensive training to be the judge of ethics? Lawyers have legal background. If they are knowledgeable, they will have ties to politics. Maybe in-house is the best way to handle this.

SENATOR BISHOP stated he did not have a problem with in-house counsel.

SENATOR BARTLETT stated she was not comfortable with in-house counsel. There may be some retired judges in the state who could serve on the commission. There may be clergy people who would also serve.

ADJOURNMENT

Adjournment: The meeting adjourned at 8:00 a.m.



SENATOR LORENTS GROSFIELD, Chairman



JUDY J. KEINTZ, Secretary

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