MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION

JOINT COMMITTEE ON ETHICS

Call to Order: By **CHAIRMAN JOHN HARP**, on March 15, 1995, at 5:30 p.m.

ROLL CALL

Members Present:
Sen. John G. Harp, Chairman (R)
Sen. Al Bishop (R)
Rep. Vicki Cocchiarella (D)
Rep. Matt Denny (R)
Rep. Rose Forbes (R)
Sen. Linda J. Nelson (D)
Sen. Fred R. Van Valkenburg (D)

Members Excused: Rep. Ray Peck, Vice Chairman (D)

Members Absent: none.

Staff Present: Greg Petesch, Legislative Council
Fredella Haab, Committee Secretary

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

Committee Business Summary:
Hearing: SB 115, SB 136
HB 362, HB 420, and HB 571

Discussion: **CHAIRMAN JOHN HARP** informed the Committee they would have public testimony concerning the issue of post-employment activities.

Testimony:

Mary Ann Wellbank stated she was a private citizen employed in the public sector. She urged the Committee to carefully evaluate the extent to which public employees were regulated in any ethics legislation. Ethics regulations of a public employee's work, activities on the job, and use of public resources was appropriate; requirements of financial disclosure, limited representation in the legislature, and prohibitions on private citizens simply because they worked for state government were ill-advised. She asked them to not validate the unfounded fears of a vocal minority by enacting broadsweeping legislation with

significant negative impact on the lives and livelihoods of Montana's public servants. **EXHIBIT 1.**

Amy Pfeifer stated that she also was a state employee. She stated she was before the Committee on behalf of herself and her husband who were both state employed attorneys. She reported she had discussed some of the aspects with the Senate Judiciary Committee at the hearing on SB 115. That bill used the term "high level public employee" and she was concerned that hearing attorney officers and hearing attorney supervisors could be designated by the agency director as high level public employees. Their concern was the director was a politically appointed position that changed every few years. If they were designated high level public employees they would be subject to the same financial disclosure provisions which the Committee discussed and those were a severe invasion of their privacy and their family's privacy; they were not compensated for that kind of invasion of privacy. She stated they were especially concerned with the post-employment restrictions. In SB 115 the post-employment restriction would prohibit them from representing a person from their agency for one year following the termination of employment. It wasn't restricted to any kind of matter dealt with in their agency. The attorneys at the agency were all family law attorneys and that was what they did before they came to the agency. She had spent many years practicing in the private sector and that was why she was hired. The provision would prohibit her from going back to the kind of work she did before she came to work for that agency. She would no longer represent the same kind of people in front of the agency that she had worked for. She had done that before the agency employed her. That would limit her from a substantial part of what family law practice was in Montana. Their agency had 42,000 cases, growing at 300 cases a month, and if she, as a family law attorney, couldn't represent people for child support enforcement and etc., it would be a severe limitation.

Amy Pfeifer addressed the lobbying provisions in the Subcommittee's Bill and stated that was also a limitation on their post-employment opportunities. Since 1985 she had worked on behalf of the Women's Section of the State Bar, etc. drafting legislation and testifying on domestic violence, sexual assault, and related areas. She had been doing that as a volunteer so she didn't have to register as a lobbyist. If she quit her job with the agency she worked for, which had nothing to do with those private efforts, she wouldn't be able to register as a lobbyist on behalf of those same entities. She resented that kind of restriction especially when it wasn't related to the work she did for her agency. All attorneys were concerned with those issues. What would they do if why were to terminate their public employment? She mentioned the provision in SB 136 against what was known as double dipping. The Committee had dealt with the issue and **Mr. Petesch** read the language yesterday regarding the proposed amendments MCA 2-2-104 that gave the various options for public employees and the two salary issue. She pointed out there

needed to be some clarification in that amendment. She noted a public employee may not receive two salaries from two entities for overlapping hours unless they reimbursed the public entity or one salary was reduced by the other and then it did not prohibit the person from receiving income. A person could use their accumulated leave or compensatory time without having to reimburse, but it didn't say that the person had to have their salary reduced. She stated it appeared that 4 (b) was an exception to 4 (a) (i) but not an exception 4 (a) (ii) because only reimbursement was used and not reduction of salary. She would be one of those people, if she were to do that, that would have accrued leave and compensatory time and she wanted to be really clear on how this provision would affect her. She stated if she were to have to reimburse her agency for the time, it would cost the agency more to contract a private attorney. The agency did contract with private attorneys and they were paid more than the staff attorneys. She concluded she would be paying them more than she made. She wanted to know how this worked. She agreed with **Ms. Wellbank's** concerns about state employee's ability to be represented by their elected representatives and to participate in the legislative process and how their representatives vote on issues that affect them.

REP. VICKI COCCHIARELLA asked **Garth Jacobson** to address where those provisions came from, why they were included, and what the discussions were in regard to SB 115. **Garth Jacobson** stated the post-employment and public disclosure basically came from the model act which was prepared by the Council of State Government Subcommittee on Ethics Laws. It was put together by several representatives from various states. Senate Bill 115 was modified model legislation adjusted to reflect the concerns of a more rural state. Senate Bill 115 stated high level people, directors, or elected officials would have more sever post-employment restrictions and as the level decreased so would the restrictions. It depended on the level of supervision and the type of activities done. The disclosure requirements were put together primarily with the same idea in mind that only those people in top level policy positions would have the ability to make a difference. The disclosure information was thought to be necessary so that it would sensitize the person involved in that issue as to basic conflict of interest situations and it would shed light on possible influence occurring in that area. Those were the two items that were primarily the focus of the disclosure requirements. The Subcommittee had softened a lot of the reporting requirements as it worked on the substitute bill. The Subcommittee basically adopted existing law. Existing law was established with the **Commissioner of Political Practices.** Mr. Jacobson added the biggest disagreement within the Ethics Council itself was reporting and how much. Senate Bill 115 was the majority opinion but there were many vocal minorities addressing how much disclosure was necessary and what level of disclosure had to be made. Post-employment restriction in the proposed legislation had consensus.

REP. MATT DENNY addressed **Mary Ann Wellbank** and noted in the course of her employment with the State she had acquired contacts and knowledge of issues. She had made the statement that knowledge and contacts were her property. He thought there was a perception, perhaps on the part of the public, that since she gained those during public employment, to a certain extent, they belonged to the public. **Mary Ann Wellbank** maintained that anything she had acquired from a learning experience, learning how the legislative process worked, learning how child support worked, and how the budget office worked, she owned that information. She was not saying that what their agency was doing was confidential sensitive information but she owned her knowledge. She was a student. She acquired what she was learning and she had the right to market that commodity. An attorney became familiar with the laws, they knew how to work in court, and that was their knowledge. The public didn't own it.

REP. DENNY asked if a scientist at a university, on university time, invented a new process or a new product, should the rights and the benefits to that particular process or product belong to the scientist? **Mary Ann Wellbank** stated there was a lot of case law in that area and she knew it was a very specialized field where someone worked for somebody and discovered a product. The patent was owned by the company, but not what she owned in her brain.

CHAIRMAN HARP requested the Committee move forward. He suggested they consider the Subcommittee Bill on page 5 and look at sub item 5, following termination of employment that a public officer, legislator, or public employee may not be registered as a lobbyist for the next regular session. He stated that was one of the issues **Mary Ann Wellbank** addressed and it was something he had underlined and questioned. It would be included in the section they were discussing. He suggested the area be discussed. Senate bill 115 included the restriction on legislators. It did not address lobbying. Senate Bill 136 was the same as existing law but specified a twelve month period. It did not address lobbying either. The provision had come from the Subcommittee itself. He asked if there was a problem or if the Committee supported this?

REP. COCCHIARELLA suggested they take the advice of **Mary Ann Wellbank** on the issue. They should probably identify what problem they were trying to solve if there was one.

{Tape: 1; Side: 1; Approx. Counter: 34.9}

SEN. FRED VAN VALKENBURG said he had made it very clear in the past that he didn't think there was much of a problem at all. The problem that existed was one of public perception rather than an actual problem. He stated, at the very most, there should be a prohibition against legislators lobbying. He didn't see a need to apply the restriction to public employees. He said there was not a real perception problem as far as public officials were

concerned. There could be a perception problem as far as legislators were concerned. There weren't many legislators that returned as lobbyists. He estimated the number was less than three or four who ended up lobbying in the session after they left. He didn't think it was going to be perfectly fair to everybody but suggested they deal with the perception problem by leaving the prohibition against legislators.

REP. DENNY said he supported the Subcommittee's paragraph just the way it was; however, he agreed with **SEN. VAN VALKENBURG** that at the very least the provision should apply it to legislators.

CHAIRMAN HARP asked how many paid lobbyists worked in Helena. **Commissioner Argenbright** replied there were 605 paid lobbyists. **CHAIRMAN HARP** asked how many of them were former legislators. **Commissioner Argenbright** said he could name about ten, but was not sure if they were from the previous session.

CHAIRMAN HARP stated the provision only applied to the following regular session.

REP. COCCHIARELLA said the provision could be considered an infringement on the individual's rights to do whatever they chose to make money. She speculated if she were to resign her seat in the Legislature and in the next session work for the State Fund and be their lobbyist, she couldn't do that. She did not understand why that was a problem. She alleged the problem was the legislature trying to limit a person's right to employment. She contended it was a basic issue of freedom to pursue whatever endeavor one chose and the legislature did not have the right to limit that or restrict that in any way.

SEN. AL BISHOP agreed with **SEN. VAN VALKENBURG,** public perception was the problem. **REP. COCCHIARELLA** asked if they shared the perception. **SEN. BISHOP** stated it was the public's perception and he didn't think it was a problem.

SEN. LINDA NELSON reminded the Committee that the Subcommittee had not drafted their own bill; they had meshed two bills together. She stated the reason for the provision was public perception. **CHAIRMAN HARP** asked if she felt strongly that all three categories needed to be included or should legislators be singled out. **SEN. NELSON** replied said she didn't feel strongly on the issue one way or the other. She stated it was innocent enough but it was not perceived as innocent by the public.

SEN. BISHOP stated he liked it the way it was.

REP. COCCHIARELLA said if they adopted the provision then the opposite type of restrictions should apply. Perhaps a legislator shouldn't be allowed to work the year before the Legislature because it was the same situation in reverse. She stated the Committee needed to address the issue of perception with the press because the press was the only ones who really knew who was

lobbying. They were the only ones who hit on that issue. She didn't think the public would ever know unless they had hired someone or elected someone and hired that same person as a lobbyist for their organization. She didn't think it was a public perception problem except with the press which made it an issue. The public then thought it was their own idea.

REP. ROSE FORBES asked **SEN. BAER** why the provision was included in the bill. **CHAIRMAN HARP** replied **SEN. NELSON** had a better feel for that as she had served on the Subcommittee. **SEN. NELSON** stated the Subcommittee had simply combined two bills and the result was the Subcommittee Bill. It did come back to public perception. She related it to term limits. There wasn't a need for term limits, but the people seemed to think they continually saw the same faces in the legislature and needed a breath of fresh air. The same faces were here all the time and the public saw that and so did she. It was as if they put all the names in a brown paper bag, shook it up, and doled them out. They were all still here.

REP. FORBES asked if the area could be deleted and the public would still be satisfied the legislature did a responsible job addressing ethics. She stated she was not sure about the issue. **CHAIRMAN HARP** declared there would always be a certain group who didn't approve of anything the legislature did. He called them the do-gooders of the world. There was a problem in everything they faced and they had to continue to combat it in every way. The go-gooders were going to try to protect the legislature from themselves. He noted there was also a group that seemed to think everything was okay. The legislature had to achieve something in the middle. He contended with all the work done to draft comprehensive ethics legislation during the session, it would be difficult to say the legislature had just tinkered with it. He related in the 14 years he had spent in the legislature they were doing more in this session than they ever had. He thought there was a public interest group who had generated the focus on ethics. That same group might put an initiative on the ballot; the legislature was attempting to respond to that. He noted they were always trying to react to outside pressures. He admitted he just didn't see the problem.

{Tape: 1; Side: 1; Approx. Counter: 45.8}

REP. DENNY stated there were waiting periods for buying handguns and he didn't see a problem with having a waiting period for lobbying. There was nothing restricting the political rights of people to return and lobby legislators on an unpaid basis. He said, at the very least, legislators should be restricted.

CHAIRMAN HARP called for a formal vote.

Motion: **REP. COCCHIARELLA** made a motion to delete number 5, page 5. ** (This is a reference to SB 136 grey bill as adopted by the

Judiciary Subcommittee to the best knowledge of the editor of the minutes - advise checking the tape references for accuracy)

Vote:		
	SEN. HARP	YES
	SEN. VAN VALKENBURG	YES
	SEN. BISHOP	YES
	SEN. NELSON	YES
	REP. COCCHIARELLA	YES
	REP. DENNY	NO
	REP. FORBES	YES

SEN. HARP said section 5, p. 5, was deleted.

Greg Petesch noted page 6, subsection 3, was existing law which said public officers and employees may not, within the months following voluntary termination of office or employment, obtain employment in which they take advantage, unavailable to others, of things they were involved in during their employment. It continued on to explain what those things were. The Subcommittee tried to clarify the ambiguity in the law. The Subcommittee took the SB 115 provision, which was 12 months, and inserted it into that section.

CHAIRMAN HARP asked the Committee what time period they preferred. **SEN. VAN VALKENBURG** wanted to leave it as it was. The Committee members agreed.

Greg Petesch stated the next item was current law and it was not in the bill. He pointed that out so everyone would know what the other post-employment provision was in current law. This was in section 2-2-201, which was entitled, "prescribed acts relating to contracts and claims." It said a former employee may not, within six months following termination of employment, contract or be employed by an employer who contracted with the State or any of its subdivisions involving matters with which the former employee was directly involved during employment. That was a contract restriction. Six months following termination of employment the person could not contract with the state. It excluded competitive bidding.

ADJOURNMENT

Adjournment: **CHAIRMAN HARP** adjourned the meeting at 6:20 P.M.

SEN. JOHN G. HARP, Chairman

FREDELLA D. HAAB, Secretary

JGF/fdh

1/15/95

SENATE
EXHIBIT NO. 1
DATE 3/15/95
BILL NO. SB 136

Testimony of Mary Ann Wellbank
Before the Select Ethics Joint Sub-Committee

My name is Mary Ann Wellbank. I am a private citizen who, at this time, happens to be employed in the public sector as are 21% of all working Montanans, who are employed by state, federal and local government.

I am first and foremost a private citizen. As a citizen I have certain rights as outlined in Article II of the Montana constitution.

Section 3 Inalienable Rights:"All persons are born free and have certain inalienable rights. They include, among others, "the rights of pursuing life's basic necessities...and seeking their health, safety and happiness in all lawful ways...recognizing their corresponding responsibilities."

Section 4 Individual Dignity" "The dignity of a human being is inviolable. No person shall be denied the equal protection of the laws. Neither the state nor any institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or conditions, or political or religious ideas."

Section 7 Freedom of Speech, Expression and Press: "No law shall be passed impairing the freedom of speech or expression... Every person shall be free to speak or publish whatever he will on any subject..."

Section 8 Right of Participation: "The public has the right to expect governmental agencies to afford such reasonable opportunity for citizen participation in the operation of agencies prior to the final decision as may be provided by law."

Section 10 Right of Privacy- "The right of individual privacy is essential and shall not be infringed without the showing of a compelling state interest"

The reason I have reiterated these provisions of the constitution is that I hope that you give serious consideration in the ethics legislation before you, to the rights of Montana citizens who are employed in the public sector. When we accept public employment, we have not waived our guaranteed rights under the Montana constitution. I am concerned about some of the provisions of SB 115, SB 136 and the consolidation amendment, which, I believe infringes on these rights and relegates public employees to second class citizens of Montana.

Specifically, these are:

SB 136 specifically targets public employees and infringes on the

rights of public employees in several ways. SB 136 provides that neither I nor the 66,000 other Montanans employed in the public sector are entitled to be represented in the Legislature by a peer.

Section 1, New (3) provides, "a public employee who is also a legislator may not draw a salary for the public employee during the time the public employee is compensated as a legislator." In other words, legislators who are also public employees cannot use accumulated annual leave, even though they are legally entitled to use annual leave for any purpose. As this committee has already discussed, there are no comparable restrictions on private sector employees who are legislators. They can draw salaries or vacation time, if they are entitled to it. This section, in effect, unreasonably discriminates against public employees.

Section 3, (3) further provides, "If a legislator or a person connected with a legislator...is a public employee and a member of a profession, occupation or class affected in any way by the legislation, the legislator shall refrain from participation in the action." Again, only public employees are targeted. My representative, who also happens to be a public employee, would be prohibited from voting on a hazardous waste siting act or other legislation brought forth by his constituents who have similar interests and are therefore in a similar class. On the other hand, non-state employee legislators are not restricted in a similar manner.

As a state employee, I do not like to think I am not entitled to the same representation as any other Montana citizen. I want to believe that the representative I elect who may be a state employee is on equal footing with other legislators.

While I can generally agree with the ethics principles set forth in SB 115, I again have some concerns about the treatment of public employees.

I am employed as an administrator of a division of a state agency. As an administrator, my job falls under the definition of "high level public employee" in Section 3 (11): "A state employee with substantial policy making authority, generally at a grade 18 or higher, as designated by the employee's respective agency, with the approval of the commission."

Under new section 13 (2) of this bill, even though I am not engaged in any political activity, I would be required to file a personal financial disclosure with the Commissioner of Political Practices, which is available to any member of the public upon written request. New Section 15 of SB 115 describes what information I must file, which includes among other things, my husband's name and his workplace number, all my income, including interest income, a description of all real estate I own including my home address, and a listing by name and amounts of debt owed and original debt. AND FOR WHAT REASONABLE PURPOSE?

EXHIBIT 1
DATE 3-15-95
SB 136

I strongly object to providing this information for the reasons that it is not relevant to the job I perform, and gives any member of the public access to what I consider personal and confidential information. The work I perform for the state places my family and me at risk of personal safety with members of the public who are subjects of government enforcement activities. I have been threatened personally. I have been told by an individual whose case is being enforced by the agency, "no wonder people who do your type of work have been shot up." I am not listed in the phone book, and do not want the public to have unrestricted access to my home address or my husband's home or work address or phone number. My work life is entirely separate from my family life. In this case, I do not believe the public right to know outweighs my constitutional right to privacy. I would not object to providing this information to the Montana ethics commission should an inquiry arise, however I strongly object to providing unrestricted access to each and every member of a curious public. And, how would the Legislature reasonably justify infringement of the constitutional rights of my spouse and children who have no connection or control of this legislation other than their relationship to me.

Finally, I refer to the amendments recommended by the Senate Ethics committee. Although I did not witness their deliberations, I believe the amendments have been generally very thoughtfully and carefully constructed.

However, I am concerned with what Greg Petesch referenced as the "revolving door" provisions, specifically Section 3, #5 which states, "A public officer, legislator or public employee may not be registered as a lobbyist for the next regular session of the legislature following the termination of employment or office." WHY NOT? Because "people" don't like seeing former state employees in the capitol?

Having been a public sector employee for the past 8 years, I have become familiar with the workings of state government and the legislative process. I have developed contacts and experience in this area. I have personally acquired knowledge, skills and abilities from my experience with government, and this experience is transferrable to the private sector. This experience is **mine**, and I have the right to use my experience in pursuit of my basic constitutional rights. Let's face it. There aren't that many employment opportunities in Helena outside of the public sector. Working for myself or a private organization involved in legislation is a viable career opportunity.

Any future employment I might have as a lobbyist in the private sector is only a problem to the extent that legislators are inappropriately influenced. The restriction against state employees becoming lobbyists is overly broad, and serves no real purpose. It infringes on me as a citizen in the exercise of my civil and political rights.

Additionally, the amendment is so broadly constructed as to limit

any other public sector employee from lobbying in the next session regardless of experience or previous contacts with the legislature. It does not just restrict policy makers or regulators from lobbying on particular issues, but restricts all public employees from lobbying on any issue. Finally, the provision isn't even clear. If I quit my public sector job for three months or even two years - have a break in service - then return to public employment - may I not be registered as a lobbyist?

A final comment: I believe that public sector employment is an honorable profession. As a public sector employee, I try to serve the citizens of this state to the best of my ability as do the members of the Legislature and the other public sector employees I know.

Although I am concerned by the potential for infringement on my constitutional rights, there is more to my testimony. I am extremely discouraged by the implicit criticisms of public sector employees in some of the ethics provisions, specifically those contained in SB 136. I think that as public employees we do not speak up enough in legislative hearings because we are concerned about even *appearances* of impropriety or of neglecting our public duties. I therefore respectfully request that when considering or revising the legislation before you that your make certain the language is carefully constructed and narrowly defined to specifically address real or likely problems, not unfounded "perceptions". Do not target public employees merely because a constituent feels state employees are over-paid, lazy, inefficient, self-serving or supportive of the status-quo. Do not relegate public sector employees to "second class citizenship."

In conclusion, I urge you to carefully evaluate the extent to which public employees are regulated in any ethics legislation. While ethics regulation of a public employee's work, activities on the job and use of public resources **is** appropriate; requirements for financial disclosure, limited representation in the legislature, and prohibitions on private citizens simply because they work for state government are ill-advised. When reviewing or drafting each section, please ask "why is this necessary", and carefully assess whether it is necessary, then narrowly construct the language to accomplish the intended purpose. Please do not validate the unfounded fears of a vocal minority by enacting broad, sweeping legislation with significant negative impact on the lives and livelihoods of Montana's public servants.

Thank you for the opportunity to comment. I very sincerely appreciate the attention this Legislature has given to ethics issues, and I am confident that you will come up with good legislation that will work for Montana.