

MINUTES

**MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION**

JOINT COMMITTEE ON ETHICS

Call to Order: By **CHAIRMAN JOHN G. HARP**, on March 21, 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: none.

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

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 410, HB 571

Discussion:

CHAIRMAN JOHN HARP informed the Committee once **Commissioner Argenbright** made a decision on a case, it could be appealed to some type of appeals committee.

SEN. FRED VAN VALKENBURG said he had asked **Greg Petesch** to draft some materials, **EXHIBIT 1**. He noted there needed to be one change due to a misunderstanding. He referred to the last line of Section A and suggested "recommend" be moved in front of "disciplinary" and insert "impose" where "recommend" had been. The sentence would read "the Commissioner may impose an administrative fine or recommend disciplinary sanctions." The disciplinary sanctions would be imposed by the individual's employer.

He explained everything in **EXHIBIT 1, Draft Copy**, except Section F had come out of the Judiciary Subcommittee Bill pertaining to

the Ethics Advisory Commission. The word "advisory" had been stricken making it an Ethics Commission and the provisions were the same down to Section F. Section F provided the Ethics Advisory Commission be given the authority to hold a hearing on the record when requested in writing by a party on an issue that had already been decided by the Commissioner of Political Practices. The hearing was limited to the matters contained in the record established before the Commissioner. The Commission may affirm, modify, or reverse the decision of the Commissioner. The process had to be completed within thirty days after it had been submitted to the Commission.

SEN. VAN VALKENBURG explained the Commission would be a five member board, appointed in the same fashion as the Reapportionment Commission, with the exception that the fifth member was chosen by consensus of the other four members. He argued the discretion of disciplinary action should not be based on the decision of only one individual who may have the position by virtue of a somewhat political process.

SEN. AL BISHOP asked if the sanctions would be imposed by the employer, if they would be uniform, and would they differ from agency to agency. **SEN. VAN VALKENBURG** replied he believed they would differ. He contended that there should be a letter of reprimand that went into an individual's file for mild occurrences. On the other hand the employer may decide, based on the recommendation of the Commissioner of Political Practices, the individual should be placed on leave without pay for thirty days for serious offenses. He added for the severe violations a maximum fine would be imposed.

Greg Petesch explained sanctions were the reprimands the Commissioner could recommend. The Commissioner would be responsible for maintaining uniformity for similar types of violations.

SEN. BISHOP said the recommendations would have full force if the employer couldn't vary from the recommendations. **Mr. Petesch** stated he was unsure if the Commissioner had the authority to order an agency to suspend an employee without pay. He could say his recommendations were based on his findings and the final decision would be the employer's.

CHAIRMAN HARP said if the individual wanted to appeal then Section F would apply giving thirty days from the opinion of the commissioner or after the appeal, the Commission would have to render an opinion. He asked how long the Commissioner had to render a decision after the informal contested case hearing. He noted someone involved in a legislative race would need a quick decision. He did not want to add additional resources and suggested, by putting a time limit, that was exactly what would happen. **Greg Petesch** noted there was no date included for the Commissioner's actions. The difference between an election issue

and an ethics violation was the ethics violation would not affect the outcome of a race where the political activity could.

REP. VICKI COCCHIARELLA expressed concern regarding an employee not knowing who the boss was in these circumstances. Who would ultimately make the decision. The Commissioner of Political Practices and the Commission had nothing to do with the individual's daily work life, so in effect, wouldn't the process create a spider web for employees to figure out who to respond to and who was in charge. Could a supervisor decide not to go through the Ethics Commission and fire the individual leaving the Bargaining Agreement to deal with it.

SEN. VAN VALKENBURG stated the hearing and appeal process was a means of enforcing the ethical requirements of the bill. He contended the process would supersede discipline outside the scope of procedures for employees. The process would not supersede the supervisor's right to discipline for actions not covered by the ethical requirements.

REP. COCCHIARELLA assumed the Code of Ethics imposed on state employees in cases where there was a Collective Bargaining Agreement, would need to be part of the agreement. She wondered how it would fit in with the agreement and if it would be outside the scope of the agreement.

SEN. VAN VALKENBURG insisted the Code of Ethics was outside the scope of the agreement the same way criminal laws were outside the scope of the agreement. He noted there was nothing in Collective Bargaining Agreements forbidding stealing.

REP. COCCHIARELLA speculated when there was an ethical violation by a state employee it would probably never reach the Commissioner's Office. It would be dealt with by the supervisor.

SEN. VAN VALKENBURG said someone would have to file a complaint with the **Commissioner of Political Practices** for them to get involved. The supervisor could threaten the employee saying if the violation reoccurred the supervisor would report it to the commissioner. If a member of the public complained the violation would go to the Commissioner of Political Practices Office.

CHAIRMAN HARP summarized one person, the supervisor, would be responsible for the initial decision. From there it could go to the five in the Commission and then to the three on appeal. **SEN. VAN VALKENBURG** noted three out of the five members of the Ethics Commission could out vote the other two.

CHAIRMAN HARP stated the reason for that was concern over the appointment process and who would be doing the appointing at any given time. Too much pressure or power for one individual to decide people's ethical standards would be at stake regardless of the level: state, local, or county.

REP. MATT DENNY referred to Section F, sub 1, and asked if there should be a time limit beyond which an appeal could not be requested.

Greg Petesch contended between thirty and sixty days was a reasonable time frame to require the appeal to be filed. The appeals should not be strung out. When the Commissioner rendered a decision if the employer felt aggrieved he would file immediately. If the employee was aggrieved they would try to drag it out. He reiterated 30-60 days was a reasonable time frame for filing the appeal.

SEN. VAN VALKENBURG recommended it be changed to sixty days.

CHAIRMAN HARP related the original provision had an Ethics Advisory Committee that worked with advisory opinions as one of their functions. The function had been removed to reduce the cost, however the Commission was currently included in the appeals process, comparable in time and expense. He asked **Commissioner Argenbright** for input regarding the cost. He asked if deleting the Advisory Committee and forming strictly an Ethics Commission for appeals had lessened the involvement.

Commissioner Argenbright, Commissioner of Political Practices, said it was difficult to envision how the process would work and how many complaints there would be. He added doing away with the Advisory Opinions certainly would reduce the work load.

Greg Petesch referred to page 12 of the Judiciary Subcommittee Bill referring to the establishment of the informal contested case proceeding. He referred to situations involving alleged violations of the use of state time, equipments, and etc. for political activities and explained the Commissioner could assess the cost of the proceeding against the person bringing the charges if the allegations were unsubstantiated or against the officer or employee if there was a substantiated violation. The amounts for civil penalty were also contained in the provision. If the decision were appealed the District Court could impose the cost. He suggested a similar provision could be included for appeals of the Commissioner's decision. If a person was guilty and the Commissioner confirmed that, it would be a deterrent to the individual not to appeal if the costs could be assessed against them.

SEN. VAN VALKENBURG suggested virtually all of subsection 8 should be moved to the enforcement section. In the same regard, under the Administrative Proceeding Act, a person would be given an opportunity to take the Ethics Commission Decision to District Court. He suggested all the ethics provisions ought to be enforced in the same manner, at least at the state level. Enforcement of the Ethics at the local government level would be another situation.

SEN. BISHOP asked **Commissioner Argenbright** in the event the legislation passed would the first complaint cause an expansion of his present facility. **Commissioner Argenbright** replied it certainly would be.

REP. DENNY said according to the grey bill it appeared there was no enforcing mechanism for legislators. **Greg Petesch** stated that was correct. The Subcommittee determined legislator's conduct should be left to disciplinary action by the member House. He added there was some Constitutional basis for the requirement. An attempt to provide for civil enforcement would infringe on the speech immunity issues which provide so long as the legislator was acting within the "legislative sphere" the legislator may not be questioned in any other place. He was not sure the Committee would want to broach that issue in legislation.

REP. DENNY asked if the bill specifically stated legislators were under the jurisdiction of the Houses. **Greg Petesch** stated the Constitution provided for the jurisdiction and Section 13 of the bill provided the Joint Committee could consider matters affecting the entire legislature and should deal with the part protecting legislators.

REP. DENNY stated he did not want it said the legislators were excluding themselves. **SEN. LARRY BAER** recalled the Committee had discussed when a legislator was sanctioned by the member House, it would then be a matter of public record. He contended the humiliation, embarrassment, and loss of political face would be humiliating enough to deter a legislator from getting caught violating the rules.

CHAIRMAN HARP suggested the provision should be included. **SEN. VAN VALKENBURG** commented that would be his preference for enforcement with respect to public officials and state employees. He suggested a specific sentence should be added in the Ethics Committee saying that the legislature had the duty and responsibility of enforcing the requirements with respect to legislators. **Greg Petesch** asked if he should insert that into the general enforcement provision and inquired what the range of administrative fine would be. He reported it had varied in portions of the Subcommittee Bill from \$50-\$1000 and \$50-\$500 depending on the type of violation.

CHAIRMAN HARP suggested \$50-\$1000 be adopted. **SEN. VAN VALKENBURG** agreed.

Greg Petesch referred to page 13 regarding District Court and asked if purposely or knowingly violating this section should remain a misdemeanor.

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SEN. VAN VALKENBURG suggested it should be removed because it would create confusion as to where discipline ought to be imposed

and would present the potential for double jeopardy. He added legally it may not be double jeopardy but from a practical standpoint it was double jeopardy allowing civil penalty and criminal penalty. He noted there were plenty of criminal penalties for violations of the criminal law. He proposed removing the six month jail sentence and placing the \$50-\$1000 fine under the authority of the Commissioner of Political Practices. **REP. ROSE FORBES** argued it should not be removed; it sent the message ethics violations would not be tolerated.

Garth Jacobson, Secretary of State's Office, suggested before the Committee decided to include the section they should consider the ability of the Commissioner to turn criminal matters over to the county attorney. He noted there were bribery and other statutes that should be considered. He suggested in the event of a criminal violation, they may want to remove the situation out of the administrative arena and into the criminal arena. It would provide the Commissioner the option to dump the case.

CHAIRMAN HARP stated a decision should be made whether or not to leave the criminal provision in.

Greg Petesch stated if the criminal penalty were left in, and a filing with the Commissioner was required, if the situation appeared to be criminal, the Commissioner could refer jurisdiction to either the justice or district court. If criminal penalties were not included there would be no need for the Commissioner to do that.

SEN. VAN VALKENBURG was not sure that agreed with what **Mr. Jacobson** had said. He noted there were other violations that would have criminal penalties which were not solely within the scope of the Commissioner's authority and he could determine, based on an investigation, if there was potential criminal activity and be given clear authority to refer the situation to the prosecuting attorney. **REP. FORBES** asked if the Commissioner could currently do that. **Commissioner Argenbright** replied he currently recommended, to the county attorney, cases of violations of the election law and currently he did not impose any civil penalties.

Greg Petesch said the distinction was the ultimate responsibility. He explained currently enforcement of any amendment to the ethics law was the responsibility of the county attorney who had both jurisdictions. That issue should be considered if the authority was moved to the Commissioner.

CHAIRMAN HARP clarified that was true for state and public employees but excluded local employees. He added if what **SEN. VAN VALKENBURG** proposed was excluded would that make it tougher to determine who had jurisdiction. **Greg Petesch** replied it would not matter. If the Commissioner, under current law, determined a criminal violation may have occurred, it was his obligation to refer it to the county attorney for consideration.

Motion/Vote: SENATORS VAN VALKENBURG, BISHOP AND NELSON; AND REP. COCCHIARELLA VOTED TO EXCLUDE THE CRIMINAL SANCTIONS. REP. DENNY, REP. FORBES, AND CHAIRMAN HARP VOTED NOT TO EXCLUDE THE SANCTIONS. The vote was left open for REP. PECK to vote.

Discussion: CHAIRMAN HARP asked if the Committee wanted to include the sanctions in the enforcement, Section A and F. He asked if they could proceed with the enforcement provisions, excluding the criminal questions still open, so Greg Petesch could include the provision in Sections A and F as far as the enforcement pertained.

Greg Petesch stated it would be moved to follow Advisory Commission Opinion. He explained the Administrative Procedure Act provided for an appeal of a final agency act and in the particular case the final agency action would be the Commissioner. He suggested there could be a problem in excluding it from access to the courts provided for in the Constitution. If a fine were imposed it could be appealed.

SEN. VAN VALKENBURG stated enforcement at the local government level should be addressed. He proposed language should be inserted providing enforcement at the local government level be done by virtue of the county attorney bringing an action against a local government employee in district court and the district court would have the same civil penalties available to impose and would recommend to the local government employer any disciplinary sanctions. CHAIRMAN HARP asked if that would be strictly local and would it be strictly civil. SEN. VAN VALKENBURG replied, to his knowledge, there was currently nothing in the codes that specifically addressed how civil penalties were imposed at the local level and he wanted to make it clear that the county attorney would be the one bringing an action. He stated his biggest concern was there would be all kinds of citizens bringing their own citizen lawsuits against people for violations of ethical laws. He contended it would be a nightmare to have citizen lawsuits over alleged ethics violations.

Greg Petesch stated the Committee would clarify in that section that Sections A-F would apply for state officers and employees and local officers and employees would be the responsibility of the county attorney.

CHAIRMAN HARP asked SEN. VAN VALKENBURG to expound on the citizen lawsuits. SEN. VAN VALKENBURG explained it would be time consuming for any judge having to preside if "Fred Freeman" sued the county sheriff for violating "Mr. Freeman's" perception of the standard of ethics.

CHAIRMAN HARP clarified SEN. VAN VALKENBURG was referring to frivolous cases and asked how they could be prevented. SEN. VAN VALKENBURG said it would be prevented by providing the county attorney was the only individual who could pursue complaints against local government employees.

CHAIRMAN HARP asked if the county attorney would determine, by his own investigation, that it was a merited case. **SEN. VAN VALKENBURG** said "Fred Freeman" could come to the county attorney and say the sheriff was violating the ethical requirements. The county attorney would decide whether or not to file an action against the sheriff.

REP. DENNY asked if anyone could file a complaint at the state level. **SEN. VAN VALKENBURG** said that would be true unless they granted prosecuting authority to someone at the state level. He reiterated, at the local level, it would be a nightmare if just anyone was allowed to bring these actions.

REP. FORBES informed **SEN. VAN VALKENBURG** there were citizens cringing as he spoke. She stated she was not convinced there would be a numerous amount of frivolous law suits; citizens should have the opportunity for recourse if they felt a specific act was unethical. **SEN. VAN VALKENBURG** contended there would be hundreds and thousands of frivolous cases. He guaranteed the abuses would be the lawsuits brought against the public employees.

REP. DENNY referred to page 12 addressing the assessment of costs to a person filing an unsubstantiated complaint. He suggested a similar provision could be made at the local level to prevent frivolous cases. **REP. FORBES** argued the public would claim they were being deprived of the opportunity to file suit because they couldn't afford it.

SEN. VAN VALKENBURG stated that did not currently occur to any great degree with respect to violation of the criminal law and the county attorney had sole discretion in terms of prosecuting violations of the criminal law.

SEN. BAER contended, in effect, the Committee had eliminated the criminal aspect of a violation leaving only civil law. Now they wanted to prevent a citizen from bringing a lawsuit under civil law by mandating a suit could only be brought at the discretion of a county attorney. He contended if that were the case no one would ever be sued for these violations. He suggested if they wanted to deter frivolous claims they could provide that the prevailing party could recover court costs and attorney fees from the non-prevailing party and if the individual did not have a substantiated case they would not want to pay these costs. Eliminating the right of the public to bring a civil suit against someone who violated the civil law, with the criminal law already eliminated, there was nothing left to enforce the provisions. He contended most prosecutors would exercise their discretion to ignore the complaint.

SEN. VAN VALKENBURG disagreed and stated he refused to sit and listen to **SEN. BAER** say prosecutors were going to use their discretion to ignore complaints. He contended if there was a valid complaint, prosecutors were going to prosecute, it was

their sworn obligation to their office. He explained the people he was referring to would not be affected by the monetary sanctions because they didn't have anything. He reported all over the state courthouses were being flooded with phony liens.

CHAIRMAN HARP referred to **REP. DENNY'S** suggestion to provide the prevailing party some avenue for reimbursement of costs or somehow to dampen the frivolous cases. He suggested they seek some middle ground. He did not want to undermine the ability of a citizen to file. He entreated **SEN. VAN VALKENBURG** not to give up on the bill when the Committee was so close to a solution.

SEN. VAN VALKENBURG asked how the provision was to be enforced at the local government level as it was currently written. **Greg Petesch** explained, in regard to local government, enforcement was partially left up to the local government. The Subcommittee provided that a local government officer or employee in violation was subject to a civil penalty. He stated responsibility was still with the county attorney to enforce proceedings under the bill. He could bring a suit on behalf of the people, but the Subcommittee's action did not prohibit an individual from bringing a suit. Having made the ethics provisions duties rather than principles, or public duty rather than a guide to conduct in many instances would preclude a citizen from filing a complaint in district court, justice court or small claims court, alleging a violation.

CHAIRMAN HARP asked, as the bill was in front of the Subcommittee, if the clarification was to the point where it was clear that the prosecutor would be the person to decide if a complaint was to be followed up. The Subcommittee left it more to the discretion of the interested party. He wondered how to get from where the Subcommittee was to where **SEN. VAN VALKENBURG'S** concerns were. He added there was also an open question on the criminal matter. He asked **SEN. VAN VALKENBURG** if this was an issue that he was too close to due to his personal involvement through his profession. He asked if there was any way to come to an agreement.

SEN. VAN VALKENBURG replied there was a solution but he did not know whether they would be able to agree. He proposed an alternative would be to put some language in the law giving the authority to every local government to adopt their own enforcement mechanism for violations of ethical requirements by employees of that particular local government. He explained that would mean every school district, every county government, every city government, every other local government entity from mosquito district to rural fire districts would have to adopt provisions putting in place some sort of enforcement mechanism. He contended it was not impractical and was in some ways giving them local control. In reference to discussions earlier in the session regarding putting duties on local government then they ought to be allowed to decide how ethics were enforced and perhaps there should be a vehicle to fund it. He summarized they

had a state employee, a county attorney, a district judge and give the authority to the county attorney and to the district court to enforce these rules on local government employees. Make it clear that was what the authority was. Looking at this and saying a local government employee or officer was subject to a civil penalty of not less than \$50 or more than \$100. Who would impose that penalty? What was the procedure to impose the penalty?

REP. COCCHIARELLA noted it was double jeopardy for state employees who were spread all over the state and would be required to have an enforcement proceeding in Helena. Why should a local government have a different procedure. She stated she was still confused on enforcement and who had authority and who did not. **Greg Petesch** stated that under the bill, as drafted, if the complaint was with a city employee a complaint could not be filed with the Commissioner. **REP. COCCHIARELLA** asked who would handle the complaint. If a state employee did something it would go to the Commissioner of Political Practices. If the Commissioner found them guilty the employee would appeal to the next level. When would the employee's supervisor become involved or was the employee's supervisor ever involved or were sanctions passed on from the Commissioner to the supervisor to follow through. She stated she had a real problem with issues of double jeopardy and state employees versus local employees. **Greg Petesch** stated he didn't think double jeopardy entered into the scene. He explained the reason the contested case procedure in front of the Commissioner worked for state employees and not local government employees was the state agencies were subject to the Montana Administrative Procedure Act. Local governments were not. A violation of this law would be outside the course and scope of a person's employment. If they were violating the law it had to be outside the course and scope of employment. If the person claimed their supervisor had told them to do the specific act in question, then the person would have the right to bring the supervisor in front of the contested case proceedings. Whether or not the supervisor was involved would depend upon the issues presented in the proceedings. There was no similar procedure available at the local government level. That was why the Judiciary Subcommittee left it up to local enforcement; they simply provided for a civil penalty. He noted there was broad language saying the county attorney had the responsibility of enforcement. Whether or not that would preclude a citizen's suit was unclear. Largely local enforcement was left to local governments alone.

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SEN. DOROTHY ECK related SB 115 had left the section that applied the principles to local government. She stated local government should be encouraged to develop their own Code of Ethics and enforce them. She noted most major local governments had a Code of Ethics and procedures for enforcement.

CHAIRMAN HARP stated the Committee could not know what the Subcommittee's intent was. He stated **SEN. VAN VALKENBURG** was trying to clarify what that enforcement would be and what person would solely have the responsibility of that enforcement.

REP. COCCHIARELLA asked what was going on. What was the problem they were trying to address? She had not heard one problem. She contended they were creating a bureaucracy and a maze for people to have to go through and she hadn't heard one identified problem in the whole discussion, at least not one that couldn't be addressed under current law.

SEN. BAER stated he could spend hours of time presenting evidence in that regard. He reported **SEN. LINDA NELSON, SEN. BISHOP** and he had spent a lot more time on the issue than the Committee had so far. He admitted the process was frustrating and urged the Committee to see it through. He noted the tendency to get away from enforcement rather than to approach a rational procedure for enforcement. He noted it was easy to cop out but if there was no enforcement procedure there would be no deterrent and with the elimination of criminal penalties, enforcement was narrowed in regard to local government. With only civil penalties and the loss of the people's power to enforce the civil law by having their day in court, enforcement would rely solely upon the county attorney. He reported he had seen officials commit wrong doings and the county attorney refused to prosecute them. The effect of eliminating the right to a person's day in court was eliminating the entire enforcement provisions in the Ethics Bill.

REP. FORBES agreed. She addressed **SEN. VAN VALKENBURG'S** comments and reported when she had been out talking in her district and the whole issue was originally brought up to her the people complaining were not "freemen". They were people who lived in houses that have families, jobs and everything else. They were not radical people who were just out there and were going to blow up the world. They were real life people like the members of the Committee. She stated a lot of the cases that were presented were not frivolous; they were real events and had occurred. The reason they were dealing with ethics legislation was because the citizens were frustrated because they felt like they had been handcuffed and they could not do anything about it. They felt like government was tromping all over them.

REP. COCCHIARELLA asked **REP. FORBES** to give one example of what she was referring to. She asked for one instance where the system did not work for the citizens.

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REP. FORBES cited the use of public funds. A situation was brought to her where there was a letter sent from a public official to the employees of that entity telling them how they should vote on a certain issue. There was an absolute uproar in the community over the fact that public time and money were spent

(stamps, equipment, etc.) for a supervisor to tell employees in a department that they needed to vote a particular way. **REP. FORBES** noted **REP. COCCHIARELLA** had cited an example herself where the Governor had sent out faxes before the election. She contended these were not isolated incidences. She reported a representative had come up to her about three weeks previous with a stack of letters from second graders that were all mailed individually from a school district with the bulk permit. The letters said "Dear Rep. so and so I am really concerned about House Bill such and such because it really is going to affect what happens to me in education." She contended the second graders had no idea what they were doing. They were in a class room and they had someone in there telling them what they needed to do and how to do it. She cited the bond issue on the building of a fairgrounds and added the legislature was swarming with example of abuse. There was a ton of public funds being spent and the public was angry about it but they felt there was nothing they could do about it.

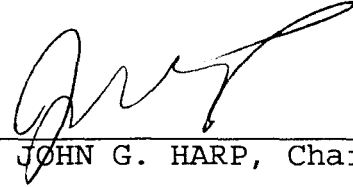
SEN. VAN VALKENBURG stated he would be curious to know if any of the people had gone to the county attorney and asked the county attorney to proceed against the individuals. Similar situation had occurred in Missoula County and the county attorney's office brought an end to it.

CHAIRMAN HARP stated the Committee had reached an impasse and was engaging in individual quarrels. He stated the Committee was losing the focus of what they were there for. He suggested they adjourn.

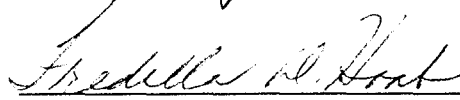
Greg Petesch said there was one section not included in **EXHIBIT 1**. He referred to Section 8 of the Subcommittee Bill, Rules of Conduct for local government officers and employees. He suggested the members needed to consider whether or not to include the section. He explained the Subcommittee language was the same for the Commission. Acts by a local government officer or employee subjected the person to disciplinary action by the employing entity and the civil penalty had the same language. That section probably needed to be addressed in the discussion on local government.

ADJOURNMENT

Adjournment: CHAIRMAN JOHN HARP adjourned the meeting at 7:00
p.m.



SEN. JOHN G. HARP, Chairman



FREDELLA D. HAAB, Secretary

JGH/fdh

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Ethics
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March 21, 1995

LCethic

**** Bill No. ***

Introduced By *****

By Request of the joint committee on ethics

A Bill for an Act entitled: "An Act WORKING DRAFT ON ETHICS

."

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 2-2-102, MCA, is amended to read:

"2-2-102. Definitions. As used in this part, the following definitions apply:

(1) "Business" includes a corporation, partnership, sole proprietorship, trust or foundation, or any other individual or organization carrying on a business, whether or not operated for profit.

(2) "Compensation" means any money, thing of substantial value, or economic benefit conferred on or received by any person in return for services rendered or to be rendered by himself the person or another.

~~(3) "Employee" means any temporary or permanent employee of the state or any subdivision thereof or member of the judiciary, including a member of a board, commission, or committee except a legislator and an employee under contract to the state.~~

~~(4) "Financial interest" means an interest held by an individual, his spouse, or minor children which is:~~

~~(a) an ownership interest in a business;~~

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~~(b) a creditor interest in an insolvent business;~~
~~(c) an employment or prospective employment for which negotiations have begun;~~

~~(d) an ownership interest in real or personal property;~~
~~(e) a loan or other debtor interest; or~~
~~(f) a directorship or officership in a business.~~

~~(5)~~(3) "Official act" or "official action" means a vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority.

(4) "Private interest" means an interest held by an individual or the individual's spouse or minor children that is:

(a) an ownership interest in a business;
(b) a creditor interest in an insolvent business;
(c) an employment or prospective employment for which negotiations have begun;

(d) an ownership interest in real property;
(e) a loan or other debtor interest; or
(f) a directorship or officership in a business.

(5) "Public employee" means:

(a) any temporary or permanent employee of the state or any subdivision of the state;

(b) a member of a quasi-judicial board or commission or of a board, commission, or committee with rulemaking authority; and

(c) a person under contract to the state.

(6) "Public officer" includes any state officer except a legislator or member of the judiciary or any elected officer of

any subdivision of the state.

(7)(a) "State agency" includes:

(i) the state;

(ii) the legislature and its committees;

(iii) all executive departments, boards, commissions, committees, bureaus, and offices;

(iv) the university system; and

(v) all independent commissions and other establishments of the state government ~~except the courts.~~

(b) The term does not include the judicial branch.

(8) "State officer" includes all elected officers and directors of the executive branch of state government as defined in 2-15-102."

{ Internal References to 2-2-102:
5-11-203x }

Section 2. Section 2-2-103, MCA, is amended to read:

"2-2-103. Public trust -- public duty. (1) The holding of public office or employment is a public trust, created by the confidence ~~which~~ that the electorate reposes in the integrity of public officers, legislators, and public employees. A public officer, legislator, or public employee shall carry out ~~his~~ the individual's duties for the benefit of the people of the state.

(2) A public officer, legislator, or public employee whose conduct departs from ~~his fiduciary~~ the person's public duty is liable to the people of the state ~~as a trustee of property, is liable to a beneficiary under 72-34-105, and shall suffer such~~

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~~other liabilities as a private fiduciary would suffer~~ is subject to the penalties provided in this part for abuse of his the public's trust. The county attorney of the county where the trust is violated may bring appropriate judicial proceedings on behalf of the people. Any ~~moneys~~ money collected in ~~such~~ the actions ~~shall~~ must be paid to the general fund of the aggrieved agency.

(3) ~~The following sections set~~ This part sets forth various rules of conduct, the transgression of any of which is, ~~as such,~~ a violation of fiduciary public duty, and various ethical principles, the transgression of any of which is ~~not, as such,~~ a ~~violation of fiduciary duty must be avoided.~~"

{Internal References to 2-2-103: None.}

Section 3. Section 2-2-104, MCA, is amended to read:

"2-2-104. Rules of conduct for ~~all~~ public officers, legislators, and public employees. (1) Proof of commission of any act enumerated in this section is proof that the actor has breached ~~his fiduciary~~ the actor's public duty. A public officer, legislator, or public employee may not-

~~(a) disclose or use confidential information acquired in the course of his official duties in order to further substantially his personal economic interests; or~~

~~(b)~~ accept a gift of substantial value or a substantial economic benefit tantamount to a gift:

~~(i)~~(a) ~~which~~ that would tend improperly to influence a reasonable person in ~~his~~ the person's position to depart from the faithful and impartial discharge of ~~his~~ the person's public

duties; or

~~(ii)(b)~~ which he that the person knows or which that a
reasonable person in his that position should know under the
circumstances is primarily for the purpose of rewarding him the
person for official action he has taken.

(2) An economic benefit tantamount to a gift includes
without limitation a loan at a rate of interest substantially
lower than the commercial rate then currently prevalent for
similar loans and compensation received for private services
rendered at a rate substantially exceeding the fair market value
of ~~such~~ the services. Campaign contributions reported as required
by statute are not gifts or economic benefits tantamount to
gifts.

(4)(a) Except as provided in subsection (4)(b), a
legislator, public officer, or public employee may not receive
salaries from two separate public employment positions that
overlap for the hours being compensated, unless:

(i) the legislator, public officer, or public employee
reimburses the public entity from which the employee is absent
for it's costs in performing the function from which the
legislator, officer, or employee is absent; or

(ii) the legislator, public officer's, or public employee's
salary from one employer is reduced by the amount of salary
received from the other public employer in order to avoid
duplicate compensation for the overlapping hours.

(b) Subsection (4)(a) does not prohibit a legislator,
public officer, or public employee from receiving income from the

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use of accrued leave or compensatory time during the period of overlapping employment."

{Internal References to 2-2-104: None.}

Section 4. Section 2-2-105, MCA, is amended to read:

"2-2-105. Ethical principles requirements for public officers and public employees. (1) The principles requirements in this section are intended as ~~guides to~~ rules of conduct, and ~~do not constitute violations as such~~ constitute a breach of the public trust and public duty of office or employment in state or local government.

(2) A public officer or public employee ~~should~~ may not acquire an interest in any business or undertaking ~~which he~~ that the officer or employee has reason to believe may be directly and substantially affected to its economic benefit by official action to be taken by ~~his~~ the officer's or employee's agency.

(3) A public officer or public employee ~~should~~ may not, within the 12 months following the voluntary termination of his office or employment, obtain employment in which he ~~the officer or employee~~ will take direct advantage, unavailable to others, of matters with which he ~~the officer or employee~~ was directly involved during ~~his~~ a term of office or during employment. These matters are rules, other than rules of general application, ~~which he~~ that the officer or employee actively helped to formulate and applications, claims, or contested cases in the consideration of which he ~~the officer or employee~~ was an active participant.

(4) A public officer or public employee ~~should~~ may not:

(a) perform an official act directly and substantially affecting a business or other undertaking to its economic detriment when he the officer or employee has a substantial ~~financial~~ personal interest in a competing firm or undertaking;
or

(b) disclose or use confidential information acquired in the course of official duties in order to substantially further the officer's or employee's private interests."

{Internal References to 2-2-105: None.}

Section 5. Section 2-2-111, MCA, is amended to read:

"2-2-111. Rules of conduct for legislators. Proof of commission of any act enumerated in this section is proof that the legislator committing the act has breached ~~his fiduciary~~ the legislator's public duty. A legislator may not:

(1) accept a fee, contingent fee, or any other compensation, except ~~his~~ the official compensation provided by statute, for promoting or opposing the passage of legislation;

(2) seek other employment for ~~himself~~ the legislator or solicit a contract for ~~his~~ the legislator's services by the use of ~~his~~ the office."

{Internal References to 2-2-111: None.}

Section 6. Section 2-2-112, MCA, is amended to read:

"2-2-112. Ethical ~~principles~~ requirements for legislators.

(1) The ~~principles~~ requirements in this section are intended only as ~~guides to~~ rules for legislator conduct, and ~~do not constitute~~

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violations ~~as such~~ constitute a breach of the public trust of legislative office.

(2) When a legislator ~~must~~ is required to take official action on a legislative matter as to which ~~he~~ the legislator has a conflict created by a personal or ~~financial~~ private interest ~~which that~~ would be directly and substantially affected by give rise to an appearance of impropriety as to the legislator's influence, benefit, or detriment in regard to the legislative matter, he should consider disclosing or eliminating the legislator shall disclose the interest creating the conflict ~~or abstaining from prior to participating in~~ the official action, as provided in subsections (4) and (5) and the joint rules of the legislature. In making ~~his~~ a decision, ~~he should~~ the legislator shall further consider:

(a) whether the conflict impedes ~~his~~ the legislator's independence of judgment;

(b) the effect of ~~his~~ the legislator's participation on public confidence in the integrity of the legislature; and

(c) whether ~~his~~ the legislator's participation is likely to have any significant effect on the disposition of the matter; and

(d) whether a pecuniary interest is involved or whether a potential occupational, personal, or family benefit could arise from the legislator's participation.

(3) A conflict situation does not arise from legislation or legislative duties affecting the entire membership of a profession, occupation, or class.

(4) ~~If a~~ A legislator ~~elects to~~ shall disclose the an

interest creating ~~the~~ a conflict, ~~he shall do so~~ as provided in the joint rules of the legislature. A legislator who is a member of a profession, occupation, or class affected by legislation is not required to disclose an interest unless the class contained in the legislation is so narrow that the vote will have a direct personal impact on the legislator. A legislator may seek a determination from the appropriate committee provided for in [section 13].

(5) A legislator has a responsibility to the legislator's constituents to participate in all matters affecting the constituents. A legislator concerned with the possibility of a conflict should briefly present the facts to the committee of that house that is assigned the determination of ethical issues. The committee shall advise the legislator as to whether the legislator should disclose the interest prior to voting on the issue pursuant to the provisions of subsection (4). The legislator shall vote on the issue after disclosing the interest."

{Internal References to 2-2-112: None.}

Section 7. Section 2-2-121, MCA, is amended to read:

"2-2-121. Rules of conduct for state public officers and state public employees. (1) Proof of commission of any act enumerated in ~~this section~~ subsection (2) is proof that the actor has breached ~~his fiduciary~~ a public duty.

(2) A state public officer or a state public employee may not:

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(a) use ~~state~~ public time, facilities, equipment, supplies, personnel, or funds ~~or equipment~~ for his private business purposes;

(b) engage in a substantial financial transaction for his ~~the officer's or employee's~~ private business purposes with a person whom ~~he~~ the officer or employee inspects or supervises in the course of his official duties;

(c) assist any person for a fee or other compensation in obtaining a contract, claim, license, or other economic benefit from ~~his~~ the officer's or employee's agency;

(d) assist any person for a contingent fee in obtaining a contract, claim, license, or other economic benefit from any state agency;

(e) perform an official act directly and substantially affecting to its economic benefit a business or other undertaking in which ~~he~~ the officer or employee either has a substantial financial interest or is engaged as counsel, consultant, representative, or agent; or

(f) solicit or accept employment, or engage in negotiations or meetings to consider employment, with a person whom ~~he~~ the officer or employee regulates in the course of his official duties without first giving written notification to ~~his~~ the officer's or employee's supervisor and department director.

(3)(a) A public officer or public employee may not use public time, facilities, equipment, supplies, personnel, or funds for any political or campaign activity persuading or affecting a political decision unless the use is:

(i) authorized by law; or

(ii) properly incidental to another activity required or authorized by law, such as the function of an elected public official, the official's staff, or the legislative staff in the normal course of their duties.

(b) Subsection (3)(a) does not prohibit an elected public official from issuing public statements concerning matters within the scope of the official's office. However, a document that is published pursuant to this subsection (3) and that is aimed at supporting or opposing a political committee, a candidate, or a ballot issue must include a written statement disclosing the public costs incurred to produce the document. The statement must meet the specifications described in 18-7-306, and the costs must be estimated based on the factors listed in 18-7-307. Documentation of the cost of publication must be filed with the commissioner of political practices.

(4)(a) A state employee shall notify the employee's immediate supervisor that a potential conflict of interest exists when:

(i) an organization of which the employee is a member is involved in a proceeding before the employing agency that is within the scope of the employee's job duties; or

(ii) the employee is a member of or affiliated with any organization attempting to influence a local, state, or federal proceeding in which the employee represents the state.

(b) The employee's supervisor shall make the disclosed information available to an interested person upon the person's

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request.

(5) A state officer or state employee may not engage in any activity, including lobbying, as defined in 5-7-102, on behalf of an organization of which the officer or employee is a member while engaged in performing the officer's or employee's job duties.

~~(3)~~(6) A department head or a member of a quasi-judicial or rulemaking board may perform an official act notwithstanding the provisions of subsection (2)(e) if ~~his~~ participation is necessary to the administration of a statute and if ~~he~~ the person complies with the ~~voluntary~~ disclosure procedures under 2-2-131.

~~(4)~~(7) Subsection (2)(d) does not apply to a member of a board, commission, council, or committee unless ~~he~~ the member is also a full-time ~~state public~~ employee.

(8) A person alleging a violation of this section by a state officer or state employee may bring an informal contested case proceeding, as provided in Title 2, chapter 4, part 6, before the commissioner of political practices. If the commissioner determines that a violation has occurred, the commissioner may impose a civil penalty of not less than \$50 or more than \$1,000, and if the violation was committed by a state employee, the commissioner may also recommend that the employing agency discipline the employee. The commissioner may assess the costs of the proceeding against the person bringing the charges if the commissioner determines that a violation did not occur or against the officer or employee if the commissioner determines that a violation did occur. If the decision is appealed, as

provided in Title 2, chapter 4, part 7, the district court may award costs and fees to the prevailing party.

(9) A local government officer or employee violating this section is subject to a civil penalty of not less than \$50 or more than \$1,000.

(10) A person who purposely or knowingly violates this section is guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than \$50 or more than \$1,000, by imprisonment in the county jail for not more than 6 months, or by both. A civil proceeding under subsection (8) or (9) does not preclude an action under this subsection."

{Internal References to 2-2-121: None.}

Section 8. Section 2-2-302, MCA, is amended to read:

"2-2-302. Appointment of relative to office of trust or emolument unlawful -- exceptions -- publication of notice. (1) Except as provided in subsection (2), it is unlawful for a person or member of any board, bureau, or commission or employee at the head of a department of this state or any political subdivision of this state to appoint to any position of trust or emolument any person related or connected by consanguinity within the fourth degree or by affinity within the second degree.

(2) The provisions of this section and 2-2-303 do not apply to:

(a) a sheriff in the appointment of a person as a cook or an attendant;

(b) school district trustees if all the trustees, with the

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exception of any trustee who is related to the person being appointed and who must abstain from voting for the appointment, approve the appointment of a person related to a trustee;

(c) a school district in the employment of a person as a substitute teacher who is not employed as a substitute teacher for more than 30 consecutive school days; ~~or~~

(d) the renewal of an employment contract of a person who was initially hired before the member of the board, bureau, or commission or the department head to whom ~~he~~ the person is related assumed the duties of the office;

(e) the employment of election judges; or

(f) the employment of pages or temporary session staff by the legislature.

(3) Prior to the appointment of a person referred to in subsection (2), the school district trustees shall give written notice of the time and place of their intended action. The notice must be published at least 15 days prior to the trustees' intended action in a newspaper of general circulation in the county in which the school district is located."

{Internal References to 2-2-302:
49-2-303x 49-3-201x}

Section 9. Section 2-18-102, MCA, is amended to read:

"2-18-102. Personnel administration -- general policy setting. (1) Except as otherwise provided by law or collective bargaining agreement, the department shall:

(a) encourage and exercise leadership in the development of

effective personnel administration within the several agencies in the state and make available the facilities of the department to this end;

(b) foster and develop programs for recruitment and selection of capable persons for permanent, seasonal, temporary, and other types of positions and for the improvement of employee effectiveness, including training, ethical conduct, safety, health, counseling, welfare, discipline, grievances, and evaluation for productivity and retention in permanent status;

(c) foster, develop, and promote job sharing in agencies;

(d) investigate from time to time the operation and effect of parts 1 and 2 of this chapter and the policies made ~~thereunder~~ under parts 1 and 2 and report the findings and recommendations to the governor;

(e) establish policies, procedures, and forms for the maintenance of records of all employees in the state service;

(f) apply and carry out parts 1 and 2 and the policies ~~thereunder~~ under parts 1 and 2 and perform any other lawful acts which may be necessary or desirable to carry out the purposes and provisions of parts 1 and 2.

(2) The department may delegate authority granted to it under parts 1 and 2 to agencies in the state service that effectively demonstrate the ability to carry out the provisions of parts 1 and 2, provided that ~~such~~ the agencies remain in compliance with policies, procedures, timetables, and standards established by the department.

(3) The department shall develop and issue personnel

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policies for the state. Adequate public notice ~~shall~~ must be given to all interested parties of proposed changes or additions to the personnel policies before the date they are to take effect. If requested by any of the affected parties, the department shall schedule a public hearing on proposed changes or additions to the personnel policies before the date they are to take effect.

(4) The department shall develop model rules of conduct for all state employees based upon the provisions of Title 2, chapter 2. The department shall provide employees with a pamphlet summarizing the provisions of Title 2, chapter 2. Each state agency shall adopt the model rules of conduct and additional rules appropriate to the specific circumstances of the agency."

{ Internal References to 2-18-102: None. }

Section 10. Section 5-7-213, MCA, is amended to read:

"5-7-213. ~~Disclosure by elected officials.~~ (1)(a) Prior to December 15 of each even-numbered year, each elected official, ~~or official-elect~~ member of a quasi-judicial board or commission, or department director shall file with the commissioner a business disclosure statement on a form provided by the commissioner. An individual filing pursuant to subsection (1)(b) or (1)(c) is not required to file under this subsection (1)(a) during the same period.

(b) Each candidate for a statewide or a state office elected from a district shall, within 5 days of the time the candidate files for office, file a business disclosure statement

with the commissioner on a form provided by the commissioner.

(c) An individual appointed to office who would be required to file under subsection (1)(a) or (1)(b) is required to file the business disclosure statement at the earlier of the time of submission of the person's name for confirmation or the assumption of the office.

(2) The statement shall must provide the following information:

(a) the name, address, and type of business of such the individual and each member of such the individual's immediate family;

(b) each present or past employment from which benefits, including retirement benefits, are currently received by the individual and each member of the individual's immediate family;

(c) each business, firm, corporation, partnership, and other business or professional entity or trust in which the individual or a member of the individual's immediate family holds an interest;

(d) each entity not listed under subsections (2)(a) through (2)(c) in which the individual or a member of the individual's immediate family is an officer or director, regardless of whether or not the entity is organized for profit;

(e) a brief description of the purpose of an entity described in subsections (2)(c) and (2)(d); and

(f) all real property, other than a personal residence, in which the individual or a member of the individual's immediate family holds an interest. Real property may be described by

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~~general description. For this purpose "immediate family" includes the individual's spouse and minor children only.~~

~~(2)(3)~~ No ~~such~~ An individual may not assume or continue to exercise the powers and duties of the office to which that individual has been elected or appointed until ~~such~~ the statement has been filed as provided in subsection (1).

~~(3)(4)~~ The commissioner shall make ~~such~~ the business disclosure statements available to any individual upon request.

(5) For purposes of this section, "immediate family" means the individual's spouse and minor children."

{ Internal References to 5-7-213: None. }

Section 11. Section 13-35-226, MCA, is amended to read:

"13-35-226. Unlawful acts of employers and employees. (1)

It is unlawful for any employer, in paying ~~his~~ employees the salary or wages due them, to include with their pay the name of any candidate or any political mottoes, devices, or arguments containing threats or promises ~~(express or implied)~~, calculated or intended to influence the political opinions or actions of the employees. It is unlawful for an employer to exhibit in a place where ~~his~~ the employer's workers or employees may be working any handbill or placard containing any threat, promise, notice, or information that in case any particular ticket or political party, organization, or candidate is elected, work in ~~his~~ the employer's place or establishment will cease, in whole or in part, or will be continued or increased; ~~his~~ the employer's place or establishment will be closed; the salaries or wages of ~~his~~ the

workers or employees will be reduced or increased; or other threats or promises ~~(express or implied)~~ intended or calculated to influence the political opinions or actions of ~~his~~ the employer's workers or employees. This section ~~shall apply~~ applies to corporations, individuals, and public officers and employees.

(2) ~~No~~ A person may not attempt to coerce, command, or require a public employee to support or oppose any political committee, the nomination or election of any person to public office, or the passage of a ballot issue.

(3) ~~No~~ A public employee may not solicit support for or opposition to any political committee, the nomination or election of any person to public office, or the passage of a ballot issue while on the job or at ~~his~~ the place of employment. However, ~~nothing in~~ subject to 2-2-121, this section is not intended to restrict the right of a public employee to express ~~his~~ personal political views.

(4) Any person who violates the provisions of this section shall be fined not to exceed \$1,000, be imprisoned in the county jail for a term not to exceed 6 months, or both, for each separate offense."

{Internal References to 13-35-226: None.}

NEW SECTION. Section 12. Filing tax returns. (1) It is the responsibility of legislators, public officers, and public employees to determine on an annual basis whether they are required to file tax returns with the state of Montana and to

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file a complete return in a timely manner, if required.

(2) The department of revenue shall provide to the commissioner of political practices information necessary to determine compliance with this section, whether or not the information is confidential. The commissioner of political practices shall keep the information confidential unless necessary to prove that a violation of this section has occurred.

NEW SECTION. Section 13. Ethics committees. Each house of the legislature shall establish an ethics committee. The committee must consist of two members of each political party. The committees may meet jointly. Each committee shall educate members concerning the provisions of Title 2, chapter 2, part 1, concerning legislators and may consider conflicts between public duty and private interest as provided in 2-2-112. The joint committee may consider matters affecting the entire legislature.

NEW SECTION. Section 14. {standard} Repealer. Section 2-2-132, MCA, is repealed.

{Internal References to 2-2-132: None.}

NEW SECTION. Section 15. {standard} Codification instruction. [Sections 12 and 13] are intended to be codified as an integral part of Title 2, chapter 2, part 1, and the provisions of Title 2, chapter 2, part 1, apply to [sections 12 and 13].

NEW SECTION. Section 16. Code commissioner instruction.

The code commissioner shall renumber section 5-7-213 as an integral part of Title 2, chapter 2, part 1.

NEW SECTION. Section 17. {standard} Severability. If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. Section 18. {standard} Effective date. [This act] is effective July 1, 1995."

-END-

{Gregory J. Petesch
Director, Legal Division
Montana Legislative Council
(406) 444-3064}

DATE 3-21-95

SENATE COMMITTEE ON Ethics Select 5:30

BILLS BEING HEARD TODAY: all - merge

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Name	Representing	Bill No.	Support	Oppose
Chris Imhoff	mt league of women voters			
J.V. Bennett	MontPIRG	AM		

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