

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### CRIMINAL JUSTICE COMMITTEE

Tuesday and Wednesday, August 10-11, 2004  
Harvest Room, State Capitol  
Bismarck, North Dakota

Representative Lois Delmore, Chairman, called the meeting to order at 10:00 a.m.

**Members present:** Representatives Lois Delmore, Bill Amerman, Randy Boehning, Ron Carlisle, Duane DeKrey, Dennis Johnson, William E. Kretschmar, Carol A. Niemeier, Mike Norland; Senators Stanley W. Lyson, John T. Traynor, Thomas L. Trenbeath

**Members absent:** Representative Lawrence R. Klemin; Senator Constance Triplett

**Others present:** David P. O'Connell, State Senator, Lansford.

See attached appendix for additional persons present.

The committee observed a moment of silence in memory of former Senator Linda Christenson who passed away on July 22, 2004.

**It was moved by Representative Carlisle, seconded by Representative Amerman, and carried on a voice vote that the minutes of the April 26, 2004, meeting be approved as distributed.**

#### GUARDIANSHIP SERVICES STUDY

At the request of Chairman Delmore, committee counsel presented a bill draft [50090.0100] regarding the establishment of a guardianship services program. She said the bill draft would require the Department of Human Services to contract with an entity to create and coordinate a unified system for the provision of guardianship services to vulnerable adults who are ineligible for developmental disabilities case management services. She said the bill draft also provides for an appropriation of \$772,550.

Chairman Delmore called on Ms. Donna Byzewski, Cochairman, North Dakota Guardianship Task Force, for testimony regarding the bill draft. Ms. Byzewski said as a guardian, much of her time is spent talking with physicians, case managers, social workers, pastors, family members, or police officers on behalf of her wards. She said guardianship should be pursued only when alternative resources such as homemaker services, a representative payee for Social Security benefits, social services support, residential placements, and in-home services have been tried but are unsuccessful or not appropriate given the circumstances. She said a guardianship is

established because the court has determined that the person is at significant risk due to his or her inability to make responsible decisions. She said guardianship is very intrusive and should only be used as a last resort because it involves taking away some or all rights from the individual and gives them to the guardian. She said a guardian often must make very difficult decisions on behalf of a ward. She said the bill draft would provide a number of indigent, vulnerable people with unmet guardianship needs a safety net as well as a chance for a better life. She said the task force members have worked tirelessly over the years to improve guardianship services. She said on behalf of the task force, she urged the committee to recommend the proposed legislation. She submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Traynor, Ms. Byzewski said most wards do not have assets. She said some have Social Security benefits or veterans' benefits that can be used but most are indigent.

In response to a question from Representative Kretschmar, Ms. Byzewski said Catholic Charities North Dakota is the only organization in the state providing corporate guardianship services.

In response to a question from Representative Niemeier, Ms. Byzewski said there are no statutory standards regarding the qualifications of guardians other than a guardian must be 18 years of age and competent. She said Catholic Charities North Dakota does have policies regarding the qualifications of guardians it hires. She said there is a need to develop statewide standards.

In response to a question from Representative Delmore, Ms. Byzewski said the bill draft would allow for organizations other than Catholic Charities North Dakota to contract with the Department of Human Services for the guardianship services.

In response to a question from Senator Trenbeath, Ms. Byzewski said the bill draft would provide guardianship services for those persons who are vulnerable but who are not developmentally disabled. She said the rules developed for the guardianship services eligibility would include financial criteria. She said the appropriation amount of \$772,550 contained in the bill draft is the minimum amount needed to provide

training to guardians and guardianship services to 210 needy persons.

In response to a question from Representative Carlisle, Ms. Byzewski said members of the task force have met with representatives of the Governor's office and the Department of Human Services regarding the needs of guardianship services.

In response to a question from Senator Traynor, Ms. Byzewski said there are no federal funds available to fund guardianship services. She said Catholic Charities North Dakota tried to access federal Title XIX funding but was denied. She said all guardianship services funding is from the state's general fund.

**It was moved by Representative DeKrey, seconded by Representative Carlisle, and carried on a roll call vote that the bill draft relating to guardianship services be approved and recommended to the Legislative Council.** Representatives Delmore, Amerman, Boehning, Carlisle, DeKrey, Johnson, Kretschmar, Niemeier, and Norland and Senators Lyson, Traynor, and Trenbeath voted "aye." No negative votes were cast.

At the request of Chairman Delmore, committee counsel presented a bill draft [50135.0100] regarding the appointment of a successor guardian. Committee counsel said the bill draft provides for a procedure for the appointment of a successor guardian if a new guardian is required. She also presented a bill draft [50134.0100] regarding the filing of annual reports by guardians and conservators. She said the bill draft provides for an annual report requirement for guardians and conservators. She said the bill draft requires the State Court Administrator's office to develop and provide a form that may be used to fulfill reporting requirements.

Chairman Delmore called on Mr. Melvin L. Webster, North Dakota Guardianship Task Force, for testimony regarding the guardianship bill drafts. Mr. Webster said the first three sections of the bill draft regarding the appointment of a successor guardian are the method he uses when the appointment of a successor guardian is necessary. He said this procedure follows North Dakota Rules of Court Rule 3.2. He said this rule provides for a motion accompanied by a brief and an affidavit signed by the existing guardian or someone with knowledge of the reasons a successor guardian is needed. He said a hearing is not required unless requested by the moving party or a responding party. He said Section 4 of the bill draft is a departure from current statute. He said under this section, if the guardian is a public administrator or corporate guardian who serves more than 10 wards, the guardian is permitted to provide notice by publishing the motion and the notice of motion in a newspaper of general circulation within the judicial district in which the court is located. He said under current law, service by publication is permitted only if the person or entity cannot be

located. He said the state needs a procedure that is economical and at the same time protects the rights of individual wards. He said it does not benefit those wards who need a guardian to access benefits or services to be subjected to an expensive court process and be subjected to long delays because there is no funding for an expensive procedure.

In response to a question from Representative Carlisle, Mr. Webster said the Protection and Advocacy Project has pointed out that the successor guardianship bill draft takes some shortcuts regarding notice and hearing. He said, however, this procedure is not for the establishment, modification, or termination of a guardianship but rather it is for the appointment of a successor guardian.

In response to a question from Senator Trenbeath, Mr. Webster said Section 4 of the bill draft does contain a shortcut for the notice requirement. Senator Trenbeath said a mailing may be a better way to provide notice to interested parties.

Representative DeKrey said the committee may want to delay action on the bill draft until the next meeting. He said language regarding providing notice by mail could be added.

In response to a question from Senator Traynor, Mr. Webster said in order to give notice in a newspaper about the appointment of a successor guardian, the ward's name would need to be published. He said only the names of those wards for whom the successor guardian was being appointed would be published, not the names of all the wards for whom the guardian provides services.

Mr. Webster said the bill draft regarding annual reporting requirements for guardians and conservators distinguishes between the filing of a report with the court and securing a court's approval or determination of the merits of the report or accounting. He submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Delmore, Mr. Webster said in about 99 percent of guardianship and conservatorship cases, the court already requires an annual report. He said the bill draft would make it a statutory requirement. He said the bill draft would make it clear that the filing of the report is not the same as court approval of the report. Court approval, he said, requires notice. He said guardianship files are not closed records.

In response to a question from Senator Trenbeath, Mr. Ted Gladden, State Court Administrator, Supreme Court, said the Council of Presiding Judges was not satisfied with the handling of annual reports. He said each judge has different practices for the filing and approval of reports. This bill draft, he said, is an attempt to clarify the procedure and provide direction to judges. He said the judiciary is in agreement with moving forward with this idea. He said providing forms would not be a hardship to his office. He said the form would give the necessary information to the

judges in a uniform format. He said the standard form would make it easier for a judge to spot irregularities.

In response to a question from Senator Traynor, Mr. Gladden said while there is not an abuse of the reporting system now, there is a lack of predictability. He said this bill draft would provide for a standard format. He said most courts already require annual reports so the bill draft would not impose an additional burden on guardians.

In response to a question from Representative Delmore, Mr. Gladden said there is a \$10 fee charged for the filing of a report.

Senator Trenbeath said there has not been any harm identified which creates a need for this legislation. He said requiring annual reports would take judicial discretion out of the process. He said it should be in the judge's discretion whether or not to order a report.

Senator Traynor said he does not agree with the penalty provision in the bill draft for failing to file an annual report.

Senator Lyson said while there may be issues to be addressed, the bill draft should go forward to the Legislative Assembly and receive a full hearing.

**It was moved by Representative DeKrey, seconded by Senator Lyson, and carried on a roll call vote that the bill draft relating to the filing of annual reports by guardians and conservators be approved and recommended to the Legislative Council.** Representatives Delmore, Amerman, Boehning, Carlisle, DeKrey, Johnson, Niemeier, and Norland and Senator Lyson voted "aye." Representative Kretschmar and Senators Traynor and Trenbeath voted "nay."

### **VULNERABLE ADULT ABUSE AND NEGLECT STUDY**

At the request of Chairman Delmore, committee counsel presented a bill draft [50088.0100] regarding an education and awareness campaign regarding vulnerable adult abuse and neglect. Committee counsel said the bill draft would appropriate \$50,000 to the Department of Human Services for the purpose of implementing an education and awareness campaign to inform the public about vulnerable adult abuse and neglect, including the manner in which incidents of adult abuse, neglect, and exploitation may be reported.

Chairman Delmore called on Ms. Linda Wurtz, Associate State Director for Advocacy, AARP North Dakota, for testimony regarding the study and the bill draft. Ms. Wurtz said she contacted the national AARP office for information regarding the definitions of "abuse," "neglect," and "exploitation." She said there are no standard definitions of these terms nor are there model bills on the mandatory reporting of adult abuse. She said vulnerable adult abuse is not just a state issue and efforts need to be coordinated on a national basis. She said AARP recommends

funding for education campaigns. She submitted written testimony, a copy of which is on file in the Legislative Council office.

Chairman Delmore called on Ms. Lynne Jacobson, Aging Services, Department of Human Services, for testimony regarding the bill draft. Ms. Jacobson distributed information regarding vulnerable adult services cases. A copy of the information is on file in the Legislative Council office.

Ms. Jacobson said the department wants vulnerable adult abuse and neglect reported but there would be problems with mandating people to report. She said the \$50,000 appropriated in the bill draft would be a proactive and preventative way of dealing with the issue. She said the money would be used for an education campaign and to set up a toll-free number for callers to report incidents and to receive information.

In response to a question from Representative Delmore, Ms. Jacobson said \$236,000 is distributed to the regional human service centers. She said the priority for this money is for services and clients. She said this money is not used for education. She said there are presentations given regarding the vulnerable adult abuse and neglect problem but those presentations do not reach enough people.

In response to a question from Representative Niemeier, Ms. Jacobson said the regional offices do not receive any money for media campaigns. She said the persons involved in providing adult protective services occasionally may be invited to do a noon talk show or there may be a newspaper article written about the services but the current funds are not used to purchase media time or space.

**It was moved by Representative Niemeier, seconded by Representative Amerman, and carried on a roll call vote that the bill draft relating to the implementation of an education and awareness campaign to inform the public about vulnerable adult abuse and neglect be approved and recommended to the Legislative Council.** Representatives Delmore, Amerman, Boehning, Carlisle, DeKrey, Johnson, Kretschmar, and Niemeier and Senators Traynor and Trenbeath voted "aye." Representative Norland and Senator Lyson voted "nay."

### **INDIGENT DEFENSE STUDY**

At the request of Chairman Delmore, committee counsel presented a bill draft [50089.0100] relating to the establishment of the Commission on Legal Counsel for Indigents. Committee counsel said the bill draft establishes the commission, provides for the powers and duties of the commission, and provides for a transition of indigent defense services from the Supreme Court to the commission. She said the bill draft does not contain an appropriation but relies on the Supreme Court to include the funding in its budget request so the amount is included in the executive budget submitted to the Legislative Assembly rather

than requiring the Legislative Assembly to add the amount to the executive budget.

Chairman Delmore called on Mr. Jim Ganje, State Court Administrator's office, Supreme Court, for testimony concerning the bill draft. Mr. Ganje said the intent of the task force in the drafting of the bill draft was to separate the money needed to establish the commission from the money needed to fund indigent defense services. He said the \$1.135 million needed to establish the commission should be included in the bill draft.

In response to a question from Senator Traynor, Mr. Ganje said the appropriation for the attorney services will be included in the Supreme Court budget request. He said the budget request will explain the need for the money in excess of the \$5 million appropriated for the 2003-05 biennium.

In response to a question from Representative Amerman, Mr. Ganje said under the bill draft, the Supreme Court will maintain the current contract system for six months. He said on January 1, 2006, all indigent defense funds will be transferred to the commission. After the upcoming biennium, he said, the commission will submit its own budget.

In response to a question from Senator Trenbeath, Mr. Ganje said the funds in the indigent defense administration fund will be appropriated to the commission beginning July 1, 2005. He said the total funding for the commission and the indigent defense services will be a combination of general fund money and the money in the indigent defense administration fund.

Representative Kretschmar said for the upcoming biennium, the money for indigent defense services should stay in the Supreme Court's budget and the money to start the commission should stay in the bill draft being considered by the committee. He said it should not be a problem to leave the commission startup funds in the bill draft.

In response to a question from Senator Trenbeath, Mr. Ganje said the commission would be a state entity created to provide indigent defense.

In response to a question from Representative Delmore, Mr. Ganje said the bill draft does not require the members of the commission be law-trained. He said the task force thought it would be a good idea but did not want to impose that requirement.

Chairman Delmore called on Ms. Christine Hogan, Executive Director, State Bar Association of North Dakota, for testimony concerning the bill draft. Ms. Hogan said she agreed with Mr. Ganje that the funding for the establishment of the commission should be in the bill draft that establishes the commission. She said the funding for this commission should be kept out of the court's budget, although the initial funding for the indigent defense services could be in the court's budget.

In response to a question from Representative Delmore, Ms. Hogan said the state needs to act on

the issue of indigent defense before the "sky falls." She said the current system is in crisis and is not meeting the constitutional requirements because of inadequate funding. She said because of the low funding and compensation, indigent defense attorneys have the incentive to plead out cases. She said Montana's indigent defense system has been challenged by the American Civil Liberties Union (ACLU). She said Montana requested that it be given an attempt to address the problem legislatively. She said the Montana legislature's proposal to the ACLU is to increase indigent defense funding from \$8.5 million to \$20 million. She said North Dakota's indigent defense system has many of the same problems as Montana's system. She said inadequate funding and overworked attorneys are the main issues. She said the state and federal constitutions require that a defendant is entitled to an adequate defense. She said this is where the ACLU may step in and prove that defendants are not getting an adequate defense. She said the system proposed in the bill draft does not totally replace the contract system with a public defender system but rather provides for a combination of the two systems. She said the establishment of public defender offices would be within the discretion of the commission.

Representative Delmore said the committee is aware of the problems with the current indigent defense system. She said the proposal will need to be considered by the Legislative Assembly. She said litigation is a possibility and the state needs to act before that happens. She said the bill draft will be amended to include \$1.135 million for the establishment of the commission.

In response to a question from Senator Traynor, Ms. Hogan said there is some merit to a full-time public defender system; however, she said, this bill draft was the compromise reached by the task force. She said as long as the appropriate safeguards and funding are in place, this proposal solves the problems with the current system.

Chairman Delmore called on Chief Justice Gerald W. VandeWalle for testimony concerning the bill draft. Chief Justice VandeWalle said he supports the legislation. He said the money to fund the commission should be in this bill draft and the remaining money to fund the services should be in the Supreme Court budget with transfer provisions to transfer the money after six months.

In response to a question from Representative Delmore, Chief Justice VandeWalle said after the upcoming biennium, the commission would develop and submit its own budget.

Chairman Delmore called on Mr. Wade Williams, North Dakota Association of Counties, for testimony regarding the bill draft. Mr. Williams said the indigent defense costs for mental health commitment and sexual offender civil commitment cases are the responsibility of the counties. He said those costs

should be the responsibility of the state and not the counties.

Chairman Delmore called on Mr. Gladden for testimony regarding the revenue collection for the indigent defense administration fund and the court facilities maintenance fund. Mr. Gladden said the collections to date total \$787,092. He said the estimate of total receipts through June 30, 2005, is \$1,750,314. He said this is based upon an estimate of \$80,269 per month through the end of the biennium. He said it is estimated that \$750,000 will be deposited in the indigent defense fund, \$460,000 will be deposited in the court facilities fund, and as provided for in the statute, any additional funds collected in excess of these amounts are to be divided equally between the two funds. He said it is estimated that an additional \$270,157 will be deposited in each fund this biennium. He provided information on the actual and estimated revenue collection, a copy of which is on file in the Legislative Council office.

In response to a question from Senator Trenbeath, Mr. Gladden said collections have been very high. He said the first money collected from a defendant is deposited in the indigent defense fund. He said he would provide information to the committee on the amount of collections versus the accounts receivable. He said now that the fee has been established, there has been more acceptance of the fee from the courts. He said the exception is in game and fish cases. He said there are complaints that the penalty is too high.

In response to a question from Senator Traynor, Mr. Gladden said about \$400,000 has been used to enhance the indigent defense contracts for the upcoming year.

**It was moved by Senator Traynor, seconded by Senator Trenbeath, and carried on a voice vote that the bill draft regarding the establishment of the Commission on Legal Counsel for Indigents include an appropriation of \$1.135 million for the establishment of the commission.**

**It was moved by Senator Traynor, seconded by Representative DeKrey, and carried on a roll call vote that the bill draft, as amended, relating to the establishment of the Commission on Legal Counsel for Indigents be approved and recommended to the Legislative Council.** Representatives Delmore, Amerman, Boehning, Carlisle, DeKrey, Johnson, Kretschmar, Niemeier, and Norland and Senators Lyson, Traynor, and Trenbeath voted "aye." No negative votes were cast.

## **LAW ENFORCEMENT TRAINING NEEDS STUDY**

Chairman Delmore called on Mr. Lloyd Halvorson, North Dakota Peace Officer Standards and Training Board, for testimony regarding the board's training plan. Mr. Halvorson said the board sent a survey to all of the law enforcement agencies in the state requesting information on their unfunded training

needs. He said 53 percent of the agencies responded to the survey and indicated a need for training in approximately 60 specific topics that fall within five general areas. He said these areas include general police subjects; accident investigation; criminal investigation; specialized courses; and supervision, management, and administration. He said refresher training in high liability areas such as search and seizure and use of force appear necessary as well. He said the plan is a work in progress and will need to be modified as time goes by. He said the plan is very ambitious and all the training proposed in the plan may not be able to be completed in one biennium. He provided written testimony and a copy of the training plan, copies of which are on file in the Legislative Council office.

In response to a question from Representative Delmore, Mr. Halvorson said the training in the training plan would be in addition to the training that is done now. He said the training that could be done using homeland security funds is not included in this plan.

In response to a question from Senator Lyson, Mr. Halvorson said the plan addresses the training needs but may not be able to be accomplished in two years. Senator Lyson said the board did a good job of developing the plan and it is the information the committee requested.

In response to a question from Representative DeKrey, Mr. Halvorson said under the plan, the training would be offered to those officers who need that particular type of training. He said not every officer needs to attend every class.

In response to a question from Senator Lyson, Mr. Halvorson said there is a need for basic training refresher courses in addition to the advanced training.

At the request of Chairman Delmore, committee counsel presented a bill draft [50146.0100] relating to the creation of a law enforcement training fund to be funded by a motor vehicle insurance premium tax. Committee counsel said the law enforcement training fund would be administered by the Peace Officer Standards and Training Board.

Senator Trenbeath said there are many taxes already imposed on motor vehicles. He said if law enforcement training is a legitimate cause, it should be funded using general fund dollars.

In response to a question from Representative Carlisle, committee counsel said she would provide a copy of the bill draft to the Attorney General.

In response to a question from Senator Traynor, Mr. Richard Bendish, Peace Officer Standards and Training Board, said 16 states use motor vehicle license fees to fund law enforcement training.

In response to a question from Representative Delmore, Mr. Bendish said the board is primarily funded through law enforcement officer license fees.

In response to a question from Senator Lyson, Mr. Bendish said local fire departments receive funds

from the premium tax on certain types of property insurance which are used to fund training.

Chairman Delmore called on Colonel Bryan Klipfel, Highway Patrol, for comments concerning the bill draft. Colonel Klipfel said general fund dollars are used to fund the Law Enforcement Training Academy. He said the funds generated under the bill draft would be used to provide additional training.

Chairman Delmore called on Mr. Chuck Johnson, Insurance Department, for comments concerning the bill draft. Mr. Johnson said the Insurance Department would provide information to the committee regarding the amount of money that could be generated under the bill draft.

In response to a question from Representative Carlisle, Mr. Bendish said \$912,225 per biennium would be needed to fund the training proposed in the training plan.

Chairman Delmore called on Mr. Jim Poolman, Commissioner of Insurance, for testimony regarding the bill draft. Mr. Poolman said North Dakota currently collects 1.75 percent on motor vehicle premiums. He said because of the retaliatory effect of the tax structure in relation to other states with higher percentages, the state would not necessarily capture all of the money provided by the increase in the premium tax. He said of the \$386 million in premiums currently being collected, a .12 percent increase would result in \$451,000 in increased tax; however, when considering the retaliatory provisions of state tax law, about \$245,000 would be collected from the increase. He said these types of increases can put domestic companies at a disadvantage. He said eight states have motor vehicle premium taxes that are less than North Dakota, six states have premium taxes that are the same, and 35 states have motor vehicle premium taxes that are higher than North Dakota. He said the premium tax percentage is built into the premium and is not listed as a separate item on consumers' billing statements.

Representative Carlisle said this bill draft would create another special fund. He proposed amending the bill draft to provide that the funds are taken from the general fund.

Senator Lyson said the Peace Officer Standards and Training Board members have indicated that it may be difficult to complete all the training proposed in the training plan in one biennium. He said an appropriation of \$400,000 to the Highway Patrol would provide adequate funding for the training that could be completed in the upcoming biennium.

**It was moved by Senator Lyson, seconded by Representative Carlisle, and carried on a voice vote that the bill draft regarding the law enforcement training fund be amended to provide for a general fund appropriation of \$400,000 to the Highway Patrol for law enforcement training.**

## EMPLOYMENT CONDITIONS STUDY

At the request of Chairman Delmore, committee counsel presented a memorandum entitled *North Dakota Century Code Section 34-06-05 - Employment Conditions Study - Background Memorandum*. She said the study was directed by the chairman of the Legislative Council as a result of an April 14, 2004, Attorney General's opinion.

Chairman Delmore called on Attorney General Wayne Stenehjem for testimony regarding the April 14, 2004, opinion. Mr. Stenehjem said the opinion addressed the issue of whether North Dakota Century Code (NDCC) Section 34-06-05 applies to smoking in workplaces. He said the opinion stated that the prohibition in Section 34-06-05(2) against subjecting an employee to surroundings or conditions that may be detrimental to the employee's health is one way the section could apply to tobacco smoke in the workplace. He said the clear and obvious interpretation of the statute is that the Labor Commissioner has the authority to investigate and ascertain employee labor conditions in the state and, in light of that authority, the Labor Commissioner has the authority to ascertain whether tobacco smoke in workplaces is detrimental to the employees' health and to address the matter through the rulemaking process. He said the prohibition in Section 34-06-05(2) may create a private cause of action against an employer who subjects employees to tobacco smoke in the workplace.

Mr. Stenehjem distributed to the committee a copy of an opinion issued on August 10, 2004, which related to whether potential regulations of the Labor Commissioner regarding environmental tobacco smoke would preempt a home rule city's ordinances regarding environmental tobacco smoke. He said the opinion provides that a local ordinance addressing clean indoor air or smoking would neither be expressly nor impliedly preempted by state law provided that the ordinance does not conflict with the regulations of the Labor Commissioner.

In response to a question from Senator Traynor, Mr. Stenehjem said there have been a number of lawsuits seeking damages because of workplace smoking. He said even without NDCC Section 34-06-05, it is likely that a person could sue for damages caused by workplace smoking.

Chairman Delmore called on Mr. Mark Bachmeier, Labor Commissioner, for testimony regarding the Attorney General's opinion. Mr. Bachmeier said North Dakota Century Code Chapter 34-06 is the chapter of state labor law that provides authority for the Labor Commissioner to investigate conditions of employment and to adopt rules prescribing standards for wages and working conditions in the state. He said under this authority, commissioners have adopted the rules that are contained in the department's *Minimum Wage and Working Conditions Order*. He said the rules establish the state minimum wage and

employment standards for things like the payment of overtime, breaks, pay stubs, and vacation pay. He said no rules have been adopted under the chapter establishing standards for workplace health and safety. He said at the state level, the department has historically relied on standards for workplace health and safety established and enforced by the federal Occupational Safety and Health Administration as well as health and safety programs at the State Department of Health and Workforce Safety and Insurance. He said the Attorney General's opinion places the issue of exposure to secondhand tobacco smoke in the context of the Labor Commissioner's authority to establish and enforce standards for wages and working conditions. He said this issue is most appropriately addressed by the Legislative Assembly as the policymaking body of the state and that the legislative process would provide the most appropriate forum for public discussion of the matter. He said the legislative process is definitive and that legislative consideration of the issue will be more timely than rulemaking in this case. Mr. Bachmeier submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Carlisle, Mr. Bachmeier said it is clear from the Attorney General's opinion that the Labor Commissioner has the authority to investigate and adopt standards. He said, however, the question is whether the Labor Commissioner and the administrative rules process is the best way to address a statewide public policy issue. He said while the Labor Commissioner has the authority to adopt the rules regarding smoking in the workplace, other agencies may have better knowledge of the health risks. He said it is a more appropriate issue for the Legislative Assembly to give full consideration.

In response to a question from Representative Kretschmar, Mr. Bachmeier said neither he nor previous labor commissioners have adopted health standards for employees.

In response to a question from Senator Traynor, Mr. Bachmeier said there are a number of options for the Legislative Assembly. He said the Legislative Assembly could decide to pass legislation that regulates smoking or the Legislative Assembly could make changes to the statute to indicate who has the authority to regulate smoking in the workplace. He said the issue could also be left as it is and direct the Labor Commissioner to address it.

In response to a question from Representative Delmore, Mr. Bachmeier said there have been no regulations adopted regarding morality. He said morality issues may also be open to a private cause of action. He said if complaints are received, the Labor Commissioner has the authority to investigate employment conditions regarding the morality portion of the statute.

Senator Trenbeath said the statute is vague. He said the statute either needs to be changed or administrative rules must be developed before anyone could be charged under the statute.

Chairman Delmore called on Mr. Jerry Hjelmstad, North Dakota League of Cities, regarding local ordinances and efforts in the state regarding smoking in the workplace. Mr. Hjelmstad said the league surveyed its members regarding the smoking in the workplace issue. He said 36 cities responded to the survey. Of those 36, he said, 19 have policies in place regarding smoking in city-owned buildings. He said 14 responded that they have no policies in place regarding smoking. He said two cities responded that they have passed smoking ordinances and one reported a pending initiated measure regarding smoking in businesses. He said the league supports local control of the issue. He said cities have the authority to pass ordinances on the topic.

In response to a question from Senator Traynor, Mr. Hjelmstad said while the league supports local control, there are policy issues for the Legislative Assembly to decide. He said the ordinances may create another liability issue for the cities. He said Fargo has certified one initiated measure to prohibit smoking in the workplace.

Chairman Delmore called on Ms. Kathleen Mangskau, Director, Division of Tobacco Prevention and Control, State Department of Health, for testimony regarding the health risks and financial costs associated with smoking. Ms. Mangskau said the health hazards of secondhand smoke, also known as environmental tobacco smoke, are well documented. She said according to the Centers for Disease Control and Prevention, secondhand smoke is a leading cause of preventable death in this country, killing 35,000 nonsmokers in the United States each year. She said in North Dakota, from 80 to 140 adults and children die from secondhand smoke each year. She said the Environmental Protection Agency (EPA) reports that smoke from the burning end of a cigarette contains over 4,000 chemicals and 42 carcinogens. She said the EPA reports that there is no safe level of exposure to environmental tobacco smoke. She said the EPA estimates that secondhand smoke causes 3,000 lung cancer deaths in nonsmokers each year. She said numerous studies have documented the health effects associated with exposure to secondhand smoke, including lung cancer and nasal sinus cancer, health disease mortality, and eye and nasal irritation in adults. She said health effects in children include acute lower respiratory tract infections, asthma induction and exacerbation, chronic respiratory symptoms, middle ear infections, and developmental effects, including low birth weight and sudden infant death syndrome (SIDS). She said in North Dakota, 56 low birth weight babies each year can be attributed to secondhand smoke costing \$378,247, 667 cases of asthma are attributable to secondhand

smoke exposure costing \$540,903, and 218 cases of ear infection attributable to secondhand smoke costing \$107,778. She said 2 of the 10 SIDS deaths in the state are attributable to smoking exposure. She said restaurant and bar workers, who typically have greater exposure to secondhand smoke, are at 50 to 100 percent increased risk of lung cancer.

Ms. Mangskau said there is growing support for smoke-free environments in North Dakota. She said a survey commissioned by the North Dakota Public Education Task Force on Tobacco in spring 2003 found the majority of North Dakotans think smoking should not be allowed in schools, public facilities, entertainment arenas, private businesses, and restaurants. She said as of July 2004, 12 states have adopted state smoke-free workplace laws. She said 11 states include restaurants in their smoke-free workplace laws and 7 states include bars. She said California and Utah were the first states to implement smoking bans in 1994. She said since 2002, 10 additional states have implemented various combinations of 100 percent smoke-free provisions. She said legislation is being considered in five additional states.

Ms. Mangskau said numerous studies have documented the economic impact of smoke-free policies. She said the studies are based on objective measure; use data several years before and after the policy implementation; use appropriate statistical tests that test for significance, controlling for underlying trends and fluctuations in data; and control for changes in economic conditions. She said the studies indicated no negative economic impact since the introduction of smoke-free policies in restaurants and bars. She said a study conducted in Minot after implementation of the smoke-free restaurant ordinance showed no negative impact on business. Ms. Mangskau submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Carlisle, Ms. Mangskau said Workplace Safety and Insurance does not have rules regarding smoking in the workplace.

In response to a question from Senator Traynor, Ms. Mangskau said there are court decisions in which the person subjected to the secondhand smoke has prevailed. She said the airline industry case is one example. She said she would provide information to the committee at its next meeting regarding lawsuits over secondhand smoke injuries.

Chairman Delmore called on Ms. Janel Schmitz, Executive Director, American Lung Association of North Dakota, for testimony regarding the smoking in the workplace issue. Ms. Schmitz said she was also appearing on behalf of the North Dakota Tobacco Policy Coalition. She said this group supports enforceable public policies that protect all people from secondhand smoke. She said the coalition also supports policies that broaden the scope and strengthen the standards of current state law while

preserving the right of local governments to adopt measures more restrictive than state law. She said she frequently meets with policymakers who say that people who work in smoking environments can choose to work elsewhere. She said in North Dakota in 2002, nearly 60,000 workers were exposed to smoke in the workplace. She said it would be difficult for thousands of workers in rural North Dakota to find other work. She said while 75 percent of white collar workers are covered by smoke-free policies in the United States, only 43 percent of the country's food preparation and service occupation workers benefit from this level of protection. She said bar and restaurant workers have three to six times more exposure to secondhand smoke than other workers and a 50 percent increase in lung cancer. She said if an employee works in a business that allows smoking, such as a manufacturing plant, it is estimated the nonsmoking employee will smoke six cigarettes in an eight-hour shift. She said the choice for the nonsmoker to avoid smoking environments is not realistic. She said it is time that all workplaces be smoke-free. She submitted written testimony, a copy of which is on file in the Legislative Council office.

In response to a question from Representative Norland, Ms. Schmitz said she is not opposed to smoking as a legal activity but rather when the smoke reaches a nonsmoker.

Chairman Delmore called on Mr. Bill Shalhoob, North Dakota Hospitality Association, for testimony regarding the smoking in the workplace study. Mr. Shalhoob said as a local hotel and restaurant owner, his businesses fall under state, local, and federal laws in many areas. He said businesses will be affected by state law and local ordinances on this issue. He said there is a difference between private and public buildings. He said he believes in the free market and free enterprise system. He said this is a business person's decision to make. He said just like employees, no one is forced to patronize a business. He said there is a huge distinction between bars and restaurants. He said members of the association believe that business would be adversely affected by eliminating smoking in bars. He said the association's position is to exempt bars from any smoking prohibition. He said the association believes in and supports reasonable smoking restrictions in restaurants. He said it is important to be careful about statewide bans. He said not all businesses in the state are the same. He said in some restaurants, 40 to 50 percent of revenue comes from smokers.

In response to a question from Representative DeKrey, Mr. Shalhoob said there are already many nonsmoking restaurants. He said about 75 percent of the state's hotel rooms are nonsmoking.

In response to a question from Representative Carlisle, Mr. Shalhoob said he is not aware of any discussions about reductions in workers' compensation rates for nonsmoking businesses. He said



workers' compensation is more related to safety issues than health issues.

Chairman Delmore called on Mr. Mark Dosch, Bismarck, for testimony regarding the smoking in the workplace study. Mr. Dosch said he is a state representative from District 32 but that he is appearing before the committee in his capacity as a local business owner. He said the lounge in the hotel he owns recently went smoke-free. He said the lounge has experienced a 25 percent increase in sales since going smoke-free. He said the hotel bar business is very competitive and he was looking for a market niche. He said he wants the free enterprise system to work, but when employees' health is at issue, some government involvement may be necessary. He said the issue may need to be put to a vote of the people.

In response to a question from Representative Delmore, Mr. Dosch said there is a market for smoke-free restaurants and bars. He said people are looking for those environments. He said if all bars were smoke-free, those bars currently smoke-free would lose their advantage. He said no one wants to take that first step, but if all bars and restaurants went smoke-free, business would maintain a status quo.

In response to a question from Representative DeKrey, Mr. Dosch said his hotel does maintain some smoking guest rooms. He said there is a new hotel in Dickinson that is smoke-free.

In response to a question from Senator Traynor, Mr. Dosch said he did not receive complaints from employees before the lounge went smoke-free.

Chairman Delmore called on Mr. David Peske, North Dakota Medical Association, for testimony regarding the smoking in the workplace study. Mr. Peske distributed a copy of a smoke-free air policy consensus statement developed by the health care providers in the Valley City area. A copy of the statement is on file in the Legislative Council office. He said the health care providers in that area support public policies at the local, state, and federal levels which protect all people from secondhand tobacco smoke. He said whether the action is the result of rules adopted by the Labor Commissioner or the result of a statewide law, the association supports smoke-free workplaces.

In response to a question from Representative Carlisle, Mr. Peske said the association's preference is for the Legislative Assembly to consider the issue of smoking in the workplace. He said members of the association have not discussed an initiated measure on a statewide ballot.

In response to a question from Representative Boehning, Mr. Peske said the association is not advocating an approach that would increase the smoking age to 21 or a total smoking ban in the state. He said the association is not against smoking in general but rather only the secondhand smoke aspect of smoking.

Chairman Delmore called on Dr. Nick Neumann, Bismarck, for testimony regarding the smoking in the

workplace study. Dr. Neumann said the physicians of the state have long supported initiatives to reduce the death and disease associated with the use of tobacco products by youth and adults. He said North Dakota Century Code Section 34-06-05 indicates a long-standing concern by state lawmakers for the health of employees in the workplace. He said there is no doubt that secondhand smoke in the workplace is detrimental to the health of employees. He said as reported in the *Journal of the American Medical Association* in 2001, exposure to secondhand smoke for as few as 30 minutes can impair coronary circulation in a nonsmoker. He said because of the detrimental impacts of secondhand smoke in the state's patient population, North Dakota physicians have played an active part in efforts of local communities to adopt clean indoor air ordinances, including efforts in Minot, Dickinson, West Fargo, and Fargo. He said the United States Surgeon General's 2000 report on reducing tobacco use found that clean indoor air laws that prohibit smoking have been shown to decrease daily tobacco consumption and to increase smoking cessation among smokers. He said while the North Dakota Medical Association supports stronger state laws pertaining to the restriction of smoking in public places, physicians recognize that local communities should not be preempted from adopting clean indoor air ordinances that are more restrictive than state law. He submitted written testimony, a copy of which is on file in the Legislative Council office.

Chairman Delmore called on Mr. Ron Garcia, Alderman, Minot City Council, for testimony regarding the smoking in the workplace study. Mr. Garcia said Minot initially passed its smoke-free family dining ordinance in 2001. He said the ordinance was referred to a vote of the people; however, the ordinance was upheld by a vote of 55 to 45 percent. He said testimonials from the community indicate that following the effective date of the ordinance, business was basically status quo. He said, however, many businesses are now reporting that business has increased from the time before the smoking restrictions became effective. He said only two businesses in the city have opted to maintain a separately ventilated eating area. He said the smoking ordinance has been a positive move for Minot. He said after being in effect for two years, 17 percent of the people still oppose the ordinance and 80 percent support it. He said 78 percent of those surveyed said the rights of employees take precedence over the rights of smokers. He said it is time for the Legislative Assembly to take a look at smoke-free workplaces. He said he and other city aldermen were told that if they supported the ordinance in 2001, they likely would not be reelected. He said in the 2002 and 2004 elections, all aldermen who sought reelection were reelected.

In response to a question from Representative Kretschmar, Mr. Garcia said the ordinance only applies to restaurants.

In response to a question from Representative Amerman, Mr. Garcia said the ordinance provides for a \$100 fine for violations of the ordinance with the fine increasing up to \$500 for subsequent violations. He said there has not been any citation issued to date.

In response to a question from Senator Traynor, Mr. Garcia said the ordinance provided for a nine-month period before the ordinance became effective in order to give businesses an opportunity to create separately ventilated rooms. He said the nine months was more time than was necessary because only a few businesses opted to create the separately ventilated room.

Chairman Delmore called on Ms. Lori Brierley, Director, Tobacco Prevention, First District Health Unit, Minot, for testimony regarding the study. Ms. Brierley said while the Minot ordinance does not protect all workers, or even all restaurant workers, they are still exceptionally fortunate to have the ordinance. She said it is the only ordinance in place in the state that provides for worker protection from secondhand smoke. She said much of what has been learned in Minot can be applied across the state. She said a study conducted by Minot State University indicated that there is a 96 percent rate of compliance with the ordinance in Minot. She said a second Minot State University study evaluated the economic impact of the smoke-free ordinance on restaurant business in Minot. She said sales tax data from the five years before the implementation of the ordinance was compared to the sales tax data from the year following implementation. She said the study found no negative economic impact. She said she does not want any state laws passed that would compromise the Minot ordinance. She submitted written testimony and a copy of the summary of the studies conducted in Minot, copies of which are on file in the Legislative Council office.

Chairman Delmore called on Ms. June Herman, American Heart Association, for testimony regarding the study. Ms. Herman said smoke-free air laws have a strong, documented, positive impact on helping smokers quit and on preventing children and adolescents from ever starting. She said Philip Morris research found that prohibiting smoking in the workplace reduces consumption and increases quit rates. She said more than 32 percent of the country's population is now protected by a local or state 100 percent smoke-free indoor air law. She said smoke-free air is becoming a public health benchmark and expectation with economic development and tourism implications. She submitted written testimony, a copy of which is on file in the Legislative Council office.

Chairman Delmore called on Ms. Deborah Knuth, Director of Advocacy and Health Initiatives, American Cancer Society, for testimony regarding the study. Ms. Knuth said broad support exists for smoke-free policies. She said no one should have to choose between a job and good health. She submitted

written testimony, a copy of which is on file in the Legislative Council office.

At the request of the committee, committee counsel provided to the committee a copy of the Minot ordinance regarding the smoking of tobacco in restaurants and a copy of the New York law regulating smoking in public and in workplaces, copies of which are on file in the Legislative Council office.

Representative Carlisle said the committee could direct the Labor Commissioner to develop rules regarding smoking in the workplace.

Senator Lyson said there is proof that smoking can harm employees. He said it is the Legislative Assembly's responsibility to consider the issue. He said the statute is vague and the Legislative Assembly should take a stand on the issue.

Representative DeKrey said the state may experience a reduction in tobacco tax revenue because of reduced smoking.

**It was moved by Representative Niemeier, seconded by Representative Kretschmar, and carried on a voice vote that the Legislative Council staff be requested to prepare a bill draft to prohibit smoking in the workplace.**

At the request of Chairman Delmore, committee counsel presented to the committee a copy of 2003 House Bill No. 1408. The committee requested that the bill draft prepared for the committee be similar to the 2003 bill.

Representative Boehning said the committee should receive information regarding any tax revenue increases or decreases that were experienced in states that have banned workplace smoking, such as California and New York. He also said the committee should receive information from the Tax Department regarding the amount of revenue that is being collected from the state's tobacco taxes.

## **REPORT OF ATTORNEY GENERAL**

Chairman Delmore called on Attorney General Wayne Stenehjem for the presentation of a report on the current status and trends of unlawful drug use and abuse and drug control and enforcement efforts in the state. Mr. Stenehjem said 135 methamphetamine labs have been busted so far this year. He said this is about half the number at the same time last year. He said the focus of drug control and enforcement efforts has been on prevention. He said in legislation proposed for the next session, it is likely there will be requests for more treatment options. He said the state is not going to be able to afford enough prison beds for all drug offenders. He said there is a need to fund more treatment for first-time offenders. He said some of the ideas passed in the last session, such as limiting the number of packages of cold medication that can be sold to a customer, seem to be making a difference.

In response to a question from Representative Delmore, Mr. Stenehjem said alcohol abuse continues

to be a problem although there has been some improvement. He said college campuses are still a problem. He said campuses are working on educating their students on the dangers of binge drinking. He said intensive and immediate attention is needed in this area.

In response to a question from Representative Amerman, Mr. Stenehjem said most of the methamphetamine used in the state comes from out-of-state sources. He said the three additional drug agents that have been added over the last two legislative sessions have greatly helped drug enforcement efforts. He said the federal government has also added customs agents at the borders.

In response to a question from Senator Traynor, Mr. Stenehjem said there are concerns about the effect of combining marijuana and alcohol. He said this combination can suppress the body's urge to expel the alcohol from the body which can lead to alcohol poisoning.

A copy of the Attorney General's report is on file in the Legislative Council office.

No further business appearing, Chairman Delmore adjourned the meeting at 2:00 p.m.

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Vonette J. Richter  
Committee Counsel

ATTACH:1