

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M



| |
|-------------|
| ROLL NUMBER |
|-------------|

DESCRIPTION

2279

2001 SENATE JUDICIARY

SB 2279

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2279

Senate Judiciary Committee

Conference Committee

Hearing Date JANUARY 31ST, 2001

| Tape Number | Side A | Side B | Meter # |
|---------------------------|--------|--------|---------------|
| 1 | X | X | 51.6-END/31.5 |
| | | | |
| | | | |
| Committee Clerk Signature | | | |

Minutes: **Senator Traynor** opened the hearin on SB 2279: A BILL FOR AN ACT TO AMEND AND REENACT SUBSECTION 1 OF SECTION 28-32-08.1 AND SUBSECTION 4 OF SECTION 54-57-03 OF THE NORTH DAKOTA CENTURY CODE, RELATING TO THE QUALIFICATIONS OF HEARING OFFICERS AND ADMINISTRATIVE LAW JUDGES.

Senator Fischer, representing district 46 of Fargo. supports SB 2279. Asking deliberation over amendment. Discussed about expertise. Does believe we owe it to agencies that administer law judge has same expertise in what they are doing.

Senator Traynor, the long period of time that was agrivating.

Senator Fischer, yes the whole process went back and forth. When expert testimony is taken in court the person judging should too.

Senator Traynor, was lack of knowledge the problem?

Senator Fischer, partially.

Senator Traynor, case was then appealed to the district court?

Page 2

Senate Judiciary Committee

Bill/Resolution Number SB 2279

Hearing Date JANUARY 31ST, 2001

Senator Fischer, yes to district court then to the supreme court then back again.

Senator Dever, expertise, what about competence?

Senator Fischer, I don't have an objection to change expertise.

Senator Trenbeath, it's already in the law it can't get...

Tape 1 side B

Senator Nelson testifies in support of SB 2279. Believes people need to know what they are talking about and need to understand what they are judging. Sites example of piano.

Senator Trenbeath, I think your analogy is flawed. There are very few district judges that have expertise in medicine.

Senator Watne, on the fiscal note, it values the expertise of its judges.

Senator Traynor, as we know district courts, they are the trial courts. I don't know if they need experience.

Allen C. Hoberg, Director for Office of Administrative Hearings opposes SB 2279. (testimony attached)

Senator Lyson, I didn't understand your testimony.

Senator Traynor, what's your view of section 2 of the Bill. Wouldn't it do the same thing, if we didn't pass section 1, but passed section 2. Are you familiar with Senator Fischer's case?

Allen Holberg, it would be conflicting. Yes, I am familiar with Senator Fischer's case. It was a very long complex case. The factors of the case were also Federal.

Senator Traynor, did ruling in Federal case establish rules? What's the time interval between hearing and ruling?

Allen Holberg, to some extent it did. 30 days, but this is sometimes not possible.

Page 3

Senate Judiciary Committee

Bill/Resolution Number SB 2279

Hearing Date JANUARY 31ST, 2001

Bob Ruter, director of special education, shares the view of a satisfied customer. In special education we work with 13 district areas which require expertise. We feel the system is working.

We provide training for our people.

Alana Footjackson, public service commissison, monitoring bill. Supports Mr. Holbergs testimony.

Senator Traynor closed the hearing on SB 2279.

SENATOR NELSON MOTIONED TO DO NOT PASS, SECONDED BY SENATOR BERCIER. VOTED INDICATED 7 YEAS, 0 NAYS AND 0 ABSENT AND NOT VOTING.

FISCAL NOTE

Requested by Legislative Council
01/22/2001

Bill/Resolution No.: SB 2279

Amendment to:

1A. State fiscal effect: *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

| | 1999-2001 Biennium | | 2001-2003 Biennium | | 2003-2005 Biennium | |
|-----------------------|--------------------|-------------|--------------------|-------------|--------------------|-------------|
| | General Fund | Other Funds | General Fund | Other Funds | General Fund | Other Funds |
| Revenues | | | | \$27,242 | | \$13,671 |
| Expenditures | | \$13,671 | | \$13,671 | | \$13,671 |
| Appropriations | | \$13,671 | | \$13,671 | | \$13,671 |

1B. County, city, and school district fiscal effect: *Identify the fiscal effect on the appropriate political subdivision.*

| 1999-2001 Biennium | | | 2001-2003 Biennium | | | 2003-2005 Biennium | | |
|--------------------|--------|------------------|--------------------|--------|------------------|--------------------|--------|------------------|
| Counties | Cities | School Districts | Counties | Cities | School Districts | Counties | Cities | School Districts |
| | | | | | | | | |

2. Narrative: *Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.*

Although this bill is almost certain to have a fiscal impact on the Office of Administrative Hearings, and possibly on other agencies too, it is very difficult to quantify the amount of that fiscal impact for two reasons. First the interpretation of the word expertise is not known. If expertise in the subject matter of the proceeding can be gained by in-house types of training sessions, the fiscal impact may be rather light. However, if expertise means significant other training or education and/or significant experience in the subject matter of the proceeding, than the fiscal impact may be rather heavy. It may even require that additional hearing officers, whether full-time or temporary, be hired by OAH so that the required expertise is available to the agency, if such hearing officers with the requisite education and experience are available. When OAH is required to fill any vacancies in its full-time ALJ staff, or even in its Cadre of temporary ALJs, it may require substantial training to obtain the requisite expertise, because OAH conducts hearings for about 65 different agencies and several of them have more than one type of hearing (some have many different types of hearings, involving many different subject matters). OAH already engages in some cross training, but would have to undertake considerably more if additional in-house training were required before an ALJ could conduct an agency's hearing. If additional training besides in-house training were necessary, that would add to the burden.

Although OAH already values the expertise of its ALJs by attempting to assign the ALJ with portfolio experience in a particular type of hearing, because of the number of types of hearings, and the timing of agency requests, over which OAH has no control, that is not always possible. Therefore, again depending

on the type of expertise required, significant cross training may be required.

Because OAH bills agencies for all hearing officer services provided by its ALJs, based on the previous two years actual expenditures, OAH would have to absorb the costs this biennium, somehow (if this is just training requirements), even though it might be built in to OAH's budget. Then, the next biennium, OAH billing rates would be adjusted accordingly for the increased training expenses incurred. If the increase would result in OAH having to hire a new ALJ or to contract with some different temporary ALJs with the requisite expertise, then, OAH would have to build those costs into its budget and the billing rate would, again, be adjusted the next to years to reflect those additional costs.

The revenues and expenditure shown above do not include any increased costs for additional hiring of or contracting with either full-time or temporary ALJs in order to meet the expertise requirements of this bill. Again, it is difficult to determine whether the caseload would require additional full-time ALJs or just contracting with additional expert temporary ALJs depending on the timing and nature of the requests for services received from the 65 different agencies for which OAH conducts hearings. The revenues and expenditures above only show an estimate of what the cross-training costs of this bill may require, again, assuming additional cross-training meets the expertise requirements of this bill. The estimates do not show any increases for other types of training that may be necessary.

3. State fiscal effect detail: *For information shown under state fiscal effect in 1A, please:*

A. Revenues: *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

OAH bills all agencies for hearing officer services. It bill all agencies \$79.52/ hour for agency hearings conducted by full-time OAH ALJs. It bills the Workers Compensation Bureau \$95.00/hour for Bureau hearings conducted by OAH temporary, contract ALJs. OAH would not recover any of the costs of training to obtain the requisite expertise in the 2001-2003 biennium because its billing rate is determined based on the previous two years actual costs. The costs of additional training would not be incurred until 2001-2003. Those additional costs would be recovered by revenues in 2003-2005 (due to increased billing rates).

B. Expenditures: *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The expenditures of cross training necessary to meet the requirements of expertise for every hearing for every agency is just a estimate. Again, it is impossible to anticipate the timing and numbers of different types of hearings that an ALJ may not have the required expertise. However, for this fiscal note, OAH estimates that it may require that each of OAH's three full-time ALJs each receive 20 hours of additional cross-training. At \$79.52/ hour the cost is \$4771. The costs could be more, however. It is even more difficult to determine the additional training requirements for temporary ALJs. Again, it depends on the timing and the types of hearings requested and when full-time ALJs would not be available with the required expertise. It may require up to 10 hours of training each for about 10 different temporary ALJs. Assuming that they could be obtained using OAH's regular full-time rate, the cost would be \$7952. It would be \$9500 at a \$95/hour rate. The later figure is probably more accurate since that is the rate it currently costs OAH to obtain temporary ALJs for the Bureau. Again, the expenditures would be considerably more

if this bill resulted in OAH to train other than by in-house means, or if OAH had to hire additional full-time ALJs with the requisite education and experience, and to contract with temporary ALJs with the requisite education and experience.

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.*

As seen above, the estimate for additional appropriation for the 2001-2003 biennium, and for each succeeding biennium would be \$13,671 for requisite cross-training only, assuming that OAH's billing rate does not otherwise increase, too. Again, this fiscal note does not attempt to estimate the cost of other training or of additional full-time FTEs, if this bill would require the hiring of additional full-time ALJs or additional contracts with temporary ALJs with the requisite education and experience under a more strict interpretation of the word "expertise" in this bill.

| | | | |
|----------------------|-----------------|-----------------------|-----------------------------------|
| Name: | Allen C. Hoberg | Agency: | Office of Administrative Hearings |
| Phone Number: | 328-3260 | Date Prepared: | 01/22/2001 |

REPORT OF STANDING COMMITTEE (410)
January 31, 2001 4:25 p.m.

Module No: SR-17-2044
Carrier: Traynor
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2279: Judiciary Committee (Sen. Traynor, Chairman) recommends DO NOT PASS (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2279 was placed on the Eleventh order on the calendar.

2001 TESTIMONY

SB 2279



OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF NORTH DAKOTA
1707 North 9th Street
Bismarck, North Dakota 58501-1882

Allen C. Hoberg
Director

701-328-3260
FAX 701-328-3254

MEMORANDUM

TO: Fifty-seventh Legislative Assembly
State of North Dakota
Senate Judiciary Committee

FROM: Allen C. Hoberg, Director
Office of Administrative Hearings *ALA*

RE: Senate Bill No. 2279

DATE: January 31, 2001

I appear today in opposition to Senate Bill No. 2279, not because I disagree generally with the concept of an expert administrative hearing officer, but because of the effect this bill will have on OAH and the effect it may have on other agencies that are under OAH's jurisdiction and those that are not under OAH's jurisdiction.

First of all, I need to say that I believe that the most important criteria or qualification for an administrative law judge or a hearing officer is that he or she be independent, *i.e.*, that they not be in the employ of the agency for which they conduct hearings. This is the situation for all of OAH's permanent and temporary, contract ALJs. They work for OAH, not for the agency for which they conduct hearings.

Second, it is important to know that not all agencies are required to use the hearing officer services of OAH ALJs. However, a number of agencies voluntarily use OAH's hearing officer services.

Now, to address specifically the matter of expertise. It can be very important in an administrative hearing that the hearing officer be expert or become expert in the subject matter of the hearing. That is why, as director of OAH, I am required by law to "attempt to assign an administrative law judge having expertise in the subject matter to be dealt with." N.D.C.C. § 54-57-03(4). But, it is not always possible to assign the most expert ALJ or even one with very much, if any, expertise in the subject matter of the hearing.

In my opinion, subject matter expertise is the most important when conducting hearings for professional boards and commissions. The subject matter can be foreign and very complex. However, this is the reason the law, which is especially designed for boards and commissions, currently allows all agencies to request the designation of a hearing officer to conduct the hearing only (assuring that the hearing is conducted fairly), but allowing the agency head (most commonly professional boards or commissions) to issue the final decision (the

only decision) in the matter. There is no recommended decision issued in these types of cases. Thus, if the agency believes that expertise is so crucial and that only the agency will have it, the agency can request a procedural hearing officer and the agency head can issue the decision. See N.D.C.C. §§ 54-57-03(2) and 28-32-08.5(5). Again, this procedural hearing officer option can be used by any agency but is most commonly used by boards and commissions. However, the agency head must be present at the hearing to use this option. Although this option is available to all agencies, only a few boards and commissions use it; most agencies and boards choose instead to have the hearing officer issue a recommended decision.

Of course, currently the agency may also ask the ALJ to issue a recommended decision. Then, the agency head can review the ALJ's recommended decision and modify or reject it, as appropriate. By using this recommended decision/final decision format, agency expertise can be employed. However, even the agency head, the final decision maker (the person who issues the final decision after a hearing officer issues a recommended decision), may not be expert in the subject matter of a hearing, especially if he or she is new to a job.

Even if a hearing officer is not expert in the subject matter of a hearing, he or she can become expert. Judges in the court system are often not expert in the subject matter of a trial. However, the parties educate the decision maker by presenting facts and argument. Sometimes the decision maker must spend time educating himself or herself before or after the hearing, or both. Again, however, it seems more important to many people that the decision maker be independent or neutral, rather than expert. There are cases when the parties prefer to have someone who is not expert decide so that there is no possibility of prejudging the matter, *i.e.*, the decision maker does not subscribe to some particular "school of thought."

New hearing officers will be a problem for OAH and other agencies which have their own hearing officers if this bill passes. OAH is a small office. It infrequently hires new ALJs. Although all our current ALJs now have considerable expertise or experience in conducting a number of different types of hearings, a new ALJ OAH would hire might not have very much, if any, expertise in the subject matter of many of the types of hearings that OAH conducts for agencies. OAH conducts hearings for about 65 agencies and some of these agencies (*e.g.*, DHS, WCB) have many different types of hearings. Therefore, although OAH may hire someone with considerable trial experience or considerable experience

representing an agency in certain types of administrative hearings, or a hearing officer who has limited experience as an agency hearing officer, that person may not be expert in the subject matter of very many of the types of hearings that OAH conducts, that his or her predecessor ALJ conducted. It is often very difficult, if not impossible, for an ALJ to get this type of expertise except through conducting hearings. There are not very many, if any, courses, offered to get certain types of expertise. OAH would look for training for the ALJ, but some would be impossible to get. Hearing experience is the only way to get some of it. OAH may be forced to hire more temporary ALJs with the required expertise, if they can be found, so that it can cover all of the different 65 agencies with sufficient expertise. At the very least, OAH would have to spend considerable time cross-training with other expert ALJs so that the new ALJ would have the benefit of their expertise prior to the first hearing. Either way, this would certainly cost OAH money, which its client agencies would pay through an increased billing rate.

Prior to the existence of OAH, many small agencies and boards faced this same problem and they did not have any real answer for it. Some agencies contracted with attorneys in private practice who not only had no subject matter expertise, but who also had no experience conducting hearings.

Many small agencies and boards make very few requests to OAH to conduct hearings. In 1999, OAH got a hearing request from a small board under OAH jurisdiction (Peace Officers Standards and Training Board) from which it had never had a request before. There are probably other agencies that have never requested services from OAH because they have never had the need. There are many agencies, boards, and commissions that rarely use OAH services (e.g., Funeral Service Board, Seed Department, Water Well Contractors Board, Veterinary Medical Examiners Board, Aeronautics Commission, Secretary of State). Generally, there is no training available for ALJs in the subject matter of these hearings, except by conducting the hearings for those agencies. At any given time, it may be that OAH has no one on staff that has ever conducted a hearing for a certain agency. In that situation there is not even anyone available to cross-train others in the office.

OAH is authorized to contract with temporary administrative law judges to conduct hearings when a permanent full-time OAH ALJ is not available. See N.D.C.C. § 54-57-02. The premise of this law is that if OAH gets too busy, or OAH ALJs have a conflict of interest, OAH can get help elsewhere. OAH contracts with attorneys in the private practice of law to get temporary

**Fifty-seventh Legislative Assembly
State of North Dakota
Senate Judiciary Committee
January 31, 2001
Page 7**

assistance. One of our temps is a former OAH full-time ALJ, one temp had some prior hearings experience, but most, prior to conducting their first hearing, have had no prior hearings experience either as a hearing officer or representing agencies in hearings. Most have had trial experience in the courts, however. It would be extremely difficult to get temporary ALJs with expertise in the subject matter of a hearing. OAH may only hire or contract with attorneys.

The one agency for which OAH primarily uses temporary ALJs to conduct its hearings is the Workers Compensation Bureau. Beginning in September 1995, the Bureau asked OAH to conduct all of its hearings. Although OAH full-time ALJs take some of these hearings and some of the full-time ALJs had some experience conducting Bureau hearings previously, the bulk of these hearings had to be conducted by temporary, contract ALJs (attorneys in private practice). The Bureau prefers that OAH use temporary, contract ALJs. When OAH started contracting with these attorneys, very few of the attorneys had any experience as attorneys in workers compensation cases. In fact, the Bureau preferred that they not have experience representing workers compensation employers or claimants. Over time, as OAH held in-house training sessions for the temps and as they did more hearings, the temps became expert in the subject matter as well as expert

in conducting hearings. It would, of course, be difficult for OAH to replace these temps with new expert, temporary ALJs.

Then, there is the problem of what exactly is subject matter expertise. Does expertise mean that the ALJ has previously conducted one hearing in that subject matter area (or two or twenty hearings), *i.e.*, experience? Does it mean that the ALJ has working knowledge of a subject matter area gained from education or other experience? Does it mean that OAH has to send an ALJ to some specific type of training in the subject matter of the hearing? Does it mean cross-training by OAH ALJs with expertise or experience is sufficient? OAH has worked with and will work with any agency to train ALJs in the subject matter of various types of hearings. The Department of Public Instruction, the Department of Human Services, and the Workers Compensation Bureau are just three examples of this cooperative effort. In-house, in-state, and out-of-state training have been cooperatively provided to our full-time and temporary ALJs to help them in the expertise of a subject matter, and OAH is willing to do that with any agency. But, again, a person of expertise may not always be available for a particular type of hearing at a particular time.

Finally, as I mentioned, some agencies that are not required to use OAH ALJs do use OAH ALJs as their hearing officers (some voluntarily use OAH frequently, some only occasionally). They use OAH not because of the ALJ's expertise in the subject matter, but because they want or need an independent hearing officer for a particular hearing (their hearing officers may have a conflict; the hearing may involve a particularly thorny issue of law that they want an OAH ALJ to deal with; the hearing might otherwise be delicate for the agency – it may even involve a legislator). Of course, the more OAH ALJs do hearings for voluntary user agencies, the more expert they become. But, I know that at least some of these agencies would have a concern if I told them that there is no one with expertise in the subject matter of the hearing available to conduct their hearing. They do not necessarily want or need expertise in the subject matter for that request. They want an independent hearing officer, or they just need someone to conduct a hearing when their agency hearing officers have conflicts. It may be helpful to have someone with expertise in the subject matter, but it is not always necessary or desired. Agencies outside OAH jurisdiction may also have trouble at times finding someone with expertise in the subject matter of the agency's hearings, especially when they hire someone new.

Fifty-seventh Legislative Assembly
State of North Dakota
Senate Judiciary Committee
January 31, 2001
Page 10

In summary, this bill would cause considerable problems for OAH. The current law is adequate. I take very seriously the statutory charge to assign someone with expertise if possible, but it is not always possible. Not only would this bill cause problems for OAH, but it would likely cause problems for a number of agencies that either have to or want to use OAH, notwithstanding that the ALJ may not have expertise. It would also likely cause problems for other agencies outside OAH jurisdiction, at least with trying to find a new hearing officer with expertise. Thus, I appear in opposition to this bill and urge a do not pass on Senate Bill No. 2279.

fz