

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2261

2007 SENATE JUDICIARY

SB 2261

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2261**

Senate **Judiciary Committee**

Check here for Conference Committee

Hearing Date: January 23, 2007

Recorder Job Number: 1806

Committee Clerk Signature

Minutes: Relating to registration of sexual offenders, computerized sexual registration sites.

Senator David Nething, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following testimony:

Testimony In Support of Bill:

Sen. Olafson introduced the bill.

Robert Bennett, Assistant Attorney General (made 1:00) Reviewed Bill – Att. #1. Stated that out of 119 complaints they have had 6 Administrative hearings. Discussed Sec. 2 of bill, page 2, line 20 and 21, “shall” vs. “may” (meter 12:00). This is consistent with the current practice.

Sen. Nething (meter 13:45) discussed the cost of the hearing being assed back to the licensee if they loose. Mr. Bennett reviewed case history, fees and travel arrangements.

Sen. Fiebiger (meter 21:20) discussed how in litigation court they give refer the costs to the unsuccessful party. Can the other side recoup if the state looses? No. Discussion of how they process a claim.

Testimony in Opposition of the Bill: None

Testimony Neutral to the Bill: None

Senator David Nething, Chairman closed the hearing.

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2261**

Senate Judiciary Committee

Check here for Conference Committee

Hearing Date: January 24, 2007

Recorder Job Number: 1842

Committee Clerk Signature

Mona L. Solby

Minutes:

Senator David Nething, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

Sen. Olafson made the motion to Do Pass

Sen. Lyson stated his complaints on the administrative hearing process charger to large a fee for there services and did not think this was right (meter 6:50)

Discussion that they only would charge the fee if they were pretty sure they would win. If they are so sure they would win why have a hearing at all?

Sen. Lyson stated that the other side wants a hearing but can not afford to have them.

In the Civil process the side that losses pays. Why are we making this only one sided? The committee requested that an amendment be made to reflect the costs

Senator David Nething, Chairman closed the hearing.

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. **SB 2261**

Senate **Judiciary Committee**

Check here for Conference Committee

Hearing Date: February 6, 2007

Recorder Job Number: 3049

Committee Clerk Signature

Mona L Solberg

Minutes: Relating to costs of investigation, prosecution and hearing.

Senator David Nething, Chairman called the Judiciary committee to order. All Senators were present. The hearing opened with the following committee work:

Sen. Olafson gave the committee a copy of an amendment – Att. #1 The committee reviewed and discussed the amendments.

Senator David Nething, Chairman closed the hearing.

Sen. Olafson made the motion to Do Pass Amendment – Att. #1 from today and **Sen. Lyson** seconded the motion. All members were in favor and the motion passes.

Sen. Olafson made the motion to Do Pass SB 2261 as amended and **Sen. Lyson** seconded the motion. All members were in favor and the motion passes.

Carrier: **Sen. Olafson**

Senator David Nething, Chairman closed the hearing.

FISCAL NOTE

Requested by Legislative Council

02/09/2007

Amendment to: SB 2261

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.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

2005-2007 Biennium			2007-2009 Biennium			2009-2011 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill assesses the costs of adjudicative proceedings to the licensed retailer in violation of sale of alcoholic beverages statute (NDCC Chapter 5-02) or if no violation is found, to the Attorney General or local governing body as appropriate.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

The fiscal impact of this bill is unknown.

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.*

The fiscal impact of this bill is unknown.

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 fiscal impact of this bill is unknown.

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The fiscal impact of this bill is unknown.

Name:	Kathy Roll / Bob Bennett	Agency:	Office of Attorney General
Phone Number:	328-3622	Date Prepared:	02/12/2007

FISCAL NOTE
Requested by Legislative Council
01/17/2007

Bill/Resolution No.: SB 2261

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.*

	2005-2007 Biennium		2007-2009 Biennium		2009-2011 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

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

2005-2007 Biennium			2007-2009 Biennium			2009-2011 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

2A. Bill and fiscal impact summary: *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill assesses the costs of adjudicative proceedings to the licensed retailer in violation of sale of alcoholic beverages statute (NDCC Chapter 5-02).

B. Fiscal impact sections: *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

The fiscal impact of this bill is less than \$5,000.

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.*

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 fiscal impact of this bill is less than \$5,000.

C. Appropriations: *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The fiscal impact of this bill is less than \$5,000.

Name:	Kathy Roll	Agency:	Office of Attorney General
Phone Number:	328-3622	Date Prepared:	01/19/2007

Date: 2-7-07

Roll Call Vote # 1

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2264

Senate _____ Judiciary _____ Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass Amendment - Att #1

Motion Made By Sen Olafson Seconded By Sen. Lyson

Senators	Yes	No	Senators	Yes	No
Sen. Nething	/		Sen. Fiebiger	/	
Sen. Lyson			Sen. Marcellais		
Sen. Olafson			Sen. Nelson		

Total Yes 6 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 2-7-07

Roll Call Vote # 2

2007 SENATE STANDING COMMITTEE ROLL CALL VOTES

BILL/RESOLUTION NO. 2261

Senate _____ Judiciary _____ Committee _____

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Pass As Amended

Motion Made By Sen. Olafson Seconded By Sen. Lyson

Senators	Yes	No	Senators	Yes	No
Sen. Nething	✓		Sen. Fiebiger	✓	
Sen. Lyson	✓		Sen. Marcellais	✓	
Sen. Olafson	✓		Sen. Nelson	✓	

Total Yes 6 No 0

Absent 0

Floor Assignment Sen. Olafson

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2261: Judiciary Committee (Sen. Nething, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2261 was placed on the Sixth order on the calendar.

Page 1, line 2, after "prosecution" insert "or defense"

Page 1, line 9, replace "The" with "If an adjudicative proceeding results in a finding of violation of this title, the"

Page 1, line 10, remove "found as a result of an adjudicative proceeding to be in"

Page 1, line 11, remove "violation of this title" and after the underscored period insert "If an adjudicative proceeding results in a finding of no violation of this title, the licensed retailer is entitled to costs of the case from the local governing body or the attorney general, as is appropriate."

Page 1, line 13, replace "local governing body or the attorney general" with "party" and replace "their" with "the party's"

Page 1, line 14, after "prosecution" insert "or defense"

Page 1, line 16, replace "of a violation of this title but" with "in a hearing under section 5-02-10 and"

Page 1, line 18, after "license" insert "if that is the case" and replace "local governing body or the attorney general" with "party entitled to costs of the case"

Page 1, line 19, replace "licensed retailer" with "other party"

Page 1, line 20, replace "licensed retailer" with "other party"

Page 1, line 21, replace "licensed retailer" with "other party" and replace "local governing body or the" with "party seeking costs of the case"

Page 1, line 22, remove "attorney general"

Page 1, line 24, replace "licensed retailer" with "other party"

Page 2, line 1, replace "local governing" with "party seeking costs of the case is entitled to the lowest amount of each cost as determined by each party. The party seeking costs of the case may seek disputed costs through a civil action in district court."

Page 2, remove line 2

Page 2, line 3, remove "suspending, revoking, or otherwise taking adverse action against the"

Page 2, remove line 4

Page 2, line 5, remove "general" and remove "that"

Page 2, line 6, replace "licensed retailer pay the" with "payment of" and after "case" insert ". If the costs of the case are to be paid by the licensed retailer, the hearing official shall require payment"

Page 2, line 17, overstrike "specifically setting forth such" and insert immediately thereafter "of facts constituting the"

Page 2, line 18, overstrike "such" and insert immediately thereafter "the"

Page 2, line 19, overstrike "such" and insert immediately thereafter "the"

Page 2, line 20, overstrike "any such" and insert immediately thereafter "the"

Page 2, line 25, overstrike the first "such" and insert immediately thereafter "the", overstrike "A" and insert immediately thereafter "The person holding the hearing shall", and overstrike "of such hearings will be made" and insert immediately thereafter "the hearing"

Renumber accordingly

2007 HOUSE JUDICIARY

SB 2261

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2261

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/6/07

Recorder Job Number: 4455

Committee Clerk Signature

A. Penrose

Minutes:

Chairman DeKrey: We will open the hearing on SB 2261.

Bob Bennett, Assistant AG: (see attached testimony).

Rep. Koppelman: The bottom line is that you want to collect costs.

Bob Bennett: We want the opportunity like other agencies, in cases we can assess certain costs.

Rep. Koppelman: Why isn't there a fiscal note, positive or otherwise.

Bob Bennett: The fiscal note impact is very minimal, less than \$5,000.

Rep. Koppelman: Why is this really necessary, if since 1999, you've only had six went to hearing. This is not a very frequent thing. Why is it that big a deal.

Bob Bennett: The reason is that we would like to have the opportunity to do it in those cases where it is a big deal. It comes straight out of our licensing budget for these types of hearings. Which is a cost we've incurred in the past in these types of cases. We want to have the ability, to say if we're going to have a hearing, we're not going to deprive anyone from having a hearing, we're going to make sure that we are going to have a legitimate hearing. We don't want to have this thing be a situation, especially when we go to the county where the licensee is located, so they don't have to drive to Bismarck. It is a big deal when we get billed for

administrative hearing for \$1200 and the most we ever collect in a state license is \$250.00. All we're asking for is a pocket for pocket reimbursement to get what comes out of our budget; because the AG's office and the Criminal Regulatory Division, License Division, it comes out of their allotment to pay for these things, and I can tell you from personal experience, sometimes you get a little angry, when you know you are giving people the due process rights, but they are sitting there with a big grin on their face, and knowing it is costing us money and they are in no hurry. It costs \$95.25/hr. for the time we start the process to the end. It is expensive. In cases such as these, we want to have our expenses reimbursed. We want the option to be able to do this.

Rep. Koppelman: That sounds reasonable, but I guess my concern/question is from an appropriation standpoint, there are cases in state government where it becomes like a shell game. The best example is ITD, we fund as a state, through their budget, the staff and so on at ITD, but if you look at the number of dollars that flow through that department in a given biennium, it's many, many times what the appropriation is. The reason is because when you need computer services in the AG's office, you have a one stop shop, you can't shop around. They send you a bill, and they can bill you whatever they want and you can't quibble. You pay it. This sounds like the same thing. If you need their services and you don't have an option to go somewhere else, they charge you and you have to pay for it. That's as it is. This bill, essentially increases your appropriation, but not by much, and the source of that extra dollars, is a user fee for the people that need it, and maybe that's appropriate. Why doesn't it show up on the bottom line, or maybe there isn't any way to quantify it.

Bob Bennett: That's the problem with having a fiscal note, we know what the process costs us, but we don't know how many cases will go to hearing. One of the cases wasn't done to contest the complaint, it was done to make a statement. When we collect a yearly fee of \$200,

and we spent \$1200 for the case, and it doesn't include the my time and other staff in order to do this. We don't do these things because of how much it costs, we resolve them in the way we think it should be done. If it increases the appropriation, I guess that's what a continuing appropriation does, but it's contingent upon those cases where we have a hearing and the AG may not use this. Other agencies have broader policies, if you go before a Board, you get your fees paid in those types of cases.

Rep. Klemin: What are the costs of the case. I've not seen that term used before. Is that used anyplace else.

Bob Bennett: The costs of the case...

Rep. Klemin: I don't need you to explain it again, I just need to know what they are...

Bob Bennett: This came as a result of the Senate amendment. We had some proposed amendments. I'm trying to find how much money or what the money was going to be and we could have had costs of an adjudicative hearing or things like that, but it came out as costs of the case. I think there is some effort to equate it to a civil cost, which you really can't do in administrative proceedings. We determined that costs of the case is the best way to determine if this is going to be repetitive. We divided the out of pocket costs not including attorney fees. That is the reason we have a very elaborate notice and objection process to say here's our costs of the case that we have on it, and that's the best we can do.

Rep. Klemin: In other words, I am very familiar with costs, obviously, but costs of the case is a new term. Let me ask you about some of the costs of the case, you said it covers the ALJ's expenses or fee that is charged is \$95/hr.

Bob Bennett: That would be the bill that we would get for them for handling the matter of the liquor license.

Rep. Klemin: Court reporter fees included?

Bob Bennett: We don't have court reporter fees, it is just recorded on tape, which is provided by the AG. Any costs of that would be part of the ALJ process; the auditory and exhibits and tape are provided by the AG.

Rep. Klemin: So the party here is going to pay for the cost of the judge, hotels, meals, mileage.

Bob Bennett: No, as far as the AG, that's one of the discussions. Our costs for travel, we go in a state car, and may involve one night, depending on where it is, so it might include the per diem for the state employee whoever might go, I'm talking about the AG, but...

Rep. Klemin: So the costs of the case would include the per diem...

Bob Bennett: Possibly, yes. Per diem for witnesses, yes. We're talking about subpoenaing witnesses, which sometimes we do. We have a city police officer subpoenaed on duty generally we don't have costs, but quite often we have other individuals who are off duty, or individuals helping us, there may be a witness fee of \$25, mileage, per diem to have the individuals come. As far as the office of AG, on the outside I'm going to say it's going to cover motel and per diem, if in fact the AG wants to assess that because of the hearing, possibly for the AAG, as far as the ALJ, that is part of the cost of the proceeding for the ALJ, the mileage, room, per diem, that is going to be assessed as part of the ALJ bill.

Rep. Klemin: What about legal assistant time, not attorney time but legal assistant. Are you going to be charging their salary.

Bob Bennett: That's not addressed.

Rep. Klemin: What does that mean.

Bob Bennett: Not addressed in this bill, it's not to include attorney fees. You are talking about what is going to be assessed against the licensee from the state. The reasonable out of pocket costs, we don't have out of pocket costs for our legal assistants in our office. We don't

have out of pocket costs for our licensing, because we have to allocate how much time is spent. I'm talking if we have to pay out, which might be the state car and might be per diem, and motel; as far as the licensee, if you are looking at what are the costs of the case for the licensee, then we may have a situation to say, well is the licensee entitled to, not attorney fees, but for a legal assistant. That would assume that we are in a position where the licensee would be entitled to the costs of the case. In our office, we are talking about reasonable out of pocket costs, this is one issue that came up from the Senate saying is it going to cover your costs Bob, if you go.

Rep. Klemin: I don't see that part. How about secretarial fees, is that in here.

Bob Bennett: If the state, we would not have out of pocket costs for secretarial.

Rep. Klemin: How about copies and postage.

Bob Bennett: That is part of the regular cost of doing business. We're not going to assess the cost of sending a complaint, we do not serve the complaint, so we wouldn't have service fees, most we would have is postage, through our general budget. This is not extraordinary out of pocket costs.

Rep. Klemin: Usually in a civil case, you can't get postage, unless it's required under certified mail for example. The investigation costs, are you going to have a private investigator fees?

Bob Bennett: That was not discussed, this was an amendment that came in after committee, I don't know if that was ever discussed, it was not discussed at the main hearing. As far as investigation costs, I can't tell you what they might be. I can tell you that the AG's office has no investigative costs.

Rep. Klemin: I know in a civil case, we have a statute on costs and disbursements, are well defined and court cases saying what is recoverable and what isn't. This is pretty undefined

and wide open. I don't know what it might entail. I understood you to say, really you wanted to get your witness fees and expenses, of course, I can see in the statute here that witnesses are entitled to be paid witness fees and expenses and those are recoverable in a civil case routinely. Was that your main thing that you wanted to recover here, was the ALJ and witness fees.

Bob Bennett: That's basically what it is, what it's going to cost for our out of pocket. The other language here relating to the Senate talking about if the State can get it, why can't the other people get it. They aren't going to have administrative law judge fees if they are successful, what other costs are they going to have. This basically came out as costs of the case, and that's why I'm saying, we are able to determine what our out of pocket costs in our office is, but when we're looking at the out of pocket costs are going to be for the licensee, who may be successful, who says that the AG never should have brought the complaint and the hearing. That's correct.

Rep. Klemin: That part would consist of witness fees and expenses, just like the AG has.

Bob Bennett: Correct.

Rep. Klemin: We're really only talking about the ALJ's fees and witness fees, if it would be more appropriate to narrow it down to that, rather than having something wide open like the costs of the case, which is hard to determine. Not well defined in here, because it seems to include everything other than attorney's fees, but yet you told me maybe and maybe not. I'm wondering if you would have a problem narrowing this down to what you really expect to try and recover.

Bob Bennett: No, I wouldn't have a problem, one of the issues that we had when we looked at all the other statutes, we saw costs of administrative hearings, some of them specifically talked about staff time looking for things. That's not really an out of pocket costs, that's a

current cost. We're looking as out of pocket occurs, what did you have to pay out of your pocket because of this hearing.

Rep. Klemin: I don't have too much of a concern about the AG being fairly specific about this, but this also would include the city attorney, who might be doing a local case, also as I understood it, the local governing body would then be entitled to recover the costs of the case, I don't know if anyone is here from a local governing body who could tell us what they think that means. Is that correct, a local governing body could recover costs of the case too.

Bob Bennett: Yes, 12-63-16, in the post board statute, uses the word costs of the case, and that may have been how it came in through the Senate side, but that also included reasonable attorney fees that were incurred, which is much broader than what we have here. We see costs of administrative actions, here they are looking at only the costs of the hearing and not the costs prior to the administrative action. We're looking that would be incurred after.

Rep. Klemin: With respect to the cities, are we giving them a blank check to assess costs of the case to the local retailer for whatever they determine is appropriate, because they can do that, as I understand this, and the other part has to accept it.

Bob Bennett: I don't think it gives them a blank check. They would still be subject to the ordinance and requirements that they have to go through for the procedure, wherever the procedure is going to be by ordinance. I don't know how many hearings the local agencies have, they may resolve them without ever having a hearing. I don't know how many formal hearings they have on licenses.

Rep. Klemin: What if they send in someone under 21 years of age in a sting operation to see if they are able to purchase alcohol in an establishment and they have cops outside waiting, is that all part of the costs of the investigation.

Bob Bennett: I can't tell you if that's a cost of the investigation, as far as costs of the case, because there isn't a case yet.

Rep. Klemin: But it's the conduct of the investigation it says.

Bob Bennett: Right, but we're talking about the out of pocket costs of the case.

Rep. Klemin: I would like to ask some questions about subsection 2, on the delivery and mailing. On line 21, the costs of the case shall be mailed to the other party by registered mail, in the list of costs. Actually, this is after we've had a hearing and a finding made, now we have this procedure for mailing by registered mail. In a civil case, you wouldn't mail something by registered mail, it could be served on the other party by mail.

Bob Bennett: This was also the addition by the Senate, to make sure that everyone knew what the costs were being asked for, because this is also keyed by the Senate amendments here to the lowest costs claimed, to make sure that there are no questions of cost. Because this does have some type of importance due to the fact that people are not going to be licensed until the costs are paid to make sure that they actually know what the costs are. If we are looking at service of the cost, we do have situations where individuals have not come in to hearing with other boards. By using registered mail, I think is appropriate, due to the fact that we want to make sure that they know what the costs are, because this will keep the individual from being relicensed or having it revoked, if in fact, the costs aren't paid to make sure there isn't a question about it. Plus it provides the basis in the statute that if there are any disputed costs that would provide an action for the court to show that they gave them the opportunity to do so. Just proof of service.

Rep. Klemin: So if the local retailer wins, and is entitled to his costs of the case, then he is to mail the costs by registered mail to the AG.

Bob Bennett: Yes.

Rep. Klemin: Why doesn't it say certified mail. I know we have this other statute, hidden away someplace that says registered and certified mail.

Bob Bennett: In Title One I believe.

Rep. Klemin: But, when the ordinary person looking at this goes to the post office and says I need something by registered mail, the post office is going to sell the registered mail, not going to sell the certified mail. So why don't we say certified mail.

Bob Bennett: That was the word put in by the Senate as well.

Rep. Klemin: On line 23, the other party has to deliver his objections. Why can't he mail his objections. Why does he have to deliver them.

Bob Bennett: He can certainly mail it, mail is delivery.

Rep. Klemin: On line 21, it says mail and on line 23, it says deliver. Your interpretation of that is that they mail it, do they have to mail it by certified mail or registered mail.

Bob Bennett: No, they may deliver it, if they want to. That's the objection to the costs, that isn't the one that is going to be assessing. The AG will be assessing these costs, this is what we are going to assess. The AG should also know what it is going to be, if in fact we have an objection, we want to make sure that they can get the objection to us, by whatever means of delivery, by hand or by mail. The key is the actual assessment, that's the starting point here that we're looking at here. It's no different than serving the order on the individual, we want to make sure that they got the order, and if they don't have the order, we would make sure that the order is in their hands.

Rep. Kretschmar: Of the 119 incidents, how many were found not guilty or not penalized.

Bob Bennett: None, we had 6 hearings, they were all found to have violated and penalties imposed. The other 113 had agreements that they had violated and issued the order, it could

have been a first or second violation in those types of cases. Either they admitted that to the order, or after hearing, they were found to have violated it.

Rep. Kretschmar: You don't include attorney's fees in the costs of the case, from the licensee's standpoint, it seems to me that reasonable attorney fees should be included. If you win a case, that pays the attorney.

Bob Bennett: That was one of the issues that came up. To make it fair to all, it was decided that no one would get attorney fees. We just want to get the out of pocket costs. During the process in the Senate Judiciary committee and the civil proceedings where it became engrossed SB 2261, I think we want to make it fair. We want to put everyone on the same plain, the AG's office, the local governing body, which also might have contract or city attorneys, on the same plain with the licensee. We're not going to be giving attorney fees to the licensee, we're not going to give them to the city attorney or to the AG. That was the reason behind the no attorney fees. When you have governing bodies that are engaged in this licensing process, the attorneys paid by the taxpayers quite often that may be a cost of doing business.

Rep. Kretschmar: It seems to me that from the licensee standpoint, that this could be a club used by the AG, to say if you go to hearing and lose, it's going to cost you \$1200. Then they might say that I'd just as soon as be closed for a couple of days.

Rep. Meyer: How many violations were as a result of a sting operation, where they send in minors into the bars.

Bob Bennett: I can't give you a percentage. I can tell you that if it were in Grand Forks or Jamestown, it probably was a sting operation, but probably not 100% of them. We've had them in other places as well. Very few of them were as a result of somebody saying we picked up a person, found a slip who said he bought it at a liquor store. Officers also might see

someone in a bar being served that is under 21. It's an enforcement effort, I can't give you a percentage, but I would say that depending on the community, many of them may be by sting, or by general card checks.

Rep. Meyer: So the sting operations are a result of the local law enforcement, they are never generated by the AG's office.

Bob Bennett: Not the AG's office, we don't send BCI agents out to do this. We just respond to what we get. Sometimes we will learn that there has been a sting operation in Fargo, but we never see an affidavit or complaint because they handle it themselves. They send warnings, they have training programs, etc.

Rep. Griffin: Are costs assessed for other Boards or agencies.

Bob Bennett: In testimony it lists the other administrative Boards and agencies that can do it, including attorney fees, yes.

Rep. Griffin: State agencies?

Bob Bennett: I don't know. I looked at other boards and commissions that perform licensing functions. I don't know if PSC does.

Rep. Klemin: There are provisions in the administrative agencies practices act in section 28-32-26 which allows costs of investigation to be assessed against the person found to be in violation of the statute or rule. It says in here, that for purposes of this section, costs are reasonable out of pocket agency costs, not including attorney fees, actually incurred in conducting the investigation in which he is assessed. So this statute that allows any administrative agency in an adjudicative proceeding to recover costs.

Rep. Wolf: Can they have a local proceeding or a state proceeding. Can they do both?

Bob Bennett: If it is going to be related to the license, we would only get involved when we get an affidavit, and I only know of that happening once, whether it's been an action taken by

the local governing body, off-sale, when the people weren't happy with what happened there, so they sent a complaint to us saying please do something, the state license fee would have been less than the local, so we did not proceed. But we could proceed independent of the local license board. Quite often the local agencies will be in a better position to know what the circumstances are, so we don't get involved.

Rep. Klemin: In adjudicative proceedings, the AG is an administrative agency under 28-32.

Bob Bennett: Yes, that's the reason we use the Administrative Law Judge, we are required to either have the AG or ALJ.

Chairman DeKrey: Thank you. Further testimony in support. Testimony in opposition or neutral. We will close the hearing.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2261

House Judiciary Committee

Check here for Conference Committee

Hearing Date: 3/7/07

Recorder Job Number: 4580

Committee Clerk Signature *D. Penrose*

Minutes:

Chairman DeKrey: We will take a look at SB 2261. What are the committee's wishes.

Rep. Klemin: I move a Do Not Pass.

Rep. Kretschmar: Second.

14 YES 0 NO 0 ABSENT

DO NOT PASS

CARRIER: Rep. Kretschmar

Date: 3/7/07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2261

House JUDICIARY Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Rep. Klemin Seconded By Rep. Kretschmar

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Griffin	✓	
Rep. Boehning	✓		Rep. Meyer	✓	
Rep. Charging	✓		Rep. Onstad	✓	
Rep. Dahl	✓		Rep. Wolf	✓	
Rep. Heller	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Kretschmar

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
March 7, 2007 3:42 p.m.

Module No: HR-43-4673
Carrier: Kretschmar
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2261, as engrossed: Judiciary Committee (Rep. DeKrey, Chairman) recommends DO NOT PASS (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2261 was placed on the Fourteenth order on the calendar.

2007 TESTIMONY

SB 2261

PROPOSED AMENDMENTS TO SENATE BILL NO. 2261

Page 1, replace lines 9 through 15 with:

"1. a. If, after a hearing conducted pursuant to section 5-02-10, the attorney general or the local governing body finds that the record supports the violation charged, the attorney general or the local governing body may be awarded the actual costs of the hearing incurred by the attorney general or the local governing body, such costs being the actual costs incurred for the services of the Office of Administrative Hearings and for witness fees, per diem, and mileage in the same amount as received by a witness in a civil case in district court.

b. If, after hearing conducted pursuant to section 5-02-10, the attorney general or the local governing body finds that the record does not support the violation charged and the complaint or action is dismissed, the attorney general or the local governing body may award to the licensee the actual costs of the hearing incurred by the licensee, such costs being the actual cost for witness fees, per diem, and mileage in the same amount as received by a witness in a civil case in district court.

c. The "actual costs of the hearing" do not include attorney fees incurred by the attorney general, the local governing body, or the licensee."

Page 1, line 19, after the second "the" insert "actual"

Page 1, line 20, replace "case" with "hearing"

Page 2, line 6, after "assessed" insert "actual" and replace "case" with "hearing"

Page 2, line 12, after the second "the" insert "actual" and replace "case" with "hearing"

Renumber accordingly

AH #1
1-23-07

TESTIMONY OF
ROBERT BENNETT, ASSISTANT ATTORNEY GENERAL,
REGARDING SENATE BILL NO. 2261

Mr. Chairman and members of the Senate Judiciary Committee, I am Robert Bennett, assistant attorney general, appearing in favor of adoption of Senate Bill No. 2261.

Senate Bill No. 2261 allows a local governing body or the Attorney General to obtain reimbursement of some costs of administrative license proceedings against an alcoholic beverage licensee found to have violated the alcoholic beverage laws of the State of North Dakota.

Two retail alcoholic beverage licenses are required before a person may engage in the retail sale of alcoholic beverages in this state. These licenses consist of a "local" license issued by the local governing body, and a "state" license issued by the Attorney General. A "local governing body" is the governing entity of a city, a county, or a federally recognized Indian tribe in this state.

N.D.C.C. § 5-02-10 authorizes a proceeding to be commenced against a retail alcoholic beverage licensee for violation of the state alcoholic beverage laws. This proceeding is initiated by an affidavit upon which the local governing body or the Attorney General may issue a complaint to suspend, revoke, or take other action against a retail alcoholic beverage license.

An administrative license proceeding by the local governing body would concern the local license issued by that governing body. Any action pursued by the Attorney General would relate to the state, and not the local, license.

Tonight, I will be discussing the procedures that have been followed by the Attorney General regarding the suspension or revocation of a state retail alcoholic beverage license.

The Attorney General may receive an affidavit, with attached investigation reports, from a city or county attorney setting forth a violation of the state alcoholic beverage laws by a current holder of a state retail alcoholic beverage license. Once the affidavit has been received, it will be reviewed to determine whether it meets the requirements of law and supports an administrative action against the license.

An administrative complaint will then be prepared and served upon the licensee. A proposed order and a waiver of hearing is also served with the administrative complaint providing the licensee with notice that if a hearing as provided in N.D.C.C. § 5-02-10 is waived, the Attorney General will impose the suspension or revocation of the state retail alcoholic beverage license as specifically described in the proposed order.

If the state licensee agrees to the provisions of the proposed order, the licensee will then return a signed waiver of hearing with an agreement that the proposed order may be entered. Upon receipt of the hearing waiver, the Attorney General, or the Deputy Attorney General, will issue the order.

If the licensee does not waive a hearing on the complaint, the licensee will provide an answer to the complaint and a hearing will be scheduled before an administrative law judge in the county in which the licensee is licensed to do business.

The administrative law judge, an assistant attorney general, and any witnesses necessary to establish the violation set forth in the administrative complaint will appear at

the hearing. The licensee and the licensee's legal counsel may also appear, call witnesses, and present evidence to oppose the complaint.

After the hearing, the administrative law judge will then make a written recommendation to the Attorney General regarding an order to be entered. The hearing exhibits and an audiotape of the testimony will be submitted to the Attorney General for the Attorney General's review prior to issuance of an order. The Attorney General issues the final order.

The administrative law judge presides at the administrative hearing at a cost to the Attorney General. The Attorney General must pay an hourly rate for the services of the Office of Administrative Hearings from the initial request for hearing until the recommended order is submitted to the Attorney General. That rate is now \$95.25 per hour.

The Office of Administrative Hearings costs, depending upon the location of the hearing, may be in excess of \$1000 for a single hearing.

Senate Bill No. 2261 allows a local governing body or the Attorney General to receive reimbursement for some of the costs incurred in holding an administrative hearing conducted pursuant to N.D.C.C. § 5-02-10 if the licensee has been found to have violated the state alcoholic beverage laws. These costs would include witness fees and expenses and the cost incurred by participation of the Office of Administrative Hearings, but the expenses would not include attorney fees.

In the case of proceedings conducted by the Attorney General, the assessment of out-of-pockets costs would not be automatic. However, this would be a five step process:

1. The Attorney General would determine if, and what, out-of-pocket costs will be assessed against the licensee;
2. An itemized list of the costs will be provided to the licensee before assessment;
3. The licensee may object to the assessment of the costs, in whole or in part;
4. The Attorney General will review the objections to the assessment of costs before assessment; and
5. The Attorney General may then assess the out-of-pocket cost to the licensee.

The assessment of costs incurred by an agency or board in an administrative proceeding brought against one of its licensees is not uncommon. Among the many licensees that are subject to reimbursement for administrative costs by their licensing boards are peace officers (N.D.C.C. § 12-63-16), podiatrists (N.D.C.C. § 43-05-16.7), funeral service practitioners (N.D.C.C. § 43-10-16), pharmacists (N.D.C.C. § 43-15-45), physicians (N.D.C.C. § 43-17-31.1), veterinarians (N.D.C.C. § 43-29-16), private investigators or persons providing private security services (N.D.C.C. § 43-30-12), occupational therapists (N.D.C.C. § 43-40-16.2), respiratory therapists (N.D.C.C. § 43-42-03), and counselors (N.D.C.C. § 43-47-07.1).

The impact that Senate Bill No. 2261 will have upon state alcoholic beverage licensees may be minimal. Few complaints issued by the Attorney General against state alcoholic beverage licensees for violation of the state alcoholic beverage laws proceed to a formal administrative hearing. Since I became personally involved with handling alcoholic beverage license complaints in the late summer of 1999, the Attorney General has issued

119 administrative complaints. Of these 119 complaints, six administrative hearings have been held in which the administrative license action was contested. The remaining complaints have been resolved without a formal hearing. Most local governing bodies will initiate their own administrative actions against the local retail alcoholic beverage license or resolve the local licensing issues without involvement of the Attorney General.

Senate Bill No. 2261 provides an opportunity for the Attorney General and a local governing body to obtain reimbursement for certain costs of administrative license proceedings brought against their respective licensees who have violated the state alcoholic beverage laws. Senate Bill No. 2261 does not deprive or prevent a licensee from requesting and obtaining a hearing from the local governing body or the Attorney General. Rather, this bill authorizes a local governing body or the Attorney General to obtain reimbursement of a portion of the costs expended in the administrative license proceeding from a licensee who has been found to have violated the state alcoholic beverage laws, just as is permitted by other licensing agencies or boards.

The Attorney General requests your favorable consideration of Senate Bill No. 2261.

TESTIMONY OF
ROBERT BENNETT, ASSISTANT ATTORNEY GENERAL,
REGARDING ENGROSSED SENATE BILL NO. 2261

Mr. Chairman and members of the House Judiciary Committee, I am Robert Bennett, assistant attorney general, appearing in favor of adoption of Engrossed Senate Bill No. 2261.

Engrossed Senate Bill No. 2261 does four things:

Section 1 allows a local governing body or the Attorney General to obtain reimbursement of some costs of administrative license proceedings against an alcoholic beverage licensee found to have violated the alcoholic beverage laws of the State of North Dakota;

Section 1 allows an alcoholic beverage licensee to obtain reimbursement of some costs of administrative license proceedings against a local governing body or the Attorney General if the alcoholic beverage licensee is found, after the formal hearing, to not have violated the alcoholic beverage laws of this state;

Section 1 provides for a continuing appropriation to the Attorney General of any costs received as reimbursement from the licensee; and

Section 2 provides that the Attorney General "may", rather than "shall", set a matter for hearing when an affidavit is received alleging a violation of the state alcoholic beverage laws.

Two retail alcoholic beverage licenses are required before a person may engage in the retail sale of alcoholic beverages in this state. These licenses consist of a "local" license issued by the local governing body, and a "state" license issued

by the Attorney General. A "local governing body" is the governing entity of a city, a county, or a federally recognized Indian tribe in this state.

N.D.C.C. § 5-02-10 authorizes a proceeding to be commenced against a retail alcoholic beverage licensee for violation of the state alcoholic beverage laws. This proceeding is initiated by an affidavit upon which the local governing body or the Attorney General may issue a complaint to suspend, revoke, or take other action against a retail alcoholic beverage license.

An administrative license proceeding by the local governing body would concern the local license issued by that governing body. Any action pursued by the Attorney General would relate to the state, and not the local, license.

The Attorney General may receive an affidavit, with attached investigation reports, from a city or county attorney setting forth a violation of the state alcoholic beverage laws by a current holder of a state retail alcoholic beverage license. Once the affidavit has been received, it will be reviewed to determine whether it meets the requirements of law and supports an administrative action against the license.

An administrative complaint will then be prepared and served upon the licensee. A proposed order and a waiver of hearing is also served with the administrative complaint providing the licensee with notice that if a hearing as provided in N.D.C.C. § 5-02-10 is waived, the Attorney General will impose the suspension or revocation of the state retail alcoholic beverage license as specifically described in the proposed order.

If the state licensee agrees to the provisions of the proposed order, the licensee will then return a signed waiver of hearing with an agreement that the proposed order may be entered. Upon receipt of the hearing waiver, the Attorney General, or the Deputy Attorney General, will issue the order.

If the licensee does not waive a hearing on the complaint, the licensee will provide an answer to the complaint and a hearing will be scheduled before an administrative law judge in the county in which the licensee is licensed to do business.

The administrative law judge, an assistant attorney general, and any witnesses necessary to establish the violation set forth in the administrative complaint will appear at the hearing. The licensee and the licensee's legal counsel may also appear, call witnesses, and present evidence to oppose the complaint.

After the hearing, the administrative law judge will then make a written recommendation to the Attorney General regarding an order to be entered. The hearing exhibits and an audiotape of the testimony will be submitted to the Attorney General for the Attorney General's review prior to issuance of an order. The Attorney General issues the final order.

The administrative law judge presides at the administrative hearing at a cost to the Attorney General. The Attorney General must pay an hourly rate for the services of the Office of Administrative Hearings from the initial request for hearing until the recommended order is submitted to the Attorney General. That rate is \$95.25 per hour.

The Office of Administrative Hearings costs, depending upon the location of the hearing, may be in excess of \$1,000 for a single hearing.

Section 1 of Engrossed Senate Bill No. 2261 allows a local governing body or the Attorney General to receive reimbursement for some of the costs incurred in holding an administrative hearing conducted pursuant to N.D.C.C. § 5-02-10 if the licensee has been found to have violated the state alcoholic beverage laws. These costs would include witness fees and expenses and the cost incurred by participation of the Office of Administrative Hearings, but the expenses would not include attorney fees. If, after a hearing, it is found that the licensee did not violate the alcoholic beverage laws, the licensee would be entitled to receive reimbursement of the "costs of the case", but the expenses or costs would also not include attorney fees.

The assessment of out-of-pockets costs would not be automatic but would follow this general procedure:

1. The prevailing party would determine if, and what, out-of-pocket costs will be assessed against the other party;
2. An itemized list of the costs will be provided to the other party before assessment;
3. The other party may object to the assessment of the costs, in whole or in part;
4. The prevailing party will review the objections to the assessment of costs; and

5. The prevailing party may then assess the permitted out-of-pocket cost to the other party with any disputed costs recoverable in district court.

The assessment of costs incurred by an agency or board in an administrative proceeding brought against one of its licensees is not uncommon. Among the many licensees that are subject to reimbursement for administrative costs by their licensing boards are peace officers (N.D.C.C. § 12-63-16), podiatrists (N.D.C.C. § 43-05-16.7), funeral service practitioners (N.D.C.C. § 43-10-16), pharmacists (N.D.C.C. § 43-15-45), physicians (N.D.C.C. § 43-17-31.1), veterinarians (N.D.C.C. § 43-29-16), private investigators or persons providing private security services (N.D.C.C. § 43-30-12), occupational therapists (N.D.C.C. § 43-40-16.2), respiratory therapists (N.D.C.C. § 43-42-03), and counselors (N.D.C.C. § 43-47-07.1).

The impact that Engrossed Senate Bill No. 2261 will have upon state alcoholic beverage licensees may be minimal. Few complaints issued by the Attorney General against state alcoholic beverage licensees for violation of the state alcoholic beverage laws proceed to a formal administrative hearing. Since the late summer of 1999, the Attorney General has issued 119 administrative complaints. Of these 119 complaints, six administrative hearings have been held in which the administrative license action was contested. The remaining complaints have been resolved without a formal hearing. Most local governing bodies will initiate their own administrative actions against the local retail alcoholic beverage

license or resolve the local licensing issues without involvement of the Attorney General.

Engrossed Senate Bill No. 2261 provides an opportunity for the Attorney General and a local governing body to obtain reimbursement for certain costs of administrative license proceedings brought against their respective licensees who have violated the state alcoholic beverage laws. Engrossed Senate Bill No. 2261 does not deprive or prevent a licensee from requesting and obtaining a hearing from the local governing body or the Attorney General but it does provide a means for the licensee to seek reimbursement of some costs of the case if the licensee is found, after the formal hearing, to not have violated the alcoholic beverage laws.

Section 2 of the Engrossed Bill provides that the Attorney General "may" set a matter for hearing after receipt of an affidavit alleging a violation of the state alcoholic beverage laws by a retail licensee. Currently, N.D.C.C. §5-02-10 uses the term "shall", instead of "may". The new permissive, rather than mandatory, language will be consistent with current practice of the Attorney General to review and determine the sufficiency of an affidavit to support further administrative action against a state alcoholic beverage licensee.

The Attorney General requests your favorable consideration of Engrossed Senate Bill No. 2261.