2011 HOUSE JUDICIARY

HB 1087

2011 HOUSE STANDING COMMITTEE MINUTES

House Judiciary Committee
Prairie Room, State Capitol

HB 1087
January 11, 2011
12735

☐ Conference Committee

Committee Clerk Signature

Minutes:

Chairman DeKrey: We will open the hearing on HB 1087.

Allen Hoberg, Director, Office of Administrative Hearings: Sponsor, support (see attached testimony).

Rep. Koppelman: I thought we had changed the name of administrative hearing officers, to administrative law judges, and I see that the change you're requesting here is saying hearing officer, and you referenced both in your testimony. Can you explain how that works? Who's ALC and hearing officer.

Allen Hoberg: In our office, the people who used to be hearing officers were changed quite a few years back; to be administrative law judges. However, the hearing officers with the agencies that still work within the agency, which are not under our jurisdiction, and there are some of those – DOT, Job Service; hearing officers for the Oil and Gas Division, are still called hearing officers. I'm not sure if there are any hearing examiners left around, I don't think so. There are still those two terms. In 20-32, it refers to hearing officers as a definition and then the definition of hearing officers, include agency hearing officers and administrative law judge.

Rep. Delmore: I've got a question on the procedure. You told us that not all petitions for reconsideration are granted. Who makes that decision and please walk us through the process that everybody may not know. Obviously, it's between what's happened and going to court.

Allen Hoberg: When you go to a hearing, the administrative law judge or hearing officer, will issue either a recommended decision or a final decision for the agency; or sometimes just sit as the procedural hearing officer, like the ALJ does for the Public Service Commission, and the PSC is all there, issuing a final decision. In any of those cases, whether it is a commission or board issuing the final decision, or an agency head, issuing a final decision after a recommended decision by the hearing officer, or a hearing officer or administrative law judge issue a final decision, then there isn't a recommended decision. There can be a request for reconsideration under 28-32-40. That means that somebody says there has been an error, mistaken fact or mistake in law that is determinative of that case, or possibly might be. That matter then comes back to the decision maker, be it the final agency head that is the final decision maker, or an administrative law judge or hearing

officer who has the final decision maker. They then consider that petition for reconsideration and the arguments of the parties saying that they've made a mistake; they may or may not agree. So then they will issue a decision on reconsideration, either saying they made a mistake and changing the decision or not. Sometimes that can avoid an appeal, because if a change is made, then the party might not appeal the matter. If the change doesn't satisfy the party, they may still appeal it. Then you would have the appeal process going up from the final decision on reconsideration up to the court system.

Rep. Koppelman: What are recommended decisions and final decisions and what the differences and when they occur, in what scenarios, etc.

Allen Hoberg: Yes, as I indicated there are those three scenarios that administrative agencies can utilize in North Dakota to reach a final decision. Probably 1/2 of the cases we do, we issue a recommended decision because that is what we are required to do by law or what the agency requested. In many cases, the agency has that option under the Administrative Agency's Practice Act. For roughly 1/2 of our cases, we issue a final decision. It may be required by law, such as in the case of WSI and a few other cases where we are required to offer a final decision for the agency. Recommended decision, of course, the agency head will have the opportunity to consider the hearing officer's or the ALJ's recommended decision and either modify that, accept it, or reject it. Then they would offer a final decision and it's that decision (the final decision) that's appealable to the district court.

Rep. Koppelman: Does it trouble you, that in WSI cases you issue final decisions; please walk through that scenario, where someone is making a complaint against WSI for an issue that's going on and they have a disagreement with WSI, they come before you as an ALJ and you review that case and make a decision that is binding both upon WSI and upon that injured worker. What happens if someone has an aggrieved by a different department of state government, and that issue comes before you and you issue a recommended decision? My understanding is then you are basically making a recommendation, this is what I think should happen based on the law and facts, but it's up to the agency to decision whether they like the decision or not; we're going to abide by it or not. The complainant, the person bringing that complaint, has no such latitude, they either have to abide by the decision if the department of government agrees with it or not, if they don't.

Allen Hoberg: That would be correct. There is a distinction between recommended and final decisions. Some of those distinctions are required by federal law, or at least that has been the interpretation. Some other states have explored that avenue and found that perhaps it is wise to keep the recommended decision in place because federal law seems to require that. Those that would be primarily affected would be Dept of Human Services, but in many cases it's the agency's option whether or not to do a recommended or final decision; unless the legislative assembly has said, or in the case of WSI on an initiated matter, has said the ALJ or hearing officer would issue a final decision. In some cases I believe the DOT cases, they have their hearing officers issue final decisions. So it is kind of an area that is developing around the state and nation, whether or not an agency ought to be able to have the final say after the hearing offer or ALJ has issued a recommended decision. That's a controversy in many states and it's something that we have to deal with on the federal level because of federal regulations and federal rules.

Chairman DeKrey: Thank you. Just as a note to the committee, we set up the Office of Administrative Hearings in 1991. We had a situation, in state government, where if a citizen had a problem with a state agency, you went to that state agency with your grievance and then the state agency that was bothering you, would determine what your fate was. We didn't think that looked real great for the citizens, so then we started the Office of Administrative Hearings so that we would have somebody who is impartial to take our grievances to, it seems to be working.

Allen Hoberg: In response to Rep. Koppelman's question, I can say, however, by and large agencies do accept most of our recommended decisions. Occasionally they will modify something to change a little bit, but by and large the vast majority of our recommended decisions, from our agency, the Office of Administrative Hearings, are accepted by the agencies.

Rep. Koppelman: Which administrative hearings are still conducted within agencies where there are administrative hearing officers and which ones are brought to the Office of Administrative Hearings, where they are heard by administrative law judges.

Allen Hoberg: The DOT does virtually all of their hearings, except dealer licensing hearings, which they voluntarily ask us to do, because those are complaint hearings. Job Service ND does all of the unemployment compensation hearings and we have a large variety of types of hearings that they do, they have occasionally asked us to do a hearing over the years for them. The Oil and Gas Division of the Industrial Commission conducts all of the oil and gas hearings and they occasionally ask us to do a hearing for them. We got a request from them a few months ago, the hearing actually settled. We occasionally get a request from them. All of the other state hearings in ND, for all the other agencies, and some of them use us a lot, and some of them use us once every five to ten years, they just don't have much going on. All the rest of the hearings in ND are required to be conducted by our office, or an agency voluntarily uses us; for example, the student loans of ND, which is part of the Industrial Commission isn't required to use us, but they have always used us for, but they have always used us for their student loan hearings and we issue final decisions for them. There are a number of other agencies like that, including the Public Service Commission, which voluntarily uses us and has since 1991. They, increasingly, have more and more hearings all the time. As you know the economic activity in that area is on the upswing and so we do a large number of hearings for them. So not only do we do all those state hearings, but there are some local hearings that we do, some of them are required by statute, annexation hearings, there are some other one that are required by statute. Some local entities voluntarily use us for employee grievance hearings; counties/cities will sometime use us. The city of Minot has used us for its tobacco hearings. We're kind of out there, available for entities who want to use us too. We provide a fair hearing for those people and the citizens of ND.

Chairman DeKrey: Thank you. Further testimony in support of HB 1087.

Anne Jorgenson Green, Staff Counsel with WSI: Support (see attached testimony) (She didn't testify in person).

Chairman DeKrey: Testimony in opposition. We will close the hearing. What are the committee's wishes in regard to HB 1087.

Rep. Koppelman: I move a Do Pass.

Rep. Maragos: Second.

13 YES 0 NO 1 ABSENT **DO PASS** **CARRIER: Rep. Koppelman**

Date: 1/11/11
Roll Call Vote # 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1087

House JUDICIARY Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☑ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Koppelman Seconded By Rep. Maragos

Representatives	Yes	No	Representatives	Yes	No
Ch. DeKrey	✓		Rep. Delmore	✓	
Rep. Klemin	✓		Rep. Guggisberg	✓	
Rep. Beadle			Rep. Hogan	✓	
Rep. Boehning	✓		Rep. Onstad	✓	
Rep. Brabandt	✓				
Rep. Kingsbury	✓				
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Maragos	✓				
Rep. Steiner	✓				

Total (Yes) 13 No Ø

Absent 1

Floor Assignment Rep. Koppelman

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

REPORT OF STANDING COMMITTEE

HB 1087: Judiciary Committee (Rep. DeKrey, Chairman) recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1087 was placed on the Eleventh order on the calendar.

2011 SENATE JUDICIARY

HB 1087

2011 SENATE STANDING COMMITTEE MINUTES

Senate Judiciary Committee
Fort Lincoln Room, State Capitol

HB1087
3/8/11
Job #15102

☐ Conference Committee

Committee Clerk Signature

Explanation or reason for introduction of bill/resolution:

Relating to the time for filing a petition for reconsideration from a final order of an administrative agency

Minutes: There is attached written testimony

Senator Nething – Chairman

Allen Hoberg – Director, Office of administrative Hearings – See written testimony. He offers an amendment to remove "may" from page1, line 9.

Senator Nething – Asks what has been done up to this point.

Hoberg – The purpose of this bill is to make it clear that an administrative agency in this context when an ALJ (administrative law judge) issues a final decision for the agency can request reconsideration.

Senator Nething – Asks if they would have to allege error or mistake on the part of the ALJ.

Hoberg – Replies yes and there may or may not be an error or mistake. He gives an example of a hearing that he heard that he made mistaking a relationship between parties.

Anne Jorgenson Green – Staff Counsel with Workforce Safety and Insurance – See written testimony.

Opposition – 0

Close the hearing on 1087

Senator Sitte moves a do pass on the amendment
Senator Olafson seconds

Verbal vote all yes

Senator Sitte moves a do pass as amended
Senator Olafson seconds

Roll call vote – 5 yes, 0 no, 1 absent
Motion passes

Senator Nething will carry

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1087

Page 1, line 9, remove "may,"

Date: 3/8/11
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1087

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Sitte Seconded By Senator Olafson

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	1		Carolyn Nelson	1	
Curtis Olafson – V. Chairman					
Stanley Lyson	1				
Margaret Sitte	1				
Ronald Sorvaag	1				

Total (Yes) _____ No _____

Absent _____

Floor Assignment Senator _____

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

Verbal all yes

Date: 3/8/11
Roll Call Vote # 2

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1087

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Senator Sitte Seconded By Senator Olafson

Senators	Yes	No	Senators	Yes	No
Dave Nething - Chairman	X		Carolyn Nelson	X	
Curtis Olafson – V. Chairman	X				
Stanley Lyson	A				
Margaret Sitte	X				
Ronald Sorvaag	X				

Total (Yes) 5 No 6

Absent 1

Floor Assignment Senator Nething

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

REPORT OF STANDING COMMITTEE

HB 1087: Judiciary Committee (Sen. Nething, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (5 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1087 was placed on the Sixth order on the calendar.

Page 1, line 9, remove "may."

Renumber accordingly

2011 TESTIMONY

HB 1087

OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF NORTH DAKOTA
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Allen C. Hoberg
DIRECTOR

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MEMORANDUM

TO: Sixty-second Legislative Assembly
State of North Dakota
House Judiciary Committee

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

RE: House Bill No. 1087

DATE: January 11, 2011

This bill arises out of an administrative hearing experience when an administrative law judge ("ALJ") was required to issue a final decision in a Workforce Safety and Insurance ("WSI") hearing. The ALJ issued a final decision and WSI requested the ALJ to reconsider that decision. The claimant's attorney objected, claiming that WSI was not a party in this context that could request the decision to be reconsidered under N.D.C.C. § 28-32-40. The ALJ ruled that WSI was a party and could request reconsideration under N.D.C.C. § 28-32-40. The ALJ then considered WSI's petition and the claimant's response and issued a decision upon reconsideration.

Although the ALJ used existing language in N.D.C.C. chapter 28-32, including the language of N.D.C.C. § 28-32-40, to make the determination that WSI was a party that could request reconsideration when the ALJ issues a final decision for the agency, it appears to be not as clear as it could be that WSI, or any other agency, can request reconsideration when an ALJ or hearing officer is issuing a final decision in that agency's hearing. In fairness, it ought to be clear; any party, including the administrative agency, ought to be able to request reconsideration after a hearing officer or ALJ issues a final decision.

This bill, as written, was brought before the State Advisory Council for Administrative Hearings ("SAC") to consider. The SAC did not see any problems with the bill and the consensus was that such a bill would make it clear that administrative agencies may ask for reconsideration when the agency's hearing officer or ALJ issues a final decision. The consensus was that all parties, including administrative agencies, ought to be able to ask for reconsideration of a final decision issued by a hearing officer or ALJ.

The reason for section 28-32-40, the ability to petition for a reconsideration, is because hearing officers and ALJs are human; they sometimes make errors or mistakes. When an agency or any other party believes that there has been an error or mistake of law or fact made by the ALJ, they can petition for reconsideration stating the error or mistake,

thus giving the hearing officer or the ALJ an opportunity to correct the error or mistake and issue a correct decision. The opportunity to file a petition for reconsideration can sometimes eliminate the need to appeal the matter to the courts.

Not all petitions for reconsideration are granted and if granted, the ruling does not necessarily favor the petitioning party. OAH's experience is that very few parties file petitions for reconsideration, but they are a necessary option for some hearings. It should be clear that all parties, including an administrative agency, may request reconsideration when a hearing officer or ALJ issues a final decision.

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2011 House Bill No. 1087
Testimony before the House Judiciary Committee
Presented by Anne Jorgenson Green, Staff Counsel
Workforce Safety and Insurance
January 11, 2011

Mr. Chairman, Members of the Committee:

My name is Anne Jorgenson Green, Staff Counsel with Workforce Safety and Insurance (WSI), here today to testify in support of HB 1087.

The proposed change in section two of HB 1087 responds to potential ambiguity with regard to WSI's ability to appeal a final Order of the Office of Administrative Hearings (OAH). You may recall law changes made in 2008 made all Orders of an OAH Administrative Law Judge final and not subject to reversal or modification by WSI, as had been the procedure in the past.

Because WSI is no longer the final decision maker, it has been argued that the existing language of N.D.C.C. 28-32-40(2) precludes WSI from appealing a final decision issued by OAH. The proposal submitted today eliminates any argument that all parties to litigation before OAH have the ability to appeal. We support OAH's efforts to provide this additional clarity.

This concludes my testimony. I'm happy to answer any questions you may have.

(1)

OFFICE OF ADMINISTRATIVE HEARINGS

STATE OF NORTH DAKOTA
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MEMORANDUM

TO: Sixty-second Legislative Assembly
State of North Dakota
Senate Judiciary Committee

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

RE: House Bill No. 1087

DATE: March 8, 2011

House Bill No. 1087 arises out of an administrative hearing experience when an Office of Administrative Hearings administrative law judge ("ALJ") was required to issue a final decision in a Workforce Safety and Insurance hearing. The ALJ issued a final decision and Workforce Safety and Insurance requested the ALJ to reconsider that decision. The claimant's attorney objected, claiming that Workforce Safety and Insurance was not a party in this context that could request the decision be reconsidered under N.D.C.C. § 28-32-40. The ALJ ruled that Workforce Safety and Insurance was a party and could request reconsideration under N.D.C.C. § 28-32-40. The ALJ then considered Workforce Safety and Insurance's petition and the claimant's response and issued a decision upon reconsideration.

Although the ALJ used existing language in N.D.C.C. chapter 28-32, including the language of N.D.C.C. § 28-32-40, to make the determination that Workforce Safety and Insurance was a party that could request reconsideration when the ALJ issues a final decision for the agency, it appears to be not as clear as it could be that Workforce Safety and Insurance, or any other agency, can request reconsideration when an ALJ or hearing officer issues a final decision for the agency. In fairness, it ought to be clear; any party, including the administrative agency, ought to be able to request reconsideration after a hearing officer or ALJ issues a final decision.

This bill, as written, was brought before the State Advisory Council for Administrative Hearings to consider. The State Advisory Council did not see any problems with the bill and the consensus was that such a bill would make it clear that an administrative agency may ask for reconsideration when the agency's hearing officer or ALJ issues a final decision. The consensus was that all parties, including administrative agencies, ought to be able to ask for reconsideration of a final decision issued by a hearing officer or ALJ. Interestingly, the claimant's attorney who objected to reconsideration in the Workforce Safety and Insurance case is a member of the State Advisory Council and he agrees that this legislation is fair and will make the law more clear.

The reason for section 28-32-40, the ability to petition for a reconsideration, is because hearing officers and ALJs are human; they occasionally make errors or mistakes. When an agency or any other party believes that there has been an error or mistake of law or fact made by a hearing officer or ALJ, they can petition for reconsideration stating the error or mistake, thus giving the hearing officer or the ALJ an opportunity to correct the error or mistake and issue a correct decision. The opportunity to file a petition for reconsideration can sometimes eliminate the need to appeal the matter to the courts.

Not all petitions for reconsideration are granted, and, if granted, the ruling does not necessarily favor the petitioning party. Very few parties file a petition for reconsideration, but they are a necessary option for some hearings. It should be clear that all parties, including administrative agencies, may request reconsideration when a hearing officer or ALJ issues a final decision.

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(2)

2011 House Bill No. 1087
Testimony before the Senate Judiciary Committee
Presented by Anne Jorgenson Green, Staff Counsel
Workforce Safety and Insurance
March 8, 2011

Mr. Chairman, Members of the Committee:

My name is Anne Jorgenson Green, Staff Counsel with Workforce Safety and Insurance (WSI), here today to testify in support of HB 1087.

The proposed change in section two of HB 1087 responds to potential ambiguity with regard to WSI's ability to appeal a final Order of the Office of Administrative Hearings (OAH). You may recall law changes made in 2008 made all Orders of an OAH Administrative Law Judge final and not subject to reversal or modification by WSI, as had been the procedure in the past.

Because WSI is no longer the final decision maker, it has been argued that the existing language of N.D.C.C. 28-32-40(2) precludes WSI from appealing a final decision issued by OAH. The proposal submitted today eliminates any argument that all parties to litigation before OAH have the ability to appeal. We support OAH's efforts to provide this additional clarity.

This concludes my testimony. I'm happy to answer any questions you may have.