

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2163

2001 SENATE INDUSTRY, BUSINESS AND LABOR

SB 2163

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2163

Senate Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date January 17, 2001

Tape Number	Side A	Side B	Meter #
1		x	28 to 49.6
(Feb. 13/01) 3	x		6.9 to 12.9
Committee Clerk Signature <i>Louis E. Pérez</i>			

Minutes:

The meeting was called to order. All committee members present. Hearing was opened on SB 2163 relating to references to commission on medical competency, ex parte temporary suspension orders issued by the state board of medical examiners, and investigative panels of the state board of medical examiners.

JOHN OLSON, ND Board of Medical Examiners, presenting the testimony of ROLF P. SLETTEN, Executive Secretary and Treasurer, ND Bd. of Medical Examiners. Written testimony attached. The current law separates the board into two separate panels. The temporary suspension takes place, complaint is served, physician retains counsel, administrative hearing takes place at the end administrative law judge will make recommendation to board. This temporary suspension statute is a fast track procedure required because the temporary suspension takes the license away pending the hearing. We ask for a delay in the consideration of this bill until the medical association can determine whether additions must be made to this statute.

Page 2

Senate Industry, Business and Labor Committee

Bill/Resolution Number SB 2163

Hearing Date January 17, 2001.

BRUCE LEVI, Representative ND Medical Assn. Written testimony attached. Ask committee to hold bill until the association and the board can work out amendments.

SENATOR ESPEGARD: Are the members of the board appointed.

B LEVI: They are appointed by the governor, chosen from a list provided by the medical association.

SENATOR TOLLEFSON: What percentage of the physicians join the association?

B LEVI: About 70%.

Hearing concluded.

Feb. 13/01. Tape 3-A- 6.9 to 12.9

Committee reconvened. All members except SENATOR ESPEGARD present. Discussion held.

Written testimony presented by BRUCE LEVI and ROLF P. SLETTEN regarding the agreement reached by the medical association and the board of medical examiners regarding this bill and the amendments agreed on.

SENATOR KREBSBACH: Motion to adopt amendments. SENATOR KLEIN: Seconded

Roll call vote: 6 yes; 0 no; 1 absent not voting. Motion carried.

SENATOR D. MATHERN: Motion: do pass as amended. SENATOR TOLLEFSON: Seconded.

Roll call vote: 6 yes; 0 no; 1 absent not voting. Carrier : SENATOR KREBSBACH.

1 **PROPOSED AMENDMENTS TO SENATE BILL NO. 2163**

2
3 Page 1, line 1, after "reenact" insert "section 23-34-04,"

4 Page 1, line 2, remove the second "and" and after "43-17.1-02" insert ", subsection 1 of section
5 43-17.1-05, and subsection 3 of section 43-17-06"

6 Page 1, after line 6, insert:

7 **"SECTION 1. AMENDMENT.** Section 23-34-04 of the 1999 Supplement to the
8 North Dakota Century Code is amended and reenacted as follows:

9 **23-34-04. Peer review committee – Mandatory reports.** A peer review committee
10 shall report to ~~the commission on medical competency~~ an investigative panel of the board
11 of medical examiners any information that indicates a probable violation of subsection 4, 5,
12 16, or 17 of section 43-17-31. A health care organization is guilty of a class B
13 misdemeanor if its peer review committee fails to make any report required by this
14 section."

15 Page 1, line 17, after "including" insert "reasonable"

16 Page 1, line 20, after the period insert "A physician may challenge the reasonableness of any cost
17 item in a hearing under chapter 28-32 before an administrative law judge. The
18 administrative law judge may approve, deny, or modify any cost item, and the
19 determination of the judge is final. The hearing must occur before the physician's license
20 may be suspended for nonpayment."

21
22 Page 2, replace lines 1 through 4 with:

23 "1. When, based on verified evidence, the board ~~has probable cause to believe the~~
24 ~~suspension of a physician's license is required to reasonably protect the public from~~
25 ~~imminent or critical harm,~~ determines by a clear and convincing standard that the
26 evidence presented to the board indicates that the continued practice by the physician
27 would create a significant risk of serious and ongoing harm to the public while a
28 disciplinary proceeding is pending, and that immediate suspension of the physician's
29 license is required to reasonably protect the public from that risk of harm, the board
30 may order a temporary suspension ex parte. For purposes of this section, "verified
31 evidence" means testimony taken under oath and based on personal knowledge. The

1 board shall give prompt written notice of the suspension to the physician, which must
2 include a copy of the order and complaint, the date set for a full hearing, and a
3 specific description of the nature of the evidence, including a list of all known
4 witnesses and a description of any documents relied upon by the board in ordering
5 the temporary suspension which, upon request, must be made available to the
6 physician."

7 Page 2, line 5, overstrike "for not more than sixty days,"

8 Page 2, line 6, overstrike "unless" and insert immediately thereafter "until a final order is issued
9 after a full hearing or appeal under this section or until the suspension is" and remove "or
10 extended by agreement of the parties"

11 Page 2, line 11, replace "fifty" with "thirty"

12 Page 2, line 12, remove "unless an extension of time has been agreed to by the parties to the
13 action", overstrike "Within", and insert immediately thereafter "The physician is entitled to a
14 continuance of the thirty-day period upon request for a period determined by the hearing
15 officer."

16 Page 2, overstrike lines 13 through 15

17 Page 2, after line 28, insert:

18 **"SECTION 5. AMENDMENT.** Subsection 1 of section 43-17.1-05 of the 1999
19 Supplement to the North Dakota Century Code is amended and reenacted as follows:

- 20 1. Any person may make or refer written complaints to the investigative panels with
21 reference to the acts, activities, or qualifications of any physician, physician
22 assistant, or fluoroscopy technologist licensed to practice in this state, or to
23 request that an investigative panel review the qualifications of any physician,
24 physician assistant, or fluoroscopy technologist to continue to practice in this
25 state. Any person who, in good faith, makes a report to the investigative panels
26 under this section is not subject to civil liability for making the report. For
27 purposes of any civil proceeding, the good faith of any person who makes a
28 report pursuant to this section is presumed. Upon receipt of any complaint or
29 request, the investigative panel shall conduct the investigation as it deems
30 necessary to ~~resolve the matter as it deems appropriate. The investigative panel~~
31 ~~shall determine whether a formal hearing should be held to determine whether~~

1 any physician, physician assistant, or fluoroscopy technologist has committed
2 any of the grounds for disciplinary action provided for by law. Upon completion
3 of its investigation, the investigation panel shall make a finding that the
4 investigation discloses that:

- 5 a. There is insufficient evidence to warrant further action;
6 b. The conduct of the physician, physician assistant, or fluoroscopy technologist
7 does not warrant further proceedings but the investigative panel determines
8 that possible errant conduct occurred that could lead to significant
9 consequences if not corrected. In such a case, a confidential letter of concern
10 may be sent to the physician, physician assistant, or fluoroscopy technologist;
11 or
12 c. The conduct of the physician, physician assistant, or fluoroscopy technologist
13 indicates that the physician, physician assistant, or fluoroscopy technologist
14 may have committed any of the grounds for disciplinary action provided for
15 by law and which warrants further proceedings.

16 **SECTION 6. AMENDMENT.** Subsection 3 of section 43-17.1-06 of the North
17 Dakota Century Code is amended and reenacted as follows:

- 18 3. ~~Require~~ Upon probable cause, require any physician, physician assistant, or
19 fluoroscopy technologist under investigation to submit to a physical, psychiatric,
20 or competency examination, or chemical dependency evaluation."

21
22 Renumber accordingly

Date: 2/13/01
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2163

Senate Industry, Business and Labor Committee

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Adopt amendments

Motion Made By Sen Krebsbach Seconded By Sen Olson

Senators	Yes	No	Senators	Yes	No
Senator Mutch - Chairman	✓		Senator Every	✓	
Senator Klein - Vice Chairman	✓		Senator Mathern	✓	
Senator Espegard	A				
Senator Krebsbach	✓				
Senator Tollefson	✓				

Total (Yes) 6 No 0

Absent 1

Floor Assignment _____

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

Date: 2/13/01
Roll Call Vote #: 2

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2163

Senate Industry, Business and Labor Committee

☐ Subcommittee on _____

or

☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken DPA

Motion Made By Sen Mathern Seconded By Sen Tollefson

Senators	Yes	No	Senators	Yes	No
Senator Mutch - Chairman	✓		Senator Every	✓	
Senator Klein - Vice Chairman	✓		Senator Mathern	✓	
Senator Espegard	A				
Senator Krebsbach	✓				
Senator Tollefson	✓				

Total (Yes) 6 No 0

Absent 1

Floor Assignment Sen Krebsbach

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

REPORT OF STANDING COMMITTEE

SB 2163: Industry, Business and Labor Committee (Sen. Mutch, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2163 was placed on the Sixth order on the calendar.

Page 1, line 1, after "reenact" insert "section 23-34-04,"

Page 1, line 2, replace the first "and" with a comma, remove the second "and", and after "43-17.1-02" insert ", subsection 1 of section 43-17.1-05, and subsection 3 of section 43-17.1-06"

Page 1, after line 6, insert:

"SECTION 1. AMENDMENT. Section 23-34-04 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

23-34-04. Peer review committee - Mandatory reports. A peer review committee shall report to ~~the commission on an~~ an investigative panel of the board of medical competency examiners any information that indicates a probable violation of subsection 4, 5, 16, or 17 of section 43-17-31. A health care organization is guilty of a class B misdemeanor if its peer review committee fails to make any report required by this section."

Page 1, line 17, after "including" insert "reasonable"

Page 1, line 20, after the period insert "A physician may challenge the reasonableness of any cost item in a hearing under chapter 28-32 before an administrative law judge. The administrative law judge may approve, deny, or modify any cost item, and the determination of the judge is final. The hearing must occur before the physician's license may be suspended for nonpayment."

Page 2, replace lines 1 through 4 with:

"1. When, based on verified evidence, the board ~~has probable cause to believe that the suspension of a physician's license is required to reasonably protect the public from imminent or critical harm~~ determines by a clear and convincing standard that the evidence presented to the board indicates that the continued practice by the physician would create a significant risk of serious and ongoing harm to the public while a disciplinary proceeding is pending, and that immediate suspension of the physician's license is required to reasonably protect the public from that risk of harm, the board may order a temporary suspension ex parte. For purposes of this section, "verified evidence" means testimony taken under oath and based on personal knowledge. The board shall give prompt written notice of the suspension to the physician, which must include a copy of the order and complaint, the date set for a full hearing, and a specific description of the nature of the evidence, including a list of all known witnesses and a description of any documents relied upon by the board in ordering the temporary suspension which, upon request, must be made available to the physician."

Page 2, line 5, overstrike "for not more than sixty days,"

Page 2, line 6, overstrike "unless" and insert immediately thereafter "until a final order is issued after a full hearing or appeal under this section or until the suspension is" and remove "or extended by agreement of the parties"

Page 2, line 11, replace "fifty" with "thirty"

Page 2, line 12, remove "unless an extension of time has been agreed to by the parties to the action" and overstrike "Within"

Page 2, overstrike lines 13 and 14

Page 2, line 15, overstrike "notice of the date set for the full hearing" and insert immediately thereafter "The physician is entitled to a continuance of the thirty-day period upon request for a period determined by the hearing officer"

Page 2, after line 28, insert:

"SECTION 6. AMENDMENT. Subsection 1 of section 43-17.1-05 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

1. Any person may make or refer written complaints to the investigative panels with reference to the acts, activities, or qualifications of any physician, physician assistant, or fluoroscopy technologist licensed to practice in this state, or to request that an investigative panel review the qualifications of any physician, physician assistant, or fluoroscopy technologist to continue to practice in this state. Any person who, in good faith, makes a report to the investigative panels under this section is not subject to civil liability for making the report. For purposes of any civil proceeding, the good faith of any person who makes a report pursuant to this section is presumed. Upon receipt of any complaint or request, the investigative panel shall conduct the investigation as it deems necessary to ~~resolve the matter as it deems appropriate. The investigative panel shall determine whether a formal hearing should be held to determine~~ whether any physician, physician assistant, or fluoroscopy technologist has committed any of the grounds for disciplinary action provided for by law. Upon completion of its investigation, the investigative panel shall make a finding that the investigation discloses that:
 - a. There is insufficient evidence to warrant further action;
 - b. The conduct of the physician, physician assistant, or fluoroscopy technologist does not warrant further proceedings, but the investigative panel determines that possible errant conduct occurred that could lead to significant consequences if not corrected. In such a case, a confidential letter of concern may be sent to the physician, physician assistant, or fluoroscopy technologist; or
 - c. The conduct of the physician, physician assistant, or fluoroscopy technologist indicates that the physician, physician assistant, or fluoroscopy technologist may have committed any of the grounds for disciplinary action provided for by law and which warrants further proceedings.

SECTION 7. AMENDMENT. Subsection 3 of section 43-17.1-06 of the 1999 Supplement to the North Dakota Century Code is amended and reenacted as follows:

3. Require Upon probable cause, require any physician, physician assistant, or fluoroscopy technologist under investigation to submit to a physical, psychiatric, or competency examination, or chemical dependency evaluation."

REPORT OF STANDING COMMITTEE (410)
February 15, 2001 10:20 a.m.

Module No: SR-28-3472
Carrier: Krebsbach
Insert LC: 18269.0101 Title: .0200

Renumber accordingly

2001 HOUSE INDUSTRY, BUSINESS AND LABOR

SB 2163

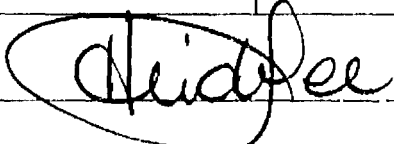
2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2163

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date March 12, 2001

Tape Number	Side A	Side B	Meter #
1	X		0-29.2
Committee Clerk Signature 			

Minutes: Chairman R. Berg, Vice-Chair G. Keiser, Rep. M. Ekstrom, Rep. R. Froelich, Rep. G. Froseth, Rep. R. Jensen, Rep. N. Johnson, Rep. J. Kasper, Rep. M. Klein, Rep. Koppang, Rep. D. Lemieux, Rep. B. Pietsch, Rep. D. Ruby, Rep. D. Severson, Rep. E. Thorpe.

Rolf Sletten: *State Board of Medical Examiners* **Written testimony.**

Rep Ruby: What costs are we looking at?

Sletten: All costs associated with prosecution.

Rep Froelich: How many have been suspended?

Sletten: About one a year for the last ten years. We have a very high disciplinary rate of about ten to fifteen per year.

Rep Koppang: Are you consistent with other states?

Sletten: All boards recognize the same schools, tests, and so forth but each board has it's own procedures, interpretations, and laws.

Bruce Levi: *ND Medical Association* **Written testimony** in support of bill.

Page 2

House Industry, Business and Labor Committee

Bill/Resolution Number SB 2163

Hearing Date March 12, 2001

Rep Ruby: So this doesn't have to be a medical complaint?

Levi: The board acts in the patients best interest.

Rep Kasper: How long are the terms of the board?

Levi: Four years.

Vice-Chairman Keiser: Are the complaints public record?

Levi: The investigation is confidential but when it is moved to the board it becomes public.

Sletten: This is an eleven member board, nine are doctors, one must be an OP, and two are public members. They are approved by the Governor for four year terms and are eligible for no more than two terms.

Chairman Berg: We'll close the hearing on SB 2163.

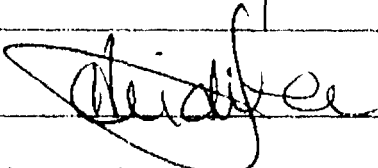
2001 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2163(B)

House Industry, Business and Labor Committee

☐ Conference Committee

Hearing Date March 20, 2001

Tape Number	Side A	Side B	Meter #
1		X	35.2-45.7
Committee Clerk Signature 			

Minutes: Chairman R. Berg, Vice-Chair G. Kelsner, Rep. M. Ekstrom, Rep. R. Froelich, Rep. G. Froseth, Rep. R. Jensen, Rep. N. Johnson, Rep. J. Kasper, Rep. M. Klein, Rep. Koppang, Rep. D. Lemieux, Rep. B. Pietsch, Rep. D. Ruby, Rep. D. Severson, Rep. E. Thorpe.

Rep Ruby: Explained bill and provided information.

Chairman Berg: This is just raising the bar for suspensions.

Rep M. Klein: I move a do pass.

Rep Lemieux: I second.

15 yea, 0 nay, 0 absent Carrier Rep Ruby

Date: 3-20-01
Roll Call Vote #: 1

2001 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2163

House Industry, Business and Labor Committee

Legislative Council Amendment Number _____

Action Taken Do Pass

Motion Made By M. Klein Seconded By Lemieux

Representatives	Yes	No	Representatives	Yes	No
Chairman- Rick Berg	✓		Rep. Jim Kasper	✓	
Vice-Chairman George Keiser	✓		Rep. Matthew M. Klein	✓	
Rep. Mary Ekstorm	✓		Rep. Myron Koppang	✓	
Rep. Rod Froelich	✓		Rep. Doug Lemieux	✓	
Rep. Glen Froseth	✓		Rep. Bill Pietsch	✓	
Rep. Roxanne Jensen	✓		Rep. Dan Ruby	✓	
Rep. Nancy Johnson	✓		Rep. Dale C. Severson	✓	
			Rep. Elwood Thorpe	✓	

Total (Yes) 15 No 0

Absent 0

Floor Assignment Rep Ruby

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

REPORT OF STANDING COMMITTEE (410)
March 21, 2001 8:28 a.m.

Module No: HR-49-6211
Carrier: Ruby
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

SB 2163, as engrossed: Industry, Business and Labor Committee (Rep. Berg, Chairman) recommends DO PASS (15 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2163 was placed on the Fourteenth order on the calendar.

2001 TESTIMONY

SB 2163

North Dakota State Board of Medical Examiners

ROLF P. SLETTEN
Executive Secretary and Treasurer

LYNETTE LEWIS
Administrative Assistant

TO: CHAIRMAN MUTCH AND THE MEMBERS OF THE SENATE INDUSTRY,
BUSINESS AND LABOR COMMITTEE

FROM: ROLF P. SLETTEN, EXECUTIVE SECRETARY AND TREASURER

RE: SENATE BILL NO. 2163

DATE: JANUARY 17, 2001

There are four sections to this bill:

Section 1 and Section 2

These two sections are strictly "housekeeping" type measures. During the last legislative session, all references to the "Commission on Medical Competency" were ostensibly changed to the Board's "investigative panels". The North Dakota Commission on Medical Competency no longer exists. The work previously done by the Commission is now done by the Board's investigative panels. Unfortunately, a few references to the Commission were overlooked during the 1999 session. The intention here is to clean up those oversights.

Section 3

This section deals with the Board's authority to issue orders of temporary suspension ex parte. The amendments embraced by this bill would accomplish the following:

1. The law currently provides that if the Board issues an order of temporary suspension ex parte, the Board must set a hearing on the merits of the case

within 60 days. In virtually every case where the Board has issued such an order the respondent physician has asked for an extension of time claiming that they can not be prepared for a hearing within that time frame. The Administrative Law Judge has always agreed to grant those extensions if both parties agreed and if it was understood that the extension would only be granted on the condition that the order of temporary suspension would remain in effect. This language would codify the authority to enter into such agreements.

2. The law currently provides that the hearing must be held within 60 days and that the maximum length of an ex parte order is also 60 days. As a practical matter, the hearing examiner always sets the hearing within approximately 50 days so that there will be time for him to issue his recommendations to the Board and for the Board to make its final decision before the 60 day suspension expires. The proposed change fixing the hearing within 50 days rather than 60 days is not intended to shorten the time frame for the hearing, but only to recognize that other procedural steps must be taken between the conclusion of the hearing and the day the order of suspension expires. This language does not change the maximum duration (60 days) of the Board's order of temporary suspension.

Section 4

During the last legislative assembly, the Board's investigative structure was changed. The Commission on Medical Competency was eliminated and the Board

was divided into two investigative panels. Those panels assumed the duties previously performed by the Commission. The law currently specifies that each panel will be comprised of five other members of the Board and the president.

This bill would remove the president from the panels. The problem here is that those members of the Board who served on the panel which investigated a particular case are not permitted to participate in the final decision regarding any sanctions which are to be imposed against the physician. In other words, if Panel A investigates a case and decides to bring a formal charge against the physician then the members of Panel B will make the final determination regarding the disposition of the case. The idea here is that the police should also not be the judges. If the president serves on both investigative panels then the president is never eligible to vote on the final disposition of the case because he/she has participated in every investigation. This means that six members of the Board are automatically eliminated from participation in the final decision on every case. If one or two others are disqualified for some reason or are simply absent, the final decision must be made by very few Board members. Removing the president from the investigative panels will insure that he/she can vote in the final disposition of almost every case.

SB 2163
Bruce Levi, North Dakota Medical Association

Last fall, North Dakota physicians passed a resolution asking our NDMA staff to explore due process concerns relating to physician disciplinary proceedings. Since that time, we have identified a number of due process issues - most notably the ex parte temporary suspension provisions addressed in SB 2163, that are found at section 43-17-32.1.

Section 43-17-32.1 authorizes an ex parte "on one side only" temporary suspension by the Board of Medical Examiners if probable cause exists to believe that the suspension of a physician's license is required to reasonably protect the public from serious harm. After the suspension, the Board is required to set a full hearing within sixty days. The physician is also entitled to appeal the suspension to the district court. However, there is no opportunity for the physician who has lost his or her license to introduce evidence or cross examine witnesses until the full hearing, which could be held sixty days later. In the meantime, the fact of the suspension is public information.

The North Dakota Medical Association believes that section 43-17-32.1 should be amended to provide an expedited process after suspension that provides an opportunity for the physician to be heard on the merits of the suspension, and to address the issue of public disclosure. The Board staff has agreed to work with us on this issue and other due process concerns.

We encourage the committee to hold SB 2163 until such time as the Association and the Board can work out amendments to the bill.

Testimony in Support of Proposed Amendments to SB 2163

We appreciate the opportunity and your patience with the time the committee provided in allowing the ND Medical Association to work with the Board of Medical Examiners in coming to agreement on changes to the Medical Practice Act – changes that continue to maintain the Board's important role in ensuring the safety of patients while recognizing the need for due process rights for physicians.

The paramount concern is to ensure that disciplinary proceedings and actions taken against physicians are in the best interests of patients. At the same time, it is important to recognize that what constitutes the best interests of patients is a two-sided coin – we need to protect the patient from a physician who requires discipline; we also need to ensure that patients are not unnecessarily or inappropriately deprived of the medical services of their physician.

As mentioned in my earlier testimony, North Dakota physicians in our Association House of Delegates passed a resolution last fall to explore due process concerns relating to physician disciplinary proceedings. Since that time, we have talked to a number of physicians and their attorneys, and have identified several issues – most notably the need to address the ex parte temporary suspension provisions that are a part of SB 2163.

The proposed amendments address several issues: the ex parte temporary suspension procedures and standards; the clarification of investigation standards and powers; and the assessment of costs against a disciplined physician.

1. *Technical reference change.* Page 1, lines 7 through 14 of the proposed amendments would change a reference to the Commission on Medical Competency, which was abolished pursuant to 1999 legislation in favor of using investigative panels of the Board. The section amended, NDCC 23-34-04, relates to the mandatory reporting of information by a peer review committee. The appropriate reference is to an "investigative panel of the Board of Medical Examiners," rather than the now-defunct commission.

2. *Assessed costs.* Page 1, lines 15 through 20 of the proposed amendments would provide a mechanism for review of costs assessed against a physician who is disciplined. Currently, there is no avenue for challenging those costs, even though current law would allow an assessment that could also serve as the basis for suspending the physician's license for nonpayment of the assessment. The new mechanism would allow the physician to challenge the reasonableness of any cost item in a hearing before an administrative law judge.

3. *Ex parte license suspension procedures.* Page 1, lines 22 through 31, and page 2, lines 1 through 16 of the proposed amendments address issues relating to the Board's procedure for temporarily suspending a physician's license.

Section 43-17-32.1 authorizes an ex parte "on one side only" temporary suspension by the Board of Medical Examiners if probable cause exists to believe that the suspension of a physician's license is required to reasonably protect the public from serious harm. After the suspension, the Board is required to set a full hearing within sixty days. The physician is also entitled to appeal the suspension to the district court. However, there is no opportunity for the physician who has lost his or her license to introduce evidence or cross examine witnesses until the full hearing, which could be held sixty days later. In the meantime, the fact of the suspension is public information and the physician may not practice medicine.

Our original proposal was to set up some form of an expedited hearing process to assure that the physician has an opportunity to provide his or her side of the story as quickly as possible. As we discussed this approach, it became evident that some of the due process concerns could be addressed by ensuring that the Board follows a more appropriate evidentiary standard in determining whether to temporarily suspend a physician's license in the first place. The amendments would change and clarify the evidentiary standard for the Board in suspending a license on a temporary basis from a "probable cause" standard to a "clear and convincing" standard. Clear and convincing evidence is "evidence which leads to a firm belief or conviction that the allegations are true," as defined in a number of cases before the North Dakota Supreme Court. The amendments would also clarify what "verified evidence" is – for purposes of evidence relied upon

by the Board for suspending a license. "Verified evidence" would be defined as "testimony taken under oath and based on personal knowledge."

The proposed amendments would also clarify the notice provisions of the law, ensuring that the physician is promptly informed of the suspension and receives a specific description of any evidence relied upon by the Board in ordering the suspension. The amendments would also ensure that the physician has access to that evidence in preparing for the full hearing.

Under current law, a physician is entitled to a full hearing sixty days after his or her license is suspended. In other words, once there is public disclosure of the suspension, a physician has to wait 60 days before given the opportunity to respond to the Board's action. The proposed amendments would reduce the number of days before the hearing to thirty, with the physician being entitled to a continuance of that thirty-day period as determined by the hearing officer.

4. *Investigations.* Page 2, lines 17 through 31, and page 3, lines 1 through 15 of the proposed amendments would clarify the standard under which the Board's investigative panels conduct investigations. Under current law, the panel is required to conduct the investigation "as it deems necessary to resolve the matter as it deems appropriate." The proposed amendments would change the standard to require the investigation as the panel deems necessary "to determine whether any physician ... has committed any of the grounds for disciplinary action provided for by law." The amendments would also require the panel to make one of three specific findings after its investigation: (1) that there is insufficient evidence to warrant further action; (2) that the conduct of the physician ... indicates that the physician may have committed any of the grounds for disciplinary action provided for by law and which warrants further proceedings; or (3) that the conduct of the physician does not warrant further proceedings but may be a "borderline" situation, in which case the panel may send a confidential letter of concern to the physician. The Board's specific authority to issue "letter of concern" was removed from the statute last session when the entire Medical Practice Act was revamped.

5. *Examinations and Evaluations.* Page 3, lines 16 through 20 of the proposed amendments would place a "probable cause" standard on the ability of an investigative panel to require a physician

under investigation to submit to a physical, psychiatric, or competency examination, or chemical dependency evaluation. Currently, there is no standard and an investigative panel has complete discretion to order examinations as part of an investigation. This has been an issue in the past between the Association and the Board, and clarifies the use of these examinations in Board investigations.

6. *Other Issues.* Another major issue raised by the Association relates to concerns about public disclosure of information about cases that have not yet been disclosed even to the physician. However, we were assured by the Board that a clearer policy will be adopted to ensure that physicians are appropriately notified that their case is being moved from an investigation to a formal proceeding before they read about it in a newspaper or receive a call from a reporter.

The Association believes that these proposed amendments are both necessary and appropriate, and urges your favorable consideration in amending SB 2163 and voting "DO PASS" on the bill as amended.

North Dakota State Board of Medical Examiners

ROLF P. SLETTEN
Executive Secretary and Treasurer

LYNETTE LEWIS
Administrative Assistant

TO: CHAIRMAN MUTCH AND THE MEMBERS OF THE SENATE INDUSTRY,
BUSINESS & LABOR COMMITTEE

FROM: ROLF P. SLETTEN, EXECUTIVE SECRETARY & TREASURER

DATE: FEBRUARY 13, 2001

RE: SENATE BILL NO. 2163

You may recall that when this bill was first heard we asked you to hold it open for a time so that the Medical Association could work up an amendment regarding the emergency suspension statute. They did send us a proposed amendment a short time thereafter.

Frankly, we were a bit shocked by that they proposed - but after awhile everybody calmed down and then we had a number of really good talks about it.

We spent a lot of time working on it sometimes independently, sometimes face to face. Their Legislative Commission talked about it and our Legislative Committee did the same.

We tried very hard to reach an agreement. We recognized that they had some legitimate concerns. And I think it is fair to say that they recognized that there were some things we could never agree to.

So we gave some, and they gave some and, in the end, we did reach an agreement. It is a compromise, not the statute we would write if left to our own devices - and not perfect from their perspective - but we have agreed that it is reasonable.

I am glad we reached an agreement and we urge you to accept this amendment - but I am also proud of the fact that agreement between the Board of Medical Examiners and the Medical Association doesn't always come easily. Our constituencies are very different. I think that the professions who have lost sight of the fact that the Board and the Association do not have the same agenda, have a fundamental problem.

Bruce Levi of the NDMA will actually present the proposed amendment and explain the details.

Thank you.

North Dakota State Board of Medical Examiners

ROLF P. SLETTEN
Executive Secretary and Treasurer

LYNETTE LEWIS
Administrative Assistant

TO: MEMBERS OF THE HOUSE INDUSTRY, BUSINESS AND LABOR
COMMITTEE

FROM: ROLF P. SLETTEN, EXECUTIVE SECRETARY AND TREASURER

RE: SENATE BILL NO. 2163

DATE: MARCH 12, 2001

There are seven sections to this bill:

Section 1 and Section 2

These two sections are strictly "housekeeping" type measures. During the last legislative session, all references to the "Commission on Medical Competency" were ostensibly changed to the Board's "investigative panels". The North Dakota Commission on Medical Competency no longer exists. The work previously done by the Commission is now done by the Board's investigative panels. Unfortunately, a few references to the Commission were overlooked during the 1999 session. The intention here is to clean up those oversights.

Section 5

During the last legislative assembly, the Board's investigative structure was changed. The Commission on Medical Competency was eliminated and the Board was divided into two investigative panels. Those panels assumed the duties

previously performed by the Commission. The law currently specifies that each panel will be comprised of five other members of the Board plus the president. This bill would remove the president from the panels. The problem here is that those members of the Board who served on the panel which investigated a particular case are not permitted to participate in the final decision regarding any sanctions which are to be imposed against the physician. In other words, if Panel A investigates a case and decides to bring a formal charge against the physician then the members of Panel B will make the final determination regarding the disposition of the case. The idea here is that the police should not also be the judges. If the president serves on both investigative panels then the president is never eligible to vote on the final disposition of the case because he/she has participated in every investigation. This means that six members of the Board are automatically eliminated from participation in the final decision on every case. If one or two others are disqualified for some reason or are simply absent, the final decision must be made by very few Board members. Removing the president from the investigative panels will insure that he/she can vote in the final disposition of almost every case.

When this bill was first heard, we (the Board of Medical Examiners) asked the Senate Committee to hold it open for a time so that the North Dakota Medical Association could work up an amendment regarding the emergency suspension statute and certain other issues that they were concerned about. The Medical Association did, in fact, draft a proposed amendment a short time thereafter. Frankly, we were a bit taken aback by that first proposal but we eventually had

a number of really good discussions about it. We devoted a great deal of time to working on this bill, sometimes independently and sometimes face to face with the representatives of the Medical Association. Their legislative commission discussed all this as did our legislative committee and we tried very hard to reach an agreement. We recognized that they had some legitimate concerns and I think it is fair to say that they recognized that there were some things we could never agree to. We gave some, they gave some and in the end we did reach an agreement. It is a compromise, not the statute we would write if left to our devices - and not perfect from their perspective - but we have all agreed that it is reasonable.

Sections 3,4, 6 and 7 of Senate Bill 2163 are the result of this joint effort between the North Dakota Board of Medical Examiners and the North Dakota Medical Association. I will let Mr. Levi present our comments on the details which were agreed to but basically you will find:

Section 3

This language gives a physician who has been the subject of disciplinary action by the Board of Medical Examiners the right to challenge the reasonableness of costs which are assessed against him or her by the Board following that action.

Section 4

This section was the subject of most of the debate between the Board and the Association. The language proposed here provides additional safeguards for a physician who is or may be the subject of a summary suspension action by the Board. Even though this language does provide certain "new" benefits to the physicians who are the subjects of those actions, we are comfortable in stating that the interests of the public are still protected as well.

Section 6

This section more clearly sets forth the options which are available to the Board's investigative panels at the conclusion of an investigation or inquiry. Most importantly, this language specifically authorizes the investigating panel to send a confidential letter of concern to the physician who has been the subject of the inquiry.

Section 7

This section provides that the investigating panel must, at least, find probable cause to believe that such an examination is warranted before ordering a physician to submit to a physical, psychiatric, or competency examination or a chemical dependency evaluation.

CONCLUSION

I am pleased that we were able to reach an agreement with the North Dakota Medical Association. I am also proud of the fact that agreement between the Board of Medical Examiners and the Medical Association doesn't always come easily. Our constituencies are very different. I think that the professions that have lost sight of the fact that their Board and their Association do not have the same constituency have a fundamental problem.

**Testimony in Support of Engrossed SB 2163
House Industry, Business And Labor Committee**

We appreciate the opportunity this session has afforded the North Dakota Medical Association to work with the State Board of Medical Examiners in coming to agreement on proposed changes to the Medical Practice Act – changes that would continue to maintain the Board's important role in ensuring the safety of patients while recognizing the need for due process rights for physicians. The Association supports Engrossed SB 2163 and urges a "DO PASS" recommendation from the committee.

The paramount concern addressed by the bill is to ensure that disciplinary proceedings and actions taken against physicians are in the best interests of patients. At the same time, it is important to recognize that what constitutes the best interests of patients is a two-sided coin – we need to protect the patient from a physician who requires discipline; we also need to ensure that patients are not unnecessarily or inappropriately deprived of the medical services of their physician.

Last fall, North Dakota physicians in the Association's House of Delegates passed a resolution to explore due process concerns relating to physician disciplinary proceedings. Since that time, we have talked to a number of physicians and their attorneys, and have identified several issues – most notably the need to address the ex parte temporary suspension provisions that are a part of Engrossed SB 2163.

The bill addresses several issues: the ex parte temporary suspension procedures and standards; the clarification of investigation standards and powers; and the assessment of costs against a disciplined physician.

1. *Technical reference change.* Page 1, lines 8 through 19 of the engrossed bill would change two references to the Commission on Medical Competency, which was abolished pursuant to 1999 legislation in favor of using investigative panels of the Board. The section amended, NDCC 23-34-04, relates to the mandatory reporting of information by a peer review committee. The appropriate reference is to an "investigative panel" of the Board of Medical Examiners, rather than the now-defunct commission.

2. *Assessed costs.* Page 1, lines 20 through 24, and page 2, lines 1 through 8 of the engrossed bill would provide a mechanism for review of costs assessed against a physician who is disciplined. Currently, there is no avenue for challenging those costs, even though current law would allow an assessment that could also serve as the basis for suspending the physician's license for nonpayment of the assessment. The new mechanism would allow the physician to challenge the reasonableness of any cost item in a hearing before an administrative law judge.

3. *Ex parte license suspension procedures.* Page 2, lines 9 through 31, and page 3, lines 1 through 12 of the engrossed bill address issues relating to the Board's procedure for temporarily suspending a physician's license.

Section 43-17-32.1 authorizes an ex parte "on one side only" temporary suspension by the Board of Medical Examiners if probable cause exists to believe that the suspension of a physician's license is required to reasonably protect the public from serious harm. After the suspension, the Board is required to set a full hearing within sixty days. The physician is also entitled to appeal the suspension to the district court. However, there is no opportunity for the physician who has lost his or her license to introduce evidence or cross examine witnesses until the full hearing, which could be held sixty days later. In the meantime, the fact of the suspension is public information and the physician may not practice medicine.

The Association's original proposal to address these concerns was to set up some form of an expedited hearing process to assure that the physician has an opportunity to provide his or her side of the story as quickly as possible. As we discussed this approach, it became evident that some of the due process concerns could be addressed by ensuring that the Board follows a more appropriate evidentiary standard in determining whether to temporarily suspend a physician's license in the first place. The engrossed bill would change and clarify the evidentiary standard for the Board in suspending a license on a temporary basis from a "probable cause" standard to a "clear and convincing" standard. Clear and convincing evidence is "evidence which leads to a firm belief or conviction that the allegations are true," as defined in a number of cases before the North Dakota Supreme Court. The engrossed bill would also clarify what "verified evidence" is -- for purposes of evidence relied upon by the Board for suspending a license. "Verified evidence" would be defined as "testimony taken under oath and based on personal knowledge."

The engrossed bill would also clarify the notice provisions of the law, ensuring that the physician is promptly informed of the suspension and receives a specific description of any evidence relied upon by the Board in ordering the suspension. The engrossed bill would also ensure that the physician has access to that evidence in preparing for the full hearing.

Under current law, a physician is entitled to a full hearing sixty days after his or her license is suspended. In other words, once there is public disclosure of the suspension, a physician has to wait 60 days before given the opportunity to respond to the Board's action. The engrossed bill would reduce the number of days before the hearing to thirty, with the physician being entitled to a continuance of that thirty-day period as determined by the hearing officer.

4. *Investigations.* Page 3, lines 22 through 31, and page 4, lines 1 through 18 of the engrossed bill would clarify the standard under which the Board's investigative panels conduct investigations. Under current law, the panel is required to conduct the investigation "as it deems necessary to resolve the matter as it deems appropriate." The engrossed bill would change the standard to require the investigation as the panel deems necessary "to determine whether any physician ... has committed any of the grounds for disciplinary action provided for by law." The bill would also require the panel to make one of three specific findings after its investigation: (1) that there is insufficient evidence to warrant further action; (2) that the conduct of the physician ... indicates that the physician may have committed any of the grounds for disciplinary action provided for by law and which warrants further proceedings; or (3) that the conduct of the physician does not warrant further proceedings but may be a "borderline" situation, in which case the panel may send a confidential letter of concern to the physician. The Board's specific authority to issue "letter of concern" was removed from the statute last session when the entire Medical Practice Act was revamped.

5. *Examinations and Evaluations.* Page 4, lines 19 through 23 of the engrossed bill would place a "probable cause" standard on the ability of an investigative panel to require a physician under investigation to submit to a physical, psychiatric, or competency examination, or chemical dependency evaluation. Currently, there is no standard and an investigative panel has complete discretion to order examinations as part of an investigation. This has been an issue in the past

between the Association and the Board, and clarifies the use of these examinations in Board investigations.

6. *Other Issues:* Another major issue raised by the Association relates to concerns about public disclosure of information about cases that have not yet been disclosed even to the physician. However, we were assured by the Board that a clearer policy will be adopted to ensure that physicians are appropriately notified that their case is being moved from an investigation to a formal proceeding before they read about it in a newspaper or receive a call from a reporter.

The Association believes that these statutory revisions are both necessary and appropriate, and urges your favorable consideration in voting "DO PASS" on Engrossed SB 2163.