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2005 HOUSE JUDICIARY

HB 1158

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1158

House Judiciary Committee

❑ Conference Committee

Hearing Date 1/11/05

Tape Number	Side A	Side B	Meter #
1	xx		12.1-end
1		xx	0-end
2	xx		0-14

Committee Clerk Signature dl Penrose

Minutes: 13 members present, 1 absent (Rep. Zaiser).

Chairman DeKrey: We will open the hearing on HB 1158.

Leann Bertsch, Commission of Labor: (see written testimony).

Representative Klemin: The first question is on page 1, line 17, subsection 2, "A charge issued by the department is prima facie evidence of a violation of this chapter." Do you know of anyplace in our code where the charge itself is the evidence, not only evidence, but it's prima facie evidence, so that the burden would be on the other side to prove their innocence rather than proven guilty.

Leann Bertsch: I'm not aware of other provisions within the Century Code that provides this. However, I don't believe that this provision is requiring the respondent to prove their innocence at that point, it just basically makes out that there is a prima facie case to go forward at that point, and then in the administrative hearing, the other party would obviously respond and set the tone for presentation of evidence at that point. The charge is filed, we've made out the prima facie

case that it is likely that housing discriminatory practice has occurred, and it goes forward to the administrative hearing for a finder of fact, to determine whether or not that actually did occur.

Representative Klemin: For the benefit of the committee, you could explain what it means to say that it is prima facie evidence.

Leann Bertsch: Prima facie case is the basic elements that in an investigation of a case, that has to be met prior to the other party even having to respond. There are certain elements that they look at. Basically, whether or not the person is a member of a protected class, whether they have standing to bring this particular issue, the nexus between the alleged discriminatory act and what they're claiming.

Representative Klemin: But doesn't it establish that, in fact, from the prosecution side, that you've established all the things that you need to establish in order to present that claim.

Leann Bertsch: I don't believe it established that a violation has occurred, basically it's just the way that the evidence is presented. First of all, there is enough evidence to go forward, or actually file the charge. Those basic elements have been met. Now the responding party would have to actually respond to that allegation.

Representative Klemin: You've taken the charge itself, it makes it a complete case basically, and the burden is on the responding party to prove their innocence.

Leann Bertsch: Yes, that would be the issue in the administrative hearing, that would be determined. Basically this is the charge, and they would have to come in and respond to it, exactly.

Representative Klemin: The second question I have, relates to page 2, line 13 speaking of punitive damages. It seems to me that everywhere else in the code they're referred to as

exemplary damages. Do you have any problem if we change that to exemplary instead of punitive.

Leann Bertsch: Yes, there would be an issue with that. We are very careful to make sure that the ND Housing Discrimination Act tracks the language in the federal Fair Housing Act so as not to jeopardize our substantially equivalent determination and the federal Fair Housing Act specifically talks about, in the judicial action, the punitive damages. So we do track the language quite carefully to make sure that there's not going to be an issue with HUD revoking our substantially equivalency which would mean a huge loss of funds for our agency, if they determined our law was not substantially equivalent and they do look at the language very carefully.

Representative Klemin: You don't think that exemplary damages are substantially equivalent to punitive damages.

Leann Bertsch: They may very well be, except that HUD may not know that on the face, and it would open up the door for them to question the substantially equivalency, so I would request that the language actually track the exact wording of the federal Fair Housing Act.

Representative Charging: Currently, how many people are you seeing in here come in under this, with this it almost puts them at a disadvantage, where they have to hire a private attorney.

Leann Bertsch: This does not change the substance of the law. Right now, the Attorney General's office, does not or cannot represent an individual. They always represent the state agency. That's the way the law already is. The language we are proposing just clarifies that so that there's no misunderstanding for claimants that the Dept. is the party being represented; even though it is the Department being represented, advocating for their determination of proximate

cause to seek relief for the claimant. But this also makes sure that the claimant knows that they have a right, on their own behalf, to be a party if they disagree or they want to go a different angle than what the department, with representation from the Attorney General, believes is appropriate. So certainly, they don't have to go out and hire an attorney if they believe that they are comfortable with the Attorney General's representation of the department on behalf of that individual. The language is not to change the substance of what is already in place, but just to clarify so that there's no misunderstanding for claimants.

Representative Klemin: On prima facie section, is that something that's in the federal one now.

Leann Bertsch: I need to read a little to see.

Representative Klemin: Is that something you are doing to be consistent with the federal law or something that you are just putting into it, as an addition to the state law.

Leann Bertsch: It's nothing that we are adding to bring this more into consistency with the federal Fair Housing Act, it just to fine tune, basically the procedures for filing a housing discrimination act, for an administrative hearing. It's very unlikely that we would ever have a housing discrimination case go to an administrative hearing, because the statute allows for the Attorney General's office to represent the department in district court action. And all of our cases where reasonable cause has been found to believe that a housing discriminatory act has occurred, all of the claimants or respondents have elected judicial determination. So that's basically the route all of these cases have taken and I believe will probably keep on taking because of the added remedies available in district court that are not available in an administrative hearing.

Representative Klemin: Just so I'm clear, subsection 2 is not part of the federal law now.

Leann Bertsch: I don't believe so.

Representative Koppelman: This is the second bill you have presented, and both are intending to simply clarify language, mainly so that the folks have a clearer understanding of their procedures or rights relative to administrative hearings and that sort of thing. Isn't that something you can clarify internally through policy or information you provide to people. When you change law, there is an unintended consequence to changes that just might make the law read clearer to a layman, but that is not necessarily the best reason to change the statute. What precipitated this.

Leann Bertsch: Why it is necessary is because our investigator's staff, when we take a case, we are a neutral third party. We don't advocate on behalf of the claimant, we don't advocate on behalf of the respondent. By having language that may not be clear to the average lay person, it puts our staff, often times in the position of having to explain their options or legal ramifications that if they make one choice over another, and that may tend to even give the appearance of impartiality to our staff by having to assist the average lay person in interpreting what should clear to the average layman in the reading. Also, some of those issues were raised in the litigation against the department, as far as claimants believing something that really isn't in the statute, and I think that rather than having that up for argument, I think it needs to be clarified with this more explicit language, not to change the substance but to explicitly explain to claimants so that they go in filing a complaint with the department, knowing full well, that if probable cause determination is issue on their behalf, what they rights are as far as election, as far

as representation of them and what their options are, so that our staff is not put in the position of having to appear to be giving advice that they shouldn't be giving.

Representative Koppelman: So is it your expectation then that this change would allow, or would encourage every average citizen in ND to read the Century Code and understand it without any help from your staff. It seems to me that you are still going to, by nature of what you do, you're still going to be in a position where you or your staff are going to have to be talking with people, claimants or whoever, and in saying, here is what the law says, read it yourself. I understand the litigation piece, that is a separate issue and that may be very viable and important. But as far as the clarification, it seems to me that if the law is clear, at least in the legal language, your office could certainly come out with a piece of literature or document saying in layman's terms, here is what the law says, your rights, etc.

Leann Bertsch: Certainly that could be the case, but I think this language clarifies even further and it's not just for the claimants themselves, but there are a number of advocacy groups that basically don't read the statute the same way it should be read, and that it's clear on the face that the department or the Attorney General's office only does represent the state agency. There has been confusion, not just among claimants but various advocacy groups as to who represents who, and I think this clarifying language would assist everyone who wants to look at the Fair Housing Discrimination Act and a more clear understanding of the process and the role of the parties involved in the case.

Representative Charging: How many cases per year.

Leann Bertsch: Are you talking about housing cases, right now I can tell you that we have 15 housing cases pending and in typically a year, we probably do approximately 37 cases, that is my estimate.

Representative Charging: How many are in litigation with the Dept. of Labor.

Leann Bertsch: What do you mean, litigation; as far as what we are pursuing in court?

Representative Charging: Any against the department.

Leann Bertsch: None of the housing cases were involved in the lawsuit.

Representative Charging: How many lawsuits.

Leann Bertsch: As far as going forward for judicial action. Presently, I believe there are six cases pending with the Attorney General's office, I know of one for sure that was filed in district court. Those are the ones that are presently pending as far as since we started doing housing discrimination cases, I couldn't tell you the exact number, but that's the number of pending cases being litigated at this point.

Representative Charging: Do you see growing number.

Leann Bertsch: The housing discrimination cases seem to be fairly stable, we seem to get the same amount of number each year. I don't see that it's going to grow significantly. I think with public awareness, certainly there is an increase, but not a dramatic increase in housing discrimination cases. I think as public awareness grows, I think less violations also occur, because respondents and housing providers alike, become more aware of their responsibilities and duties, so I see that the number of cases by the Department of Labor will address, will significantly grow in that respect.

Representative Maragos: You said that you normally do about 37 cases annually.

Leann Bertsch: I believe so.

Representative Maragos: What is the average turnaround time, and how does it compare with other states around us, do you know how we are doing in that regard.

Leann Bertsch: We are actually doing very well, as far as turnaround and holding cases. Every year HUD comes in and does an annual performance review to evaluate how we're doing, because of the contract that we have, and at our last annual performance review, that was just completed this fall, basically within our region, ND did extremely well compared to the rest of the nation. Our district did extremely well. The average turnaround right now is approximately 120 days for housing cases. The goal for the department, however, is to have housing cases completed within 100 days. That's the goal set by HUD and we are certainly working hard to make sure that we meet that.

Representative Koppelman: In the past, the legislature in placing the Housing Discrimination area in your office, and for labor issues, has always taken the stance that the goal, when two parties are at odds, should be reconciliation. Are you trying to get those folks on the same page if there is a problem that can be worked out, that is preferential to going to court, or even an administrative hearing, as this bill deals with. How is that working. You mentioned a lot of litigation, is that still what your department is pursuing and is it successful.

Leann Bertsch: That is the goal, and we certainly do emphasize conciliation, even though Rep. Charging asked how many cases we have in litigation. The majority of our cases come to a successful resolution through conciliation or mediation and that's also stressed by HUD. The emphasis by HUD is that you start trying to conciliate the case from the start, as soon as the complaint is filed, that process is in place. We've had great success in conciliating those cases.

Representative Onstad: An individual brings a complaint of discrimination against the housing authority or apartment complex. What is the Dept. of Labor's position. Is it neutral. It sounds like you are taking the side of the housing authority.

Leann Bertsch: The department is a neutral party. They don't take any type of position. When they have to conciliate, basically they're role is they take the information and from the beginning they send out information to both parties about the conciliation process. Basically, that's to open up a line of communication as to what each party would see as a fair resolution of that case. Immediately, they start investigating as well. That means talking to the claimant, getting the respondent's answer, if it has to involve additional investigation such as having architecture and design and construction cases, going out and reviewing the property. They are neutral, there is certainly no advocacy on either party's position, and that is made very clear to both sides, that we are not in the advocacy role.

Representative Onstad: So when does the Attorney General become involved.

Leann Bertsch: The Attorney General's role would not come into play until the Department of Labor has totally completed the case. In a housing case, they have to totally complete the investigation and they have to issue a final investigative report. If the final investigative report results in a case being forwarded or a determination of reasonable cause, the reasonable cause case is forwarded to the Attorney General's office to issue a charge. If there is a determination that there is no reasonable cause, that is the extent of the department's role. The complaint is dismissed and there is no more further action on the department's side. The claimant on their own behalf could certainly file their claim in district court, but that would be the extent of the department's role in those cases.

Chairman DeKrey: Thank you for appearing. Further testimony in support of HB 1158.

Amy Schauer Nelson, Executive Director of ND Fair Housing Council: (see written testimony).

Representative Onstad: With the present language, and the proposed language. Let's take the proposed language, do you feel that will reduce the complaints or increase the amount of complaints.

Amy Schauer Nelson: I don't think it will change the number of complaints that get filed; because that isn't what is being affected here. What's being affected, is when those complaints are filed and they are ruled to have cause, what happens then. What will happen is what Commissioner Bertsch said, is that few people would take the administrative law judge process, they would file to go through district court. The problem you have is that most individuals that come into this process, do not understand the administrative law judge process. Do not understand the district court process. They really wouldn't be able to make that determination. If they don't elect for district court, it automatically goes through the administrative law judge process. It won't have an effect on more cases being filed, because this is further down the pipeline.

Representative Onstad: This is after a complaint is filed.

Amy Schauer Nelson: This is after a ruling has been issued, that all this language is being proposed.

Chairman DeKrey: How do you see the Attorney General representing the state, which he does for every agency in this state, and then also the complaint, because every transaction I've ever had, legal transaction with another party or whatever, we were advised to have two separate

attorneys. How is the same person supposed to fairly and equitably represent both the state and the person bringing the complaint.

Amy Schauer Nelson: All I can say is that at the federal level that does occur. At the federal level, that HUD attorney or DOJ attorney, represents both the interests of the USA and also that individual complainant unless they hire private counsel on their own. I don't see why that rule couldn't be extended into the state. Right now, the Attorney General's office feels that they shouldn't be doing that rule. We feel that there is room to do that. Some agencies in other states, for instance, a Florida group, has also subcontracted with their legal services division to also represent them and the complainant.

Representative Meyer: Is there a timeline after these complaints are filed where you can choose to go through administrative law judge or take it to district court, is there any timeline in there where that happens. Or if you choose one option, you're not allowed the other option.

Amy Schauer Nelson: Yes, I believe it is 20 days from the time that the charge or the probable cause ruling is issued, that either party then at that point, can elect for district court. If nobody elects for district court, it automatically goes to the administrative law judge process.

Representative Meyer: Who does advise, is the department of labor, or is it your organization that advises these people what course they should take in regard to the complaint.

Amy Schauer Nelson: If it is somebody we are working with, we would advise them, provide the facts to them. I don't want to speak for the department of labor, because I think Commissioner Bertsch has outlined that, they are more of a neutral third party, don't advocate for or against either way. If the complainant is not using my agency, again Century Code is very difficult language to read and understand, and I don't think the vast majority of people going

through this complicated process feel to start out, hey it's better for me to go to district court. That's the problem.

Representative Kretschmar: Is it more difficult or more red tape, to do these things in the federal system, rather than the state system.

Amy Schauer Nelson: In my opinion, the federal system is easier, because you have that representation of the individual, where the work is being done there. This is a little bit more difficult process for the complainant, and that is obviously who we work with.

Representative Koppelman: Is the role of your organization oftentimes to advocate litigation for people you feel have been damaged or harmed, or do you provide services helping people litigate these claims.

Amy Schauer Nelson: You mean after a probable cause ruling.

Representative Koppelman: Or before, either.

Amy Schauer Nelson: Let's take after a probable cause ruling. We will inform them that they can elect for district court, or you can elect to go through administrative law judge process, and we leave that option up to them, as to their ultimate decision. As Commissioner Bertsch said, a vast majority of them will choose the district court process. We do not have attorneys on staff, so if we do hire an attorney, if a complaint is getting ready to be filed, do we file that with the department of labor or in district court. We do not have attorneys on staff, our budget for legal fees is $4,000/yr. But there are situations where, if we find that the violation is particularly egregious, we may advocate for a lawsuit, but again it is the client's decision. It's pretty rare that we feel lawsuits. The vast majority of the complaints are filed with the department of labor.

Representative Koppelman: On the issue of punitive damages that you talked about, or as Rep. Klemin pointed out, exemplary damages in other Century Code listings, you seem to say that you advocate for the potential at least for punitive damages against the defendant, do you also favor them against the claimant, if the tables are turned.

Amy Schauer Nelson: We are advocating for the rights of the person who is the alleged victim of housing discrimination. If a charge has been filed, that case, the department of labor has already ruled that there was discrimination occurring there. In that case, we would be advocating that damages be awarded to that victim. There would not be a situation where the damages should be awarded to the respondent in that case. Labor has already looked at, and said that Yes, discrimination was found here.

Representative Koppelman: But the whole purpose for a process going forward, either administrative hearing or whether taking the case to district court, is to sort out the facts in the law in determining what the situation is and how to remedy it. So it's possible, maybe even happened for the department to say, yes there may be a violation here, probable cause and we need to move forward and by the time everything gets out on the table, it's discovered, well, this was a frivolous claim. If that's the case, wouldn't it be the right, if you favor punitive damages, wouldn't you also say, hey if somebody is out there trying to make life difficult for the other party in an unjustified way, wouldn't they also be in jeopardy of punitive damages.

Amy Schauer Nelson: When a case has been found to have cause, by either HUD or department of labor, I have not seen a case so far to date, where there hasn't been cause, where there has been a violation of the Fair Housing Act within that.

Representative Charging: Can you just give me an example of what kinds of violations and what describes the violation or what have you seen.

Amy Schauer Nelson: I'll reference for you the cases that are currently pending with the AG's office. The majority of them are disability complaints. There are some on new design construction violation; a building was built that was not accessible for people with disabilities, there is one regarding a denial and additional charging for a service animal for a person with a disability, there is also a familial status case, where families with children were denied access to housing. That's the majority of them pending with the AG's office, those type in nature. The type of complaints that get filed with the ND Dept of Labor, overwhelmingly, are disability complaints. Primarily, reasonable accommodation and modification questions. Second, overwhelmingly, are families with children being denied housing because of the presence of the children. After that, it's kind of a bigger group of denial because of receiving a Section 8 voucher, or denial due to race or national origin.

Representative Charging: That's why I find it belaboring for people to bring cases, they don't have the means nor the ability to follow through with the process. Do you find that true.

Amy Schauer Nelson: It's a very complicated process. Even those of us who have worked in it for several years, find new issues being raised every day. Somebody coming in, who has never gone through this process before, just getting their complaint filed is confusing, let alone if you get a cause ruling and then go forward to that next step. If you don't have somebody helping you, who knows the process, or a private attorney, it is very difficult.

Representative Charging: Do most of these people in that case are having difficulties, it is not in their means to hire an attorney.

Amy Schauer Nelson: That's correct, again we are looking at typically rental transactions. You're renting housing, you don't even own your own home yet. In other parts of the human rights act, you get fired from your job because you were discriminated against, now you don't have income coming in either. Your housing goes away. They are trying to make ends meet each day, they can't think about hiring an attorney, and one of the bigger issues that we've been working with is the fact that we can't get attorneys to take pro bono work or contingency cases here in North Dakota, because it is such a specialized piece of law.

Representative Klemin: I've been looking over these comments by HUD that you've got attached from the Federal Register, which I guess they explain or respond to other comments and the rules that were actually adopted, as I understand what this is. It appears that what you've got attached here relates to the issuance of the charge and it looks to me like it's first an investigation to determine if there is reasonable cause to believe that there has been a violation and the general counsel would make a reasonable cause determination, and then if they determine that reasonable cause exists, the general counsel issues a charge and then that charge is served on the respondent who would be entitled to a hearing. It goes on to state in here that evidence is presented at the hearing in accordance with some procedures which are not set out in these papers.

Amy Schauer Nelson: I didn't attach everything.

Representative Klemin: Following the submission of the evidence at the hearing, the administrative law judge would make a decision. It seems to me, and I haven't been involved personally with the federal process, but at that hearing, doesn't the general counsel have the burden of going forward to prove the essential facts of the charge first.

Amy Schauer Nelson: Correct, that has been my understanding of the process also. They have to show that the case is set forth in the charge.

Representative Klemin: Then the respondent would have the opportunity to present its defense.

Amy Schauer Nelson: Correct.

Representative Klemin: From that, a decision is made. So when we have in this bill, on page 1, subsection 2, line 17 and 18, the charge itself is prima facie evidence of the violation, that actually shifts the burden of proof to the respondent. From the legal dictionary, prima facie evidence is evidence that until its effect is overcome by other evidence, will suffice as proof of a fact or issue. In other words, if this bill is passed with this section here, the department actually wouldn't have to do anything other than issue the charge and then the burden of proof would be on the respondent to prove he's innocent, as opposed to the department proving the central facts of the case. Would you agree with that?

Amy Schauer Nelson: I'm not an attorney. I think Commissioner Bertsch argued the reason for that language being in there. It's not language we are for or against. We're comfortable with that language being in there. I personally don't have the strongest legal background to say that you are incorrect in the statement you are making.

Representative Klemin: The second issue is the punitive damages. As I understand it, you're taking issue with the fact that this bill says punitive damages cannot be awarded, whereas the attachment that you've got here, notes that the comments says that both punitive or exemplary damages, they are using the terms interchangeably in the Federal Register, so I believe that it means the same thing. It says in here, I'm looking at the comment relating to Section 104.3-10,

says the administrative law judge may order the respondent to pay damages to the aggrieved person, including damages caused by humiliation and embarrassment. Then later on the next page, it talked about what those are, monetary relief in the form of damages, including damages cause by humiliation and embarrassment and attorney fees and goes on to say damages for humiliation and embarrassment and non-compensatory damages i.e. punitive and exemplary damages. So you're point is that what is in this bill, regardless of whether we call it punitive or exemplary, is contradictory to what's in the federal rule now, which does give that authority.

Amy Schauer Nelson: Correct. The reason I attached one page, is what the actual federal law says. The reason I attached the commentator's notes, because they went into that level of detail regarding the types of damages. I thought that would be on interest to the committee, that HUD said specifically, we're not going to say you can't award compensatory or punitive damages.

Representative Klemin: Your point is that this would be the kind of deviation that would make it more likely that HUD would find the ND law not to be substantially equivalent.

Amy Schauer Nelson: That is our opinion, correct.

Representative Koppelman: Is this a change, in Section 2, in your view is that a change from current law. In other words, is it your understanding that under current law, punitive damages could be awarded and this would change that, or is it just a clarification of what already is the case.

Amy Schauer Nelson: In my opinion, punitive damages could be awarded now, but this would be a change. I believe that there might be some disagreement with the Attorney General's office on that, but we feel punitive could be awarded.

Chairman DeKrey: Thank you. Further testimony in support of HB 1158.

Cheryl Bergian, Director, ND Human Rights Coalition: (see written testimony).

Representative Delmore: In looking at the amendments you've offered, is there a reason that you didn't look at lines 12 and 13, punitive damages.

Cheryl Bergian: I attempted to reference those amendments in my testimony, page 2, lines 12 and 13 is at the beginning of the second paragraph on the back page. I meant to ask that the amendment be deleted.

Representative Delmore: It looks like you are taking out any language in the bill with the exception of one small part of it.

Cheryl Bergian: The amendment on page 1, lines 17 and 18 regard prima facie evidence would be the only thing left.

Chairman DeKrey: Thank you. Further testimony in support or opposition of HB 1158.

Bruce Murry, ND Protection and Advocacy Project: (see written testimony).

Chairman DeKrey: Thank you for appearing.

Doug Bahr, Director of Civil Litigation, Attorney General's office: (see written testimony). I am here to provide assistance.

Representative Maragos: The two lines, neither the department nor the administrative hearing officer may order punitive damages - if that were removed, would it just be automatically assumed that they could levy punitive damages upon the respondent, on page 2, lines 12 and 13.

Doug Bahr: I believe we would then be in the confusion state we are now, where there's arguments both ways. There's no formal Attorney General's opinion, none has been requested, to permit an administrative law judge to issue punitive damages, is a violation of the right to a jury trial, because you are placing in an individual the right to place such monetary restrictions on

someone and denying them of any constitutional right to have a jury trial, to make those decisions. Many courts have gone that way. We don't have a decision in North Dakota, admittedly, and so by putting this in, it would hopefully make that clear that that wasn't an option. I have been told that that is consistent with the federal law.

Representative Maragos: Are you aware of any administrative hearing officer levying any penalties or punitive damages.

Doug Bahr: I am aware of where they can levy penalties. I am not aware of any case law or any statutes in North Dakota that permit them to levy punitive or exemplary damages. I am not aware of any, but there may be. There are cases where they can do penalties. If you are spraying without a license, spraying pesticides without a license, they may be order the statutory penalty provided in the law.

Representative Maragos: I guess it just addresses punitive damages, even though you are not aware that they can't. Is that correct?

Doug Bahr: If we remove that language, we're back where we are today; where some people will go to the department and say you can seek these kinds of damages and the department is going to have to say, I don't know if we can. The department could ask for a formal Attorney General's opinion, but that's only good until the Court decides otherwise. If this body wants to make this decision, this is the opportunity to do it and leave it in the hands of the court to guess which way was intended. It puts the opportunity for this body to make the policy that it has the authority to make.

Representative Klemin: First of all, on the ethical dilemma issue that you raised, let's see if we can just follow that to its end. What happens, if you had to follow the rules of professional

responsibility I presume, and following that to the logical conclusion, what would happen in that situation if the Attorney General's office did have this ethical dilemma and what would you have to do.

Doug Bahr: I think you would have to talk to the Labor Commissioner, to see how much additional funds she would need appropriated, because I think we would be having to have them retain outside counsel to be appointed as a special assistant attorney general and be paying legal bills at both ends. Legal bills for the office to represent the department, and legal bills for someone to represent the individual's claim. Basically we would have two attorneys in every one of these cases, where there was any potential conflict.

Representative Klemin: But what you would have to do is withdraw, and they would have to hire outside counsel for this.

Doug Bahr: If the legislature says there is a statutory duty for the department, through the Attorney General to represent these individuals, there is no opportunity to withdraw. We would just pay outside counsel $150/hr to handle those cases.

Representative Klemin: But the Attorney General's office would have to withdraw.

Doug Bahr: The actual employees of the office of Attorney General could not handle those cases.

Representative Klemin: So in that situation, the position being advanced by the person who say that the Attorney General's office should represent that aggrieved person too, may actually be against their best interest.

Doug Bahr: I think their interest is getting an attorney for free. That's a legitimate interest. If I were in a position where I needed legal assistance, and I could get an attorney for free, whether

the Attorney General's office or good private counsel, I would be happy to do that for free. My point is, the policy of this state's interests are being represented through the Labor Commissioner, and if there interest is contrary to the policy of the state, why should the state be paying to represent that interest also.

Representative Klemin: On the issue of punitive damages, section 2 of this bill, we were provided with a copy of the Federal Register from HUD on this issue, and it looks like under the federal rules that the administrative law judge can issue punitive damages, is that your understanding of this.

Doug Bahr: As I mentioned a minute ago, I don't have the answer to that. From what you've read, it sounds like that is.

Representative Klemin: So I think the point that the Commissioner of Labor was making, is that ND law needs to be substantially equivalent to the federal law, which is part of the reason for this bill, and so if that's the case, and this says that you can't issue punitive damages, and the federal law says you can. Are we not then violating that substantial equivalency requirement.

Doug Bahr: I am not familiar with the federal law to answer that. I can ask someone in our office to look that and provide a response. They still do have the right to punitive damages through the civil action, as I understand it. This is simply to avoid any potential constitutional concerns that you cannot get it through the administrative process. You're right, if it is permitted through the administrative process under federal, that is a difference, whether that is substantially different I don't know.

Representative Klemin: On the prima facie issue, when you said that this does put the burden on the respondent. What's the problem with the Dept of Labor coming into the hearing before the administrative law judge and putting in the facts necessary to prove a prima facie case.

Doug Bahr: There is no problem with that, and that is what would ultimately happen. Whatever the respondent came with, the department would have to put in information too, and the administrative law judge would determine by the preponderance of the evidence, the greater weight, which party prevailed. The benefit of this was just to make the Labor Commissioner's determination of some effect. That it wasn't a meaningless act, you go through it, and you start from scratch, at least it provided some presumption at the beginning of the hearing.

Representative Klemin: But what it really does, is says you are guilty until proven innocent.

Doug Bahr: It says that the department has already found you guilty; that it has gone through the process established by law and made a determination that you are guilty and now you need to come and respond to that.

Representative Klemin: So what I said was correct.

Doug Bahr: You're not guilty until you are proven innocent, because you were found guilty through the department's investigatory process.

Representative Klemin: Now I am confused, I thought a charge was what you had to do to initiate the process.

Doug Bahr: I thought I clarified this at the beginning. Someone makes a complaint with the department, says I was discriminated against. The department goes through the process, investigates it while attempting to conciliate or mediate the case. If it doesn't get conciliated or mediated, they issue a final determination. If that determination is of probable cause, meaning

there is evidence that there was a discrimination, then the charge of discrimination is issued. It's not because an individual made the complaint, it's because the department investigated and determined, based upon that investigation, that there was probable cause, so there has been a process already, obviously not a constitutional due process, where they had the opportunity to call witnesses, etc. but there has been a process of investigation, at least a preliminary determination made.

Representative Klemin: So then the next step would be the person charged with violation, would have the opportunity for administrative hearing.

Doug Bahr: As I understand it, the person who made the complaint, has the choice to choose to pursue it in civil court or to have an administrative hearing, and as the Commissioner testified, to date, they have always chosen to have the civil hearing, rather than administrative process.

Representative Klemin: So once the charge is made, the claimant can choose to go forward with a hearing, and at that hearing, the aggrieved person, the person against whom the charge was made was a party, and under the present procedure, does the department have the burden of going forward to establish its case before the administrative law judge, before the respondent has to respond.

Doug Bahr: I believe that, under the present procedure, the department would have the burden of going forward, as well as the burden of proof.

Representative Klemin: OK, has that process been working okay.

Doug Bahr: To the best of my knowledge.

Representative Koppelman: Thank you for your testimony. I think it does clarify the dilemma here, relative the Attorney General's position and also the process and procedure. You

mentioned the point recently here, in response to Representative Klemin's question, the issue of wanting legal service for free, and you also referred to legal aid with reference to employees in the Attorney General's office. Legal Aid in ND, as I understand it, is there to provide legal advice for people that can't afford it.

Doug Bahr: It is, there are very strict guidelines as to who can get that advice, and it's limited to certain types of cases, and I'm not an expert on being able to tell you exactly what those are. I don't know whether they have authority to provide any kind of assistance in these kinds of cases or not. If they do, I don't know if they have authority or the funds. These types of actions aren't cheap (civil or administrative cases).

Representative Koppelman: In essence, the complainant's rights, or at least their interests, are being advanced through this process. In other words, somebody makes a complaint with the department, in order to move forward, the department has to find probable cause and say there is a violation here, and then moves forward to either the administrative hearing process or to the district court. That's the point where the Attorney General's office is involved, representing the department and the finding that there is something here that looks like there is a violation. Now, if that's the case, and I understand what you said, if there are other issues that the individual wants to advance other than the matter that the department made their finding on, they are free to hire private counsel but their interests, the complaint that was found valid that will advance. Having said all of that, there is no communication with the person making this complaint, it goes through that process and then the Attorney General handles it and they don't hear what is going on. Is that a fair criticism, and is there a way to improve that. Is there at least a way to let them know what is going on.

Doug Bahr: I cannot say whether that is or is not a fair criticism. I haven't handled one of these cases. I will talk to the attorney who does. I can speculate that maybe the attorney was concerned that sending them copies directly, would make them believe that they were his client and therefore didn't want to put himself in that position where that belief would be perpetuated and therefore a possible ethical violation or other charges brought. So it's possible he sent them to the Commissioner and then they send it to them, so that they are clear that it's going through them. If it is clear in law and it's clear in notices that the department provides these individuals, personally I don't see why they can't be copied on substantive stuff, as long as it doesn't somehow violate attorney-client privilege; in other words, if there is specific communication between the Commissioner and the attorney, we don't want to waive that privilege by sending it to a non-representative party. The department is concerned with policy. The individual may only be concerned with getting money.

Representative Koppelman: If this bill passes, I think it will clarify a lot of what we're discussing. I think the AG and the department could come up with a way to keep that person in the loop. It is valid to say that if someone has an issue, it would be nice to know what is going on.

Doug Bahr: It concerns me if there is no communication, either through the department or through our office with these individuals. If it is accurate of what was said, I don't know, that a case was actually settled without the individual even knowing about that and having input, that concerns me too. I think their input should be sought and understood, as long as they understand that that doesn't mean that we represent them.

Representative Delmore: Your last statement leads to think that you are talking both ways. First you're saying that there can't be any conflict, that person can't be a part of it, and you really turned that around. What has the Attorney General's office done in the past without this specific bill, how did they handle these cases.

Doug Bahr: I don't understand.

Representative Delmore: You turned it around, you said that person can't be represented by the Attorney General; however, you just stated very clearly that that person does need to have input. What's happened in the past. Have they had that input before.

Doug Bahr: As a matter of courtesy, I believe they should have input because the department is representing the policy of the state of ND, and on behalf of that individual. In other words, the department is concerned with this individual's claim. The department is the client, and whether the department talks to that person, and says we are considering this possible settlement, that is something we can work out. I think they should have input, that doesn't make them the client. Often times when the state is involved in lawsuits, we seeks other people's input to make sure the settlement will adequately protect all the interests involved, whether it's an individuals or other government entities or whatever.

Representative Delmore: What has been done by the Attorney General's office in the past. You didn't have this in place.

Doug Bahr: I have not handled these cases and I don't know how that exactly has been done. I know we have always taken the position, that we do not represent the individual and we cannot represent the individual. So whether they got communication or not, I don't know.

Representative Delmore: I really think it would have been helpful to have somebody here from the Attorney General's office who actually has represented some of these cases. That's the answer to the question we need in telling us why we need this piece of legislation, specifically for that reason.

Representative Meyer: On page 2, under the exemplary or punitive damages. When you are before an administrative law judge, and the department may order the appropriate relief, including actual damages, how do you get actual damages when you can't produce receipts. There is nothing you could do unless you put in punitive damages to get an award. There wouldn't be any award they could award.

Doug Bahr: In cases, there are actual damages, for example the person was discriminated against housing, so they had to rent a place that charged $150/mo more in rent, and they are in a year contract. Depending on whatever the actual issue was. There can be actual damages. Every case is different. It's important that injunctive relief is also permitted, declaratory relief saying there was a violation, injunctively prohibiting future discrimination, and to the extent possible rectify past discrimination.

Representative Meyer: What could I have done to rectify it, is there a complaint filed kept on this person.

Doug Bahr: I believe in the law there are specific civil penalties that can be assessed against a person. The difference between penalties and punitive damages, is that punitive damages purely goes to the individual. Civil penalties are more broad. They go to the government. So if there were continuing violations and the person refused to quit, that would be a remedy and I believe

the department does maintain a record of these files and would know if there is repeated concerns with the same entity.

Representative Charging: I have two questions. One, going back to the basis for the bill, which is the substantial equivalent to federal law and the other one with the housing conflict. If the federal government can do it, who advocates for the USA and the individual, who filed the complaint, why can't we in North Dakota.

Doug Bahr: We can't advocate for their interests. We cannot represent them as a client. Our bill, the law specifically says bring a charge, the department is the client of the Attorney General. We should seek the individual's input, but they are not the client and they cannot control or dictate how the office of Attorney General represents the client agency. That is the concern. I don't know if the information I've received, is not that the federal government actually represents the individual as a client. They advocate their interests, and that is exactly what this bills permits the office of the AG to do.

Representative Charging: My other question is, of the 37 cases that are pending, I got the feeling that people with disabilities, as much as most of those cases are, don't you feel that those people are finding it difficult to live in this state and maybe this legislation might make it a better place for them. Are they all seeking money damages. How much money are we talking about.

Doug Bahr: I don't know any of the specifics of the cases. I don't know if the individuals are seeking money damages, I know there are many that simply want to have discrimination discontinued. That's a good goal. I'm not saying that money damages is a bad goal. Many times it is an effective goal and purely under the current law, compensatory damages are clearly

permitted. I'm not taking a position whether money damages are good or bad. But the point is that the department dictates the policy of the state.

Representative Boehning: In Section 3, if the person wants to get the benefit of punitive damages, he has to intervene in the case, correct, in lines 24-27.

Doug Bahr: I don't see where that has anything to do with punitive damages. It provides that the aggrieved person may intervene. That's already in the law. It was never the intent of this body that the AG represent the individual. They would not have to intervene if they were already represented by the AG.

Representative Boehning: Basically, what the AG and Labor Commissioner's office is doing, is saying that there was a charge out there, that says the person whoever the charge was against, is trying to resolve that, not trying to win a million dollar lawsuit for that person.

Doug Bahr: As I understand this, any of this relief afforded, the department can't seek on behalf on that individual. It can seek any types of relief or actual damages, if this is adopted it can't seek punitive damages, but it can seek actual damages on behalf of that individual. They can intervene or not. If they want to take a different position or argue differently, then the position of the department is, they would need to intervene.

Representative Boehning: Can you take this to a district court now.

Doug Bahr: They have the option at the start, once the determination of probable cause is found, to choose administrative or civil district court. In civil, you have a right clearly to punitive damages. If this is passed, you won't have the right to that in an administrative hearing. That is the distinction between the two. The person has the option within 20 days to determine, I want to go through the administrative hearing or I prefer to go to civil.

Representative Boehning: If the person wants to bring monetary case against the other party, they will bring a civil case, and the Department of Labor will take it that direction then.

Doug Bahr: I am not following the question. The one who claims they were discriminated against, has the choice, once the Department makes the finding, to have an administrative process in which compensatory damages can be awarded or to go through the civil process in which compensatory or punitive damages can be awarded. That is their choice. In either case, the office of AG represents the department, whether for the administrative or the civil process. So the person can get those types of damages under either circumstance.

Representative Boehning: In other words, the person can go through civil case and get punitive damages through the Dept of Labor.

Doug Bahr: That is correct.

Representative Zaiser: You indicated several times that you represent the state of ND, correct. So in a case where an individual brings a claim against somebody who discriminated against them in a housing situation, you represent who, the individual or...

Doug Bahr: Are you saying when an individual brings a claim against a state entity?

Representative Zaiser: Against an individual property owner, a landlord for discrimination and the Labor department is involved. So you represent the Labor department.

Doug Bahr: Correct.

Representative Zaiser: So who represents the complainant.

Doug Bahr: Her interests are represented through the Labor department. The department files the complaint, on her behalf, but she is not the client.

Chairman DeKrey: Thank you. Any testimony in opposition to HB 1158.

Labor Commissioner: I want to clarify a few things that were said. There were some misstatements made. What is the time frame for an individual, once a reasonable cause determination is issued by the department. An individual has had a determination in their favor, has 30 days, not 20, within which to elect judicial or administrative hearings. In all the cases where reasonable cause determinations have been issued, they've all elected judicial action, rather than administrative hearing. Just to clarify, I know Ms. Schauer-Nelson indicated that she provided the Register, I have studied the Fair Housing Act as amended, and specifically it goes through the remedies in administrative hearings and it goes through the remedies available in district court. Specifically with the remedies in administrative hearings, it indicates that the remedies allowed the aggrieved person, that the administrative judge may issue, include actual damages, suffered by an aggrieved person and injunctive, or equitable, relief, and then, of course, may assess a civil penalty. That is how our law tracks. Then it goes on to say what the remedies are available, relief that may be granted in court. Specifically is lists the same remedies that it did for administrative hearings and in addition to that, it lists punitive damages. That's why the distinction. It specifically lists punitive damages available in district court, does not list that in administrative hearings. That is pretty clear, this is the overall statute of the Fair Housing Act, and it's very clear on its face. So our statutes which track that language and specifically clarify that punitive damages are not available in administrative hearings, but certainly available in district court and that's really the route that individuals, who have had a reasonable cause determination in their favor, have chosen.

Representative Klemin: We didn't have a copy of the statute that you have there, but if we don't include this section 2 in the bill, who actually really tracking the federal statutes then without it, because federal statute doesn't say that either.

Labor Commissioner: I don't believe it would a departure from the federal statute, but it was just to attempt to clarify for those who have to make the choice between administrative hearing and judicial election. The real difference is the punitive damages they may get in judicial election vs. an administrative hearing. If you don't adopt that language, I don't think it is going to change what is already in place, it's just clarifying language. To clarify for those individuals who have to make that choice. Obviously, if some claimant actually ever did choose to go the administrative route and wanted to argue that punitive damages could be awarded, it would be up to the judiciary to determine that in a suit. We want this body to determine whether that's policy they want to set forth instead of the court.

Representative Meyer: If a claimant opts to go to district court, and not the administrative hearing, is the work product that your office has done, is that available to the individual in district court, or does it all have to be done again.

Labor Commissioner: The individual is going to get the determination and the final investigative report. The final investigative report is a very comprehensive analysis, it tracks exactly who was interviewed, the evidence gathered, the analysis of the evidence, and that is available to both parties. Yes, that is available.

Representative Delmore: How often in the past has the AG represented the Labor department and who from his office did the work.

Labor Commissioner: The Housing Discrimination Act is fairly knew, so the cases that have been presented, have been actually forwarded to the AG's office have been very few, approximately 6 or 7 and one filed in district court. I can honestly say that the word product from the AG's office is wonderful. The assistant that has been doing housing cases, is no longer there. I can tell you that representation from the AG's office is wonderful and the consistency on the general basis, is that they do provide information and we have had representation from the AG on other cases, such as wage claims. Routinely they will provide a courtesy copy of the actions that are going on to the claimant that we are representing on their behalf. I think the example talked about earlier was an obscure situation that shouldn't happen, and will not happen with the communication that I think is in place and will be in place.

Representative Klemin: Would it be possible for you to provide us with a copy of the statute.

Labor Commissioner: Certainly.

Chairman DeKrey: I am going to appoint a subcommittee to handle this bill, chaired by Rep. Klemin, myself and Rep. Onstad. We would like a copy of that.

Labor Commissioner: I can definitely provide that.

Chairman DeKrey: With that, we are going to close the hearing.

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1158

House Judiciary Committee

☐ Conference Committee

Hearing Date 1/17/05

Tape Number	Side A	Side B	Meter #
2		xx	0-7.2

Committee Clerk Signature

Minutes: 14 members present.

Chairman DeKrey: Representative Klemin will explain his amendments to HB 1158.

Representative Klemin: This is the Labor Department bill. The amendment deletes lines 17, 18 on page 1. That's the change requested by the Labor Commissioner. That would mean that the guilty until proven innocent, changes the burden of proof in these cases so that the charge itself is prima facie evidence of the violation, which means they don't have to prove anything, all they have to say is that he did violate it for these reasons. This is not a big burden. So it changes the burden of proof and what this amendment proposes to do is to it back the way it is right now, so that they have the burden of proving the case, which isn't all that tough for them to do, but procedurally it should be their burden, not for the person accused to prove he's innocent. The second change is on page 2. To delete section 2. Removes the statement that either the department or the administrative hearing officer may order punitive damages under this chapter. There seemed to be considerable disagreement by the people who testified, as to whether they

could or couldn't do that now. And whether if putting this in, would make them out of compliance with the federal. I think the solution is to leave it the way it is in the law right now.

Chairman DeKrey: Rep. Klemin moves the Klemin amendments.

Representative Maragos: Seconded.

Representative Koppelman: Do you know of any cases in ND where the administrative hearing officer did this.

Representative Klemin: I don't know of any, but that doesn't mean it isn't.

Representative Boehning: On page 2, removing lines 12 and 13, if you take those lines out of there, the agency will be able to levy fees or fines in the administrative hearing; to do punitive damages.

Representative Klemin: I don't think it changes anything over what they currently can do. The law doesn't say they can or cannot. Both sides are saying that federal law says one way or the other, this leaves it as the status quo.

Representative Boehning: They could levy fines if so choose.

Representative Klemin: Yes, but that's not realistic. We still have the federal law that applies in this situation. There is considerable disagreement about what the federal law was on the subject. Let's have them argue the federal law, and let's not get into that in the state statute.

Representative Onstad: I'm okay with the changes, but when it comes to lines 10, 11 and 12, it just seems like the department, if their hear that, and if they find the housing authority is in violation, it just seems like it ends there. Shouldn't they have to fix it. I don't think they make that statement.

Representative Zaiser: I concur with that. There is no remedy provided for. What does the poor person do.

Chairman DeKrey: Voice vote on the amendment. Motion carried. What are the committee's wishes.

Representative Galvin: I move a Do Pass as amended.

Representative Maragos: Seconded.

Chairman DeKrey: I guess I have questions too. I am going to support it to get it over to the Senate. Hopefully they will get serious about fixing it.

Representative Klemin: I think the way is now as amended, we are really talking about who the Attorney General represents. I think that it makes it clear that he represents the department and not an individual.

Chairman DeKrey: The clerk will call the vote on a Do Pass as amended motion.

9 YES 5 NO 0 ABSENT DO PASS AS AMENDED CARRIER: Rep. Klemin

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1158

Page 1, line 1, remove ", subsection 1 of section 14-02.5-32,"

Page 1, remove lines 17 and 18

Page 2, remove lines 6 through 13

Renumber accordingly

58108.0101
Title.0200

Adopted by the Judiciary Committee
January 17, 2005

VR
1/17/05

HOUSE AMENDMENTS TO HOUSE BILL NO. 1158 JUD 1/17/05

Page 1, line 1, replace the first "section" with "sections" and remove ", subsection 1 of section 14-02.5-32,"

Page 1, line 2, remove "section"

Page 1, line 3, remove "and penalties"

Page 1, remove lines 17 and 18

Page 1, line 19, replace "3." with "2."

HOUSE AMENDMENTS TO HOUSE BILL NO. 1158 JUD 1/17/05

Page 2, line 3, replace "4." with "3."

Page 2, remove lines 6 through 13

Renumber accordingly

Date: 1/17/05
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1158

HOUSE JUDICIARY COMMITTEE

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass as Amended

Motion Made By Rep. Galvin Seconded By Rep. Maragos

Representatives	Yes	No	Representatives	Yes	No
Chairman DeKrey	✓		Representative Delmore	✓	
Representative Maragos	✓		Representative Meyer		✓
Representative Bernstein	✓		Representative Onstad		✓
Representative Boehning		✓	Representative Zaiser		✓
Representative Charging		✓			
Representative Galvin	✓				
Representative Kingsbury	✓				
Representative Klemin	✓				
Representative Koppelman	✓				
Representative Kretschmar	✓				

Total (Yes) 9 No 5

Absent Ø

Floor Assignment Rep. Klemin

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

REPORT OF STANDING COMMITTEE

HB 1158: Judiciary Committee (Rep. DeKrey, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (9 YEAS, 5 NAYS, 0 ABSENT AND NOT VOTING). HB 1158 was placed on the Sixth order on the calendar.

Page 1, line 1, replace the first "section" with "sections" and remove ", subsection 1 of section 14-02.5-32,"

Page 1, line 2, remove "section"

Page 1, line 3, remove "and penalties"

Page 1, remove lines 17 and 18

Page 1, line 19, replace "3." with "2."

Page 2, line 3, replace "4." with "3."

Page 2, remove lines 6 through 13

Renumber accordingly

2005 SENATE JUDICIARY

HB 1158

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HB 1158

Senate Judiciary Committee

☐ Conference Committee

Hearing Date February 15, 2005

Tape Number	Side A	Side B	Meter #
1		X	3000- End
2	X		0.0 - End

Committee Clerk Signature Mona L Gallberg

Minutes: Relating to labor dept. admin. hearing and representation in enforcement actions.

Senator John Syverson, Vice Chairman called the Judiciary committee to order. All Senators were present except for Sen. Traynor. The hearing opened with the following testimony:

Testimony In Support of the Bill:

Leann Bertsch - Commissioner of Labor (meter 3000) Gave testimony - Att. #1

Sen. Trenbeath stated that if the Attorney General would advocate in favor of the dept.'s finding of probable cause that would be just that. If the Dept. did find "probable cause" and believe discrimination had occurred the AG would be representing you on that bases. Yes. **Sen. Trenbeath** further stated that if the dept did not find "no probable cause' the AG would not be in position of advocating a position on your behalf. Leann responded that if there is "no probable cause" found then there is no administrative hearing, no action on behalf of the dept. They would have to pursue it on their own in court. The dept. of Labor dismisses the complaint. That is the finished. Discussed the AG's stand.

Doug Bahr - Office of the Attorney Generals (meter 3800) Gave Testimony - Att. #2 Most cases coincide but not all. We do not want to be in the position to be mandated by the claimant. There are some ethnical concerns. **Senator Triplett** asked what current procedures of discussion with the claimant were. (meter 4570) Stated that if the AG's office suggest that while they can not do anything for them they could seek private council

Testimony in Opposition of the Bill:

Amy Schaer Nelson, Executive Dir. of the ND Fair Housing Council (meter 5390) Gave Testimony - Att. #3. **Senator Syverson** sited that this bill puts into law what the Attorney General is already doing. Ms. Nelson sited concerns of claimant not getting a fair hearing. **Senator Triplett** stated that in Sec. 2 the aggrieved person is part of the hearing in the notification process. By naming the person they are privy to notifications of procedures **Cheryl Bergian**, Dir. ND Human Rights Coalition. (meter 435) Gave Testimony - Att. #4 We ask the amendments not be adopted. Discussion of the engrossment. Discussion of the ND Fair Housing Act. When the AG completely separates himself from a conviction it greatly influences the outcome. **Senator Triplett** asked what do you think the difference is in the meaning "on behalf" of the aggrieved person in the language before and now? What exactly is your concern. We need to keep it consistent with Federal Fair Housing Act with the ND Fair Housing act and we change it from "on behalf" of to for the "benefit of" it clearly states that they are not as supportive. **Senator Triplett** stated that this is a better change for notification even though it is clarifying the distances. I do not see a large distinction between on behalf and benefit of. Discussed there interpretations of this statement. Senator Triplett asked Mr. Bahr the question? I did not draft the amendment. I would speculate "on be half of" sounds like you actually

represent them instead of the people of ND. The Human Rights Coalition has sued the Dept. of Labor in arguments have asserted that we have a legal duty to represent these individual, that they control how we litigate these matters, giving them all the legal advise like as a private attorney. **Senator Triplett** stated that this is very clear throughout the bill, would it be problematic if we took this wording out? The purpose here is to clarify so there is no confusion. The people testifying against do not want it clarified. They want it confusing for the claimant. Are you concerned that you would loose your certificate of compliance with HUD if you change those words? **Ms. Bertsch** responded No. Discussed more of (1100) above.

Senator John (Jack) T. Traynor, Chairman closed the Hearing

2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 1158

Senate Judiciary Committee

☐ Conference Committee

Hearing Date February 23, 2005

Tape Number	Side A	Side B	Meter #
1	X		-1,560-2485

Committee Clerk Signature

Minutes:

Chairman Traynor opened the committee meeting to discuss HB 1158. All Senators were present with the exception of Senator Triplett.

Senator Syverson- The attorney general's office would like to enhance the concept that they are not allowed to defend any person. They would like clarification on that matter.

Chairman Traynor- The attorney general represents only the state and state agencies, not a private party. That is the intent of the bill.

Senator Nelson- There was testimony in opposition to this bill, perhaps this issue should be studied in the interim? It appears there may be a cross-over of duties between the Labor Department and the aggrieved person.

Senator Syverson- If an aggrieved person has their civil rights violated under the Fair Housing Act, where would they find legal counsel?

Senator Trenbeath- I know that when a complaint is filed with the Labor Department of the state, it automatically triggers an investigation on the federal level, not sure if this applies with the Fair Housing Act.

Chairman Traynor- The ND Labor Commissioner says that the added language is consistent with the Fair Housing Act.

Senator Nelson- The problem is the Attorney General was working closely with the Labor Department, and the aggrieved person was being left out of the loop.

Action taken:

Senator Trenbeath moved a Do Pass recommendation for HB 1158. Seconded by Senator Syverson. The bill passed 4-1-1. Senator Trenbeath is the carrier of the bill.

Chairman Traynor closed the meeting on HB 1158.

Date: 2/23/05
Roll Call Vote #: 1

2005 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. HB 1158

Senate Judiciary Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken Do Pass

Motion Made By Senator Trenbeath Seconded By Senator Syverson

Senators	Yes	No	Senators	Yes	No
Sen. Traynor	X		Sen. Nelson		X
Senator Syverson	X		Senator Triplett		
Senator Hacker	X				
Sen. Trenbeath	X				

Total (Yes) 4 No 1

Absent 1

Floor Assignment Sen. Trenbeath

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

REPORT OF STANDING COMMITTEE

HB 1158, as engrossed: Judiciary Committee (Sen. Traynor, Chairman) recommends **DO PASS** (4 YEAS, 1 NAY, 1 ABSENT AND NOT VOTING). Engrossed HB 1158 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

HB 1158

John Hoeven
Governor

Leann K. Bertsch
Commissioner

NORTH DAKOTA
Department of
LABOR

State Capitol - 13th Floor
600 E Boulevard Ave Dept 406
Bismarck, ND 58505-0340

discovernd.com/labor
discovernd.com/humanrights

Testimony on HB 1158
Prepared for the
House Judiciary Committee

January 11, 2005

Chairman DeKrey and members of the House Judiciary Committee, good morning. For the record, I am Leann Bertsch, Commissioner of Labor.

HB 1158 proposes clarifying language to Chapter 14-02.5 of the North Dakota Century Code. This is the Chapter which contains the North Dakota Housing Discrimination Act. This bill addresses administrative hearing procedures, the relief available to aggrieved persons in administrative hearings, and representation of parties in enforcement actions.

The North Dakota Housing Discrimination Act was carefully drafted with intent that it be "substantially equivalent" to the federal Fair Housing Act. State and local agencies enforcing laws that are deemed by the U.S. Department of Housing and Urban Development (HUD) to be substantially equivalent to the federal law are eligible to contract with that agency to investigate cases for them. Substantial equivalency is crucial because it, first, provides the Department of Labor with federal funding for our program. Secondly, it ensures that there will be only a single investigation of a complaint rather than two separate investigations of the same complaint by state and federal agencies. Finally, it provides for a large measure of local control over the investigation and disposition of cases filed in the state.

The standard for substantial equivalency is that the state or local law must offer at least the same protections and same remedies as the federal law. Our law has been reviewed by HUD and has been deemed to be substantially equivalent. The amendments to the North Dakota Housing Discrimination Act proposed in HB 1158 do not reduce the protections or remedies of the statute, but merely clarify the provisions already in place, with the exception of paragraph 2 in section 1, which specifically

provides that a charge issued by the Department is prima facie evidence of a violation of the Chapter.

The first issue addressed in the bill relates to the representation of an aggrieved person in administrative hearings and in district court. The added language clarifies that the attorney general represents the Department, not the aggrieved person. Although the attorney general's representation of the Department is to advocate for the Department's finding of probable cause, the representation is also for the purpose of seeking relief for the benefit of the aggrieved person. The added language makes clear that the aggrieved person may participate in the hearing on his or her own behalf and be represented by private counsel. This provision is consistent with the federal Fair Housing Act. Sections 1 and 3 of the bill address this issue.

The second issue addressed is the relief available to an aggrieved party in an administrative hearing under the North Dakota Housing Discrimination Act. The added language in section 2 of the bill clarifies that punitive damages may not be ordered in an administrative hearing. Punitive damages may be awarded by a judge in an action filed in district court. This added language provides clarification necessary for aggrieved persons to make an informed decision on whether to elect to have their case heard in an administrative hearing or in district court. The proposed language regarding the availability of punitive damages is consistent with the federal Fair Housing Act.

Thank you for your time and patience. I would be pleased to answer any questions you may have.

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Testimony before the
House Judiciary Committee
on House Bill 1158
by the North Dakota Fair Housing Council
January 11, 2005

Mr. Chairman, and members of the Committee, my name is Amy Schauer Nelson and I am the Executive Director of the North Dakota Fair Housing Council (NDFHC). The NDFHC is a non-profit agency who provides support, encouragement and assistance to those seeking equal opportunity in housing. The NDFHC educates the public on Fair Housing Laws and also investigates allegations of housing discrimination. When discrimination is found, we assist complainants in filing complaints of housing discrimination and throughout the administrative process. As a result of our assistance in complaint filing, we often work with the North Dakota Department of Labor (DOL) because it is the state agency charged with receiving complaints and enforcing violations. We strongly support their efforts in working to eliminate housing discrimination in North Dakota. Although we support some of the language proposed in House Bill 1158, there are a couple problem areas which we raise for your reconsideration.

First, the NDFHC has concerns regarding all the proposed language in this bill stating that the Attorney General only represents the North Dakota Department of Labor and not individual complainants. For instance, Page 1-Line 9 (Administrative hearing No. 1) proposed language: "The attorney general, at the request of and on behalf of the department, may participate in and advocate in favor of the department's finding of probable cause. The aggrieved person may be represented by private counsel." Page 1-Line 19 (Administrative hearing No. 3) proposed language "Neither the department nor the attorney general represents an aggrieved person at a hearing under this chapter..." Page 2-Line 3 (Administrative hearing No. 4) proposed language: "If a claim filed by the department proceeds to a hearing, the department is a party in the hearing. The attorney general represents the department in any action or proceeding under this chapter." Page 2-Line 18 (Attorney General action for enforcement): "...for the benefit (deleting current language "on behalf") of the aggrieved person in a district court. In any action for enforcement under this section, the attorney general represents the department."

This proposed language would leave a complainant of housing discrimination in an impossible situation of not having someone representing their interests unless they hire private counsel. In the vast majority of complaints filed with DOL, the reason the complaint is being filed with DOL is because the individual cannot afford an attorney. If the individual could afford an attorney, they would pursue legal action instead of the DOL administrative process.

To give you some background, the Attorney General's Office (AG) is the agency charged by the state to enforce violations (Probable Cause Rulings) identified by DOL. The AG's Office has taken the position that they only represent the North Dakota Department of Labor and cannot represent individuals in situations where DOL has found Probable Cause on an individual's complaint and is pursuing enforcement. There has been no official opinion by the Attorney General if this is a correct interpretation. The North Dakota Fair Housing Council and a number of other interested parties was in process of requesting an Attorney General opinion on this matter because we believe the Attorney General should represent individuals in Probable Cause Rulings and is legally obligated to do so. Unfortunately, this bill was filed before such an opinion could be requested.

As a result, when DOL requests the AG to enforce a Probable Cause ruling, the action which is filed by the AG is filed ONLY on behalf of the North Dakota Department of Labor. The complainant's name is not listed on the filing and the complainant no longer has any control over their complaint. The AG will not directly provide the complainant with any correspondence or copies of actions on the filing. The complainant only receives copies of actions and results on the filing if DOL provides copies to them. Although we appreciate DOL providing this correspondence to complainants, they are relying on the AG's Office to provide them with the correspondence which does not often occur unless they ask for it. Although DOL states it will attempt to work toward the same goals as the complainant, this is not guaranteed. The AG states it only represents DOL which leaves the complainant dependent upon DOL for the remedy the complainant may be seeking. Unfortunately, we have seen problems with this relationship. Recently, a Minot client who had filed a complaint of housing discrimination which was found to have Probable Cause by DOL and referred to the AG for enforcement had her complaint settled without consulting with her. She was simply notified one day that her complaint had been settled and was surprised to find out such since she had received no recent correspondence regarding what she was seeking for settlement or that settlement was being negotiated. This was able to occur because the complainant was not named on the filing.

The Attorney General must be required to enforce the Department's findings of probable cause. Without this enforcement, the discriminatory action will continue to occur. The Attorney General must also be required to advocate for the rights of a complainant and represent their interests. Currently, the US Department of Justice (DOJ) and the US Department of Housing & Urban Development (HUD) advocates for the United States of America AND the individual who filed the complainant when there is a Probable Cause Ruling. The complainant's name is listed on filings with that of the United States of America. HUD and DOJ work with the complainant to ensure that their interests are properly represented. HUD and DOJ both acknowledge that they only represent the United States as an action proceeds, but they both see their roles as enforcing the Fair Housing Act for the United States of America and the complainant. By having the complainant named on the filing, this continues to give the complainant ownership in their complaint and assures that they are copied on all correspondence. The complainant also has the option of hiring private counsel who HUD/DOJ would work with. We seek to have similar policy put in place for the North Dakota Attorney General's Office to follow and adhere to.

The North Dakota Fair Housing Council seeks to have all language referencing that the Attorney General may only represent the Department of Labor deleted from this bill.

The other area of proposed language which is of concern is the language regarding punitive damages. Page 2-Line 12 (Section 2. Amendment): "Neither the department nor an administrative hearing officer may order punitive damages under this chapter."

The North Dakota Fair Housing Council understands that the North Dakota Department of Labor has no authority to order damages under the North Dakota Housing Discrimination Act. However, limiting the ability of an Administrative Law Judge or other Officer from being able to award punitive damages is a deviation from the Federal Fair Housing Act. This deviation could greatly affect substantial equivalency and the funds which are provided to the North Dakota Department of Labor from HUD for investigation and enforcement of fair housing complaints. I have attached for you copies of the sections of the Federal Fair Housing Act which address damages as well as a copy of the Federal Register in which HUD addressed commenter's questions regarding compensatory and punitive damages. HUD states quite clearly in its response that it will not limit the types of damages which can be awarded.

The NDFHC has asked HUD to review this bill's language regarding the proposed changes and their affect on substantial equivalency. We have not received a response yet to our inquiry but feel very certain that any limit on the types of damages will affect substantial equivalency.

The North Dakota Fair Housing Council seeks to have the language referencing the inability of an Administrative Officer to award punitive damages deleted from this bill. Without the deletion of such language, substantial equivalency for the State of North Dakota will be challenged.

where a subpoena should be quashed because it is unreasonable and oppressive or for other good cause, or where the subpoena should be conditioned upon the discovering party's advancing the reasonable cost of producing subpoenaed books, papers or documents. The proposed provision is retained.

Subpart G—Prehearing procedures

Subpart G governs prehearing statements (§ 104.800); prehearing conferences (§ 104.810); and settlement negotiations before a settlement judge (§ 104.820). Except for comments addressing the addition of a discovery conference discussed above, no commenters addressed this subpart.

Subpart H—Hearing Procedures

Section 104.720 Waiver of right to appear.

Section 104.720 permits the parties to waive the right to an oral hearing and present the matter for decision on a written record. Commenters urged the revision of this section to prohibit waiver unless non-party aggrieved persons agree to the waiver. Alternatively, the commenters would provide notice of the proposed waiver to non-party aggrieved persons and would permit such persons to intervene within 15 days of the notice.

Those aggrieved persons interested in participating in the proceeding as an intervenor and controlling the procedural conduct of the litigation as a party are permitted to intervene of right (aggrieved persons on whose behalf the charge is issued) or by permission of the ALJ (other aggrieved persons). Where such persons have not filed timely requests for intervention, or where their interest is not sufficient to justify intervention, HUD does not believe that any purpose would be served by a regulation permitting the person the right to control the conduct of selected aspects of the proceeding. Part 104 was drafted with the expectation that the HUD representative, in the absence of intervention by the aggrieved person on whose behalf the charge is issued, will keep that person informed of the course of the proceedings where necessary for the proper disposition of the charge. Therefore, provision for notification to such persons of this procedural step is not mandated by the rules.

Section 104.740 In camera and protective orders.

Section 104.740, which governs in camera inspections and protective orders contains a minor editorial revision suggested by commenters.

Section 104.750 Exhibits.

Section 104.750 provides for the prehearing exchange of exhibits to be offered into evidence. One commenter noted that some parties may attempt to use the requirement for the prehearing exchange of exhibits to prevent the use of rebuttal exhibits that have not been exchanged. At the request of the commenter, HUD has revised this section to exclude unanticipated rebuttal exhibits from the exchange requirement.

Section 104.760 Authenticity.

At the request of a commenter, § 104.760 has been clarified to state that the authenticity of all documents submitted "*and furnished to the parties as required under § 104.7*" proposed exhibits in advance of the hearing shall be admitted.

Section 104.780 Record of hearing.

Under § 104.780, all oral hearings must be recorded and transcribed by a reporter designated by and under the supervision of the ALJ. One commenter observed that this section requires all hearings to be transcribed and argued that this requirement will be expensive. The commenter recommended that this section be revised to require transcripts only if requested by a party or an aggrieved party, or ordered by the ALJ. HUD believes that the provision of a transcript is necessary for the full and complete record in the case and to ensure the adequate review of the proceeding by the Secretary under § 104.930, and by the courts under section 812(i), and to permit court enforcement of the Administrative order under section 812(j).

Subpart I—Dismissals and Decisions

Section 104.900 Dismissal.

Under § 104.900, the ALJ is required to dismiss the proceeding:

—Where the complainant, the respondent or the aggrieved person on whose behalf the complaint was filed makes a timely election to have the claims asserted in the charge decided in a civil action under section 812(o) of the Act (see §104.900(a)); or

—Where an aggrieved person has commenced a civil action under an Act of Congress or a State law seeking relief with respect to the discriminatory housing practice and the trial of the civil action has commenced. The commencement of a civil action for appropriate temporary or preliminary relief under section 810(e) or proceedings for such relief under section 813 of the Fair Housing Act do not affect administrative proceedings under Part 104. (see § 104.900(b)). At the suggestion of a commenter, this provision has been clarified to provide that the administrative proceeding will not be affected by such proceedings as a hearing on the temporary or preliminary relief or the issuance of a decision or order granting or denying such relief.

One commenter noted that Part 104 procedures are applicable where the respondent and the aggrieved person do not act (*i.e.*, neither the respondent nor the aggrieved person elects the civil remedy). The commenter argued that Part 104 should include a procedure for an ALJ order by default. Even though the aggrieved person and the respondent may choose not to participate actively in a case, HUD's representative will be required to present sufficient evidence to make a *prima facie* case that a discriminatory housing practice has occurred or is about to occur. Accordingly, there are no provisions for default in the regulation.

Section 104.910 Initial decision of administrative law judge.

Under § 104.910, if the ALJ determines that the respondent has engaged, or is about to engage in a discriminatory housing practice, the ALJ is required to issue an initial decision against the respondent and to order appropriate relief including damages; injunctive or other equitable relief; and civil penalties. The following issues were raised regarding relief.

Injunctive or such other equitable relief. Under proposed § 104.910(b)(2) the ALJ may impose injunctive or such other equitable relief as may be appropriate. One commenter argued that the regulations should discuss the types of affirmative relief (e.g., the posting of fair housing posters) that may be ordered by the ALJ. Given the range of affirmative remedial activities that may be accorded to overcome discriminatory housing practices, HUD believes that it would be counterproductive to undertake a listing of all types of such relief under this section.

The proposed rule provides that no order for injunctive or other relief may affect any contract, sale, encumbrance, or lease consummated before the issuance of the initial decision that involves a *bona fide* purchaser, encumbrancer, or tenant without actual knowledge of the charge.

Commenters noted that a considerable amount of the time may elapse between the filing of the complaint and the issuance of the charge, and from the issuance of the charge to the issuance of the initial decision. They argued that the

matter of internal policy, HUD anticipates that the views of the investigator with regard to the reasonable cause determination will be communicated to the General Counsel's office. HUD does not believe that it is necessary to incorporate this requirement in the regulation.

As required under section 810(d)(2) of the Act, § 103.230(c) provides that the Assistant Secretary shall make information derived from an investigation, including the final investigative report, available to the aggrieved person and the respondent, upon request, at any time following the completion of the investigation. In response to a commenter, the final rule has been revised to require HUD, following the completion of the investigation, to notify the aggrieved person and the respondent that the FIR is complete and will be provided or upon request. Under most circumstances, the notification will be provided with the charge, where a charge is issued under § 103.405, or with the notice of dismissal under § 104.400(a)(2).

art E—Conciliation Procedures

Section 103.310 Conciliation agreement.

If conciliation is successful, the terms of the settlement are reduced to a written conciliation agreement. Section 810(b)(2) of the Act provides that a conciliation agreement shall be an agreement between the respondent and the complainant, and shall be subject to the approval of the Secretary. Section 103.310(b) incorporates these requirements and states that the Assistant Secretary will indicate HUD approval of the conciliation agreement by signing the agreement.

The final rule makes a minor revision to this provision. Under the proposed rule, if HUD is the complainant, the Assistant Secretary would execute the agreement only if the aggrieved person is satisfied with the relief provided to protect his or her interest. The final rule recognizes that there may be circumstances where HUD may file a complaint that identifies a class of aggrieved persons, rather than specific aggrieved persons. Under such circumstances it would be impossible to mine if all aggrieved persons in the re satisfied with the relief ed. Accordingly, the final rule permits the Assistant Secretary to execute the agreement if all aggrieved persons named in the compliant filed by HUD are satisfied with the relief provided to protect their interests.

Section 103.310(b)(2) would preserve the General Counsel's ability to issue a charge under § 103.405, where the aggrieved person and the respondent have executed a conciliation agreement that has not been approved by the Assistant Secretary.

Commenters argued that HUD should not be permitted to commence or continue the investigation once an agreement is reached between the aggrieved party and the respondent. The commenters argued that the retention of this provision would "chill" conciliation agreements between the aggrieved person and the respondent and would serve no purpose since the Assistant Secretary will have right to initiate complaints under the 1988 Amendments. HUD could lose the ability to initiate a new complaint if the time period for the filing of the complaint has passed. Moreover, it would be wasteful of administrative resources to require HUD to file another complaint and to maintain a second case file under these circumstances. The final rule does not adopt the commenter's suggestion.

Section 103.315 Relief sought for aggrieved persons.

Section 103.315 lists the types of relief that may be sought for the aggrieved person during conciliation. Under paragraph (a)(1), monetary relief in the form of damages, including damages caused by humiliation or embarassment and attorneys fees. One commenter argued that monetary relief should be limited to "compensatory" damages. Another commenter argued against the provision of damages for humiliation or embarrassment, stating that such a practice would result in extraordinary and unreasonable damage awards.

HUD has left paragraph (a)(1) unchanged. Damages for humiliation and embarrassment and noncompensatory damages (i.e., punitive and exemplary damages) can be awarded in civil actions brought under Title VIII. Since respondents will seek a full release of all claims as a part of the conciliation, the regulation should permit negotiations that take such factors into account as a part of the settlement. Although monetary damages other than actual damages are usually not provided for in a conciliation agreement, it is HUD's intent that the rule not preclude the possibility of seeking punitive or exemplary damages for an aggrieved person in an appropriate situation.

Paragraph (a)(2) provides for other make-whole relief, including access to the dwelling at issue or to a comparable dwelling, the provision of services or facilities in connection with a dwelling, or other specific relief. This provision has been amended to provide for "other equitable relief, including but not limited to" the listed actions. While one commenter felt that the provision for access to a comparable dwelling was redundant, HUD believes that the inclusion of this provision is appropriate to cover situations where the original dwelling at issue is no longer available.

Commenters argued that the provisions permitting the binding arbitration of disputes arising out of the complaint could be improved by the addition of a description of the rules and procedures that will be used in arbitration. This change has not been made. HUD wishes to keep the arbitration remedy as flexible as possible in order that individual aggrieved persons and respondents will have the opportunity to adopt the procedures that will best suit their circumstances.

Section 103.320 Provisions sought for the public interest.

Section 103.320 lists the types of provisions that may be sought for the vindication of the public interest. Commenters argued that the regulations should announce the standards that HUD will use in determining whether a conciliation agreement will adequately vindicate the public interest. No useful purpose would be served by listing every form of public interest that HUD may protect with conciliation agreement provisions. These provisions are often tailored to the circumstances of particular cases. The suggested change has not been adopted.

One commenter noted that civil penalties may be assessed in the administrative proceeding and the civil action. This commenter urged HUD to add a new provision permitting the seeking of civil penalties of up to $50,000 in conciliation. As noted above, HUD has not precluded the negotiation of damages in lieu of possible court-awarded punitive damages on behalf of the aggrieved person in conciliation, because such agreements are made in return for the full release by the aggrieved person of all claims against the respondent. However, since the public interest is vindicated by ensuring future compliance and by rectifying the effects of past discriminatory housing practices, rather than penalizing the respondent for such practices, civil penalties have not been added under § 103.320.

One commenter argued that HUD should be permitted to seek compensation for private fair housing groups that have participated in

§ 103.335 Review of compliance with conciliation agreements.

HUD may, from time to time, review compliance with the terms of any conciliation agreement. Whenever HUD has reasonable cause to believe that a respondent has breached a conciliation agreement, the General Counsel shall refer the matter to the Attorney General with a recommendation for the filing of a civil action under section 814(b)(2) of the Fair Housing Act for the enforcement of the terms of the conciliation agreement.

Subpart F—Issuance of Charge

§ 103.400 Reasonable cause determination.

(a) If a conciliation agreement under § 103.310 has not been executed by the complainant and the respondent, and approved by the Assistant Secretary, the General Counsel, within the time limits set forth in paragraph (c) of this section, shall determine whether, based on the totality of the factual circumstances known at the time of the decision, reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur. The reasonable cause determination will be based solely on the facts concerning the alleged discriminatory housing practice, provided by complainant and respondent and otherwise, disclosed during the investigation. In making the reasonable cause determination, the General Counsel shall consider whether the facts concerning the alleged discriminatory housing practice are sufficient to warrant the initiation of a civil action in Federal court.

(1) In all cases not involving the legality of local zoning or land use laws or ordinances:

(i) If the General Counsel determines that reasonable cause exists, the General Counsel will immediately issue a charge under § 103.405 on behalf of the aggrieved person, and shall notify the aggrieved person and the respondent of this determination by certified mail or personal service.

(ii) If the General Counsel determines that no reasonable cause exists, the General Counsel shall: issue a short and plain written statement of the facts upon which the General Counsel has based the no reasonable cause determination; dismiss the complaint; notify the aggrieved person and the respondent of the dismissal (including the written statement of facts) by certified mail or personal service; and make public disclosure of the dismissal. Public disclosure of the dismissal shall be by issuance of a press release, except that the respondent may request that no release be made. Notwithstanding a respondent's request that no press release be issued, the fact of the dismissal, including the names of the parties, shall be public information available on request.

(2) If the General Counsel determines that the matter involves the legality of local zoning or land use laws or ordinances, the General Counsel, in lieu of making a determination regarding reasonable cause, shall refer the investigative materials to the Attorney General for appropriate action under section 814(b)(1) of the Fair Housing Act, and shall notify the aggrieved person and the respondent of this action by certified mail or personal service.

(b) The General Counsel may not issue a charge under paragraph (a) of this section regarding an alleged discriminatory housing practice, if an aggrieved person has commenced a civil action under an Act of Congress or a State law seeking relief with respect to the alleged discriminatory housing practice, and the trial in the action has commenced. If a charge may not be issued because of the commencement of such a trial, the General Counsel will so notify the aggrieved person and the respondent by certified mail or personal service.

(c)(1) The General Counsel shall make the reasonable cause determination after the Assistant Secretary forwards the matter for consideration. The General Counsel shall make a reasonable cause determination within 100 days after filing of the complaint (or where the Assistant Secretary has reactivated a complaint, within 100 days after service of the notice of reactivation under § 103.115), unless it is impracticable to do so.

(2) If the General Counsel is unable to make the determination within the 100-day period specified in paragraph (c)(1) of this section, the Assistant Secretary will notify the aggrieved person and the respondent, by certified mail or personal service, of the reasons for the delay.

§ 103.405 Issuance of charge.

(a) A charge:

(1) Shall consist of a short and plain written statement of the facts upon which the General Counsel has found reasonable cause to believe that a discriminatory housing practice has occurred or is about to occur;

(2) Shall be based on the final investigative report; and

(3) Need not be limited to facts or grounds that are alleged in the complaint filed under Subpart B of this part. If the charge is based on grounds that are alleged in the complaint, HUD will not issue a charge with regard to the grounds unless the record of the investigation demonstrates that the respondent has been given notice and an opportunity to respond to the allegation.

(b) Within three business days after the issuance of the charge, the General Counsel shall:

(1) Obtain a time and place for hearing from the Chief Docket Clerk of the Office of Administrative Law Judges;

(2) File the charge along with the notifications described in § 104.410(b) with the Office of Administrative Law Judges;

(3) Serve the charge and notifications in accordance with 24 CFR 104.40; and

(4) Notify the Assistant Secretary of the filing of the charge.

§ 103.410 Election of civil action or provision of administrative proceeding.

(a) If a charge is issued under § 103.405, a complainant (including the Assistant Secretary, if HUD filed the complaint), a respondent, or an aggrieved person on whose behalf the complaint is filed may elect, in lieu of an administrative proceeding under 24 CFR Part 104, to have the claims asserted in the charge decided in a civil action under section 812(o) of the Fair Housing Act.

(b) The election must be made not later than 20 says after the receipt of service of the charge, or in the case of the Assistant Secretary, not later than 20 days after service. The notice of the election must be filed with the Chief Docket Clerk in the Office of Administrative Law Judges and served on the General Counsel, the Assistant Secretary, the respondent, and the aggrieved persons on whose behalf the complaint was filed. The notification will be filed and served in accordance with the procedures established under 24 CFR Part 104.

(c) If an election is not made under this section, the General Counsel will maintain an administrative proceeding based on the charge in accordance with the procedures under 24 CFR Part 104.

(d) If an election is made under this section, the General Counsel shall immediately notify and authorize the Attorney General to commence and maintain a civil action seeking relief under section 812(o) of the Fair Housing Act on behalf of the aggrieved person in an appropriate United States District Court. Such notification and authorization shall include transmission of the file in the case, including a copy of the final investigative report and the charge, to the Attorney General.

(e) The General Counsel shall be available for consultation concerning

the receipt of the transcript. Corrections of the official transcript will be permitted only where errors of substance are involved and upon the approval of the administrative law judge.

§ 104.790 Arguments and briefs.

(a) *Arguments.* Following the submission of evidence at an oral hearing, the administrative law judge may hear oral arguments at the hearing. The administrative law judge may limit the time permitted for such arguments to avoid unreasonable delay.

(b) *Submission of written briefs.* The administrative law judge may permit the submission of written briefs following the adjournment of the oral hearing. Written briefs shall be simultaneously filed by all parties and shall be due not later than 30 days following the adjournment of the oral hearing.

§ 104.800 End of hearing.

(a) *Oral hearings.* Where there is an oral hearing, the hearing ends on the day of the adjournment of the oral hearing or, where written briefs are permitted, on the date that the written briefs are due.

(b) *Hearing on written record.* Where the parties have waived an oral hearing, the hearing ends on the date set by the administrative law judge as the final date for the receipt of submissions by the parties.

§ 104.810 Receipt of evidence following hearing.

Following the end of the hearing, no additional evidence may be accepted into the record, except with the permission of the administrative law judge. The administrative law judge may receive additional evidence upon a determination that new and material evidence was not readily available before the end of the hearing, the evidence has been timely submitted, and its acceptance will not unduly prejudice the rights of the parties. However, the administrative law judge shall include in the record any motions for attorney's fees (including supporting documentation), and any approved corrections to the transcripts.

Subpart I—Dismissals and Decisions

§ 104.900 Dismissal.

(a) *Election of judicial determination.* If the complainant, the respondent, or the aggrieved person on whose behalf a complaint was filed makes a timely election to have the claims asserted in the charge decided in a civil action under section 812(o) of the Act, the administrative law judge shall dismiss the administrative proceeding.

(b) *Effect of a civil action on administrative proceeding.* An administrative law judge may not continue an administrative proceeding under this part regarding an alleged discriminatory housing practice after the beginning of the trial of a civil action commenced by the aggrieved person under an act of Congress or a State law seeking relief with respect to that discriminatory housing practice. If such a trial is commenced, the administrative law judge shall dismiss the administrative proceeding. The commencement and maintenance of a civil action for appropriate temporary or preliminary relief under section 810(e) or proceedings for such relief under section 813 of the Fair Housing Act does not affect administrative proceedings under this part.

§ 104.910 Initial decision of administrative law judge.

(a) *In general.* Within the time period set forth in paragraph (d) of this section, the administrative law judge shall issue an initial decision including findings of fact and conclusions of law upon each material issue of fact or law presented on the record. The initial decision of the administrative law judge shall be based on the record of the proceeding.

(b) *Finding against respondent.* If the administrative law judge finds that a respondent has engaged, or is about to engage, in a discriminatory housing practice, the administrative law judge shall issue an initial decision against the respondent and order such relief as may be appropriate. The relief may include, but is not limited to, the following:

(1) The administrative law judge may order the respondent to pay damages to the aggrieved person (including damages caused by humiliation and embarrassment).

(2) The administrative law judge may provide for injunctive or such other equitable relief as may be appropriate. No such order may affect any contract, sale, encumbrance or lease consummated before the issuance of the initial decision that involved a bona fide purchaser, encumbrancer or tenant without actual knowledge of the charge issued under § 104.405.

(3) To vindicate the public interest, the administrative law judge may assess a civil penalty against the respondent.

(i) The amount of the civil penalty may not exceed:

(A) $10,000, if the respondent has not been adjudged to have committed any prior discriminatory housing practice in any administrative hearing or civil action permitted under the Fair Housing Act or any State or local fair housing law, or in any licensing or regulatory proceeding conducted by a Federal, State or local governmental agency.

(B) $25,000, if the respondent has been adjudged to have committed one other discriminatory housing practice in any administrative hearing or civil action permitted under the Fair Housing Act, or any State or local fair housing law, or in any licensing or regulatory proceeding conducted by a Federal, State, or local government agency, and the adjudication was made during the five-year period preceding the date of filing of the charge.

(C) $50,000, if the respondent has been adjudged to have committed two or more discriminatory housing practices in any administrative hearings or civil actions permitted under the Fair Housing Act or any State or local fair housing law, or in any licensing or regulatory proceeding conducted by a Federal, State, or local government agency, and the adjudications were made during the seven-year period preceding the date of the filing of the charge.

(ii) If the acts constituting the discriminatory housing practice that is the subject of the charge were committed by the same natural person who has previously been adjudged, in any administrative proceeding or civil action, to have committed acts constituting a discriminatory housing practice, the time periods set forth in paragraphs (b)(3)(i) (B) and (C) of this section do not apply.

(iii) In a proceeding involving two or more respondents, the administrative law judge may assess a civil penalty as provided under paragraph (b) of this section against each respondent that the administrative law judge determines has been engaged or is about to engage in a discriminatory housing practice.

(c) *Finding in favor of respondent.* If the administrative law judge finds that a respondent has not engaged, and is not about to engage, in a discriminatory housing practice, the administrative law judge shall make an initial decision dismissing the charge.

(d) *Date of issuance.* The administrative law judge shall issue an initial decision within 60 days after the end of the hearing, unless it is impracticable to do so. If the administrative law judge is unable to issue the initial decision within this time period (or within any succeeding 60-day period following the initial 60-day period), the administrative law judge shall notify in writing all parties, the aggrieved person on whose behalf the charge was filed, and the Assistant Secretary, of the reasons for the delay.

North Dakota Human Rights Coalition

P.O. Box 1961, Fargo, ND 58107-1961 (701) 239-9323 Fax (701) 478-4452 www.ndhrc.org

Testimony
House Bill 1158
House Judiciary Committee
January 11, 2005

Chairman DeKrey and members of the Committee, thank you for the opportunity to present testimony in favor of House Bill ~~1130~~ 1158. I am Cheryl Bergian, Director of the North Dakota Human Rights Coalition. The Coalition includes a broad-based, statewide membership of individuals and organizations interested in the furtherance of human rights in North Dakota; the Coalition's mission is to effect change so that all people in North Dakota enjoy full human rights.

We support the work of the Division of Human Rights in the North Dakota Department of Labor for the enforcement of the North Dakota Human Rights Act and North Dakota Housing Discrimination Act. However, we have some objections to changes the Labor Commissioner is proposing to the North Dakota Housing Discrimination Act.

An issue has arisen regarding enforcement of the North Dakota Housing Discrimination Act and the interplay among the North Dakota Department of Labor, the North Dakota Attorney General's Office, and the person while has filed a complaint under the North Dakota Housing Discrimination Act. The Attorney General's Office has taken the position that they do not represent the complainant in enforcement actions under the Act, and that they only represent the State of North Dakota (the Labor Department). This has resulted in the Attorney General's Office's refusal to communicate with the complainant after a probable cause determination has been issued by the Labor Department, and to only communicate with the Labor Department. The ultimate result is that the Attorney General's Office and the Labor Department have actually settled a complaint under the Act without informing the complainant that the settlement was in the offing, and without conferring with the complainant regarding that settlement.

This is not how the federal government acts when the U.S. Department of Justice and the U.S. Department of Housing and Urban Development enforce the federal Fair Housing Act, upon which the North Dakota Housing Discrimination Act is modeled. The DOJ files complaints in the name of the complainant and HUD, and confers with the complainant and HU regarding the progress of the complaint and any settlement prospects. In fact, the Fair Housing Act calls for the Department of Justice to bring a civil action "on behalf of the aggrieved person." The NDHRC believes that this is the appropriate way to enforce discrimination laws in North Dakota. The DOJ does acknowledge that it represents only HUD as it proceeds, but it sees its role as enforcing the Fair Housing Act for both the complainant and HUD.

The NDHRC asks that the following amendments proposed by the Labor Commissioner in HB 1158 be

amended and deleted by this committee:

14-02.5-31(1), page 1, lines 9-12
14-02.5-31(3) page 1, lines 19-23 and page 2, lines 1-5
14-02.5-36, page 2 lines 19-20.

The Labor Commissioner is also asking that the North Dakota Housing Discrimination Act, 14-02.5-32, page 2, lines 12-13, be amended to state that punitive damages are not available under the chapter, through the department or through an administrative hearing. The NDHRC understands that this is because of an informal opinion of the Attorney General's office, by e-mail during the 2003 Legislative Session, that the award of punitive damages under the Act by the department or in an administrative hearing may be unconstitutional. The Attorney General's Office has not issued a formal opinion on this question, nor was the Attorney General's Office able to provide the basis for this informal, undocumented opinion. The NDHRC asks that the Committee amend and delete the amendment to 14-02.5-31(1), page 2, lines 12-13 because of the uncertainty of the need for this amendment. According to a conversation with the Attorney General's Office, the possibility of unconstitutionality of the provision is based on decisions in some other states by courts regarding those states' constitutions. The North Dakota Supreme Court has not issued an decision regarding this question, nor has it had an opportunity to address the question under North Dakota's Constitution. It is speculation at this point how the North Dakota Supreme Court would respond on this question, and to amend the North Dakota Housing Discrimination Act at this time is premature and unnecessary.

We ask for a do pass recommendation, with the above amendments, on House Bill ~~1130~~ 1158. I appreciate this opportunity to testify on behalf of the North Dakota Human Rights Coalition.

Priest. A sacerdotal minister of a church. A person in the second order of the ministry, as distinguished from bishops and deacons.

Priest-penitent privilege. In evidence, the recognition of the seal of confession which bars testimony as to the contents of a communication from one to his confessor. Nearly all states provide for this privilege by statute.

Primæ impressionis /práymiy imprèshiyównəs/. A case *primæ impressionis* (of the first impression) is a case of a new kind, to which no established principle of law or precedent directly applies, and which must be decided entirely by reason as distinguished from authority. See **First impression case.**

Primæ preces /práymiy príysiyz/. Lat. In the civil law, an imperial prerogative by which the emperor exercised the right of naming to the first prebend that became vacant after his accession, in every church of the empire.

Prima facie /práymə féyshiy(iy)/. Lat. At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary. State ex rel. Herbert v. Whims, 68 Ohio App. 39, 38 N.E.2d 596, 599, 22 O.O. 110.

Prima facie case. Such as will prevail until contradicted and overcome by other evidence. Pacific Telephone & Telegraph Co. v. Wallace, 158 Or. 210, 75 P.2d 942, 947. A case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded. In re Hoagland's Estate, 126 Neb. 377, 253 N.W. 416.

A prima facie case consists of sufficient evidence in the type of case to get plaintiff past a motion for directed verdict in a jury case or motion to dismiss in a nonjury case; it is the evidence necessary to require defendant to proceed with his case. White v. Abrams, C.A.Cal., 495 F.2d 724, 729. Courts use concept of "prima facie" case in two senses: (1) in sense of plaintiff producing evidence sufficient to render reasonable a conclusion in favor of allegation he asserts; this means plaintiff's evidence is sufficient to allow his case to go to jury, and (2) courts used "prima facie" to mean not only that plaintiff's evidence would reasonably allow conclusion plaintiff seeks, but also that plaintiff's evidence compels such a conclusion if the defendant produces no evidence to rebut it. Husbands v. Com. of Pa., D.C.Pa., 395 F.Supp. 1107, 1139.

Prima facie evidence. Evidence good and sufficient on its face; such evidence as, in the judgment of the law, is sufficient to establish a given fact, or the group or chain of facts constituting the party's claim or defense, and which if not rebutted or contradicted, will remain sufficient. Prima facie evidence is evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence. State v. Haremza, 213 Kan. 201, 515 P.2d 1217, 1222.

Prima facie evidence is evidence that, until its effect is overcome by other evidence, will suffice as proof of fact in issue; "prima facie case" is one that will entitle party to recover if no evidence to contrary is offered by opposite party. Duncan v. Butterowe, Inc., Tex.Civ.App., 474 S.W.2d 619, 621. Evidence which suffices for the proof of a particular fact until contradicted and overcome by other evidence. Evidence which, standing alone and unexplained, would maintain the proposition and warrant the conclusion to support which it is introduced. An inference or presumption of law, affirmative or negative of a fact, in the absence of proof, or until proof can be obtained or produced to overcome the inference.

See also **Presumptive evidence.**

Prima facie tort. The infliction of intentional harm, resulting in damage, without excuse or justification, by an act or series of acts which would otherwise be lawful. Cartwright v. Golub Corp., 51 A.D.2d 407, 381 N.Y.S.2d 901, 902.

Primage /práymij/. In old mercantile law, a small allowance or compensation payable to the master and mariners of a ship or vessel; to the former for the use of his cables and ropes to discharge the goods of the merchant; to the latter for lading and unlading in any port or haven. It is no longer, however, a gratuity to the master, unless especially stipulated; but it belongs to the owners or freighters, and is nothing but an increase of the freight rate.

Prima pars æquitatis æqualitas /práymə párz èkwətéydəs əkwólətæs/. The radical element of equity is equality.

Primary. First; principal; chief; leading. First in order of time, or development, or in intention. As to primary Conveyance; Election; Obligation; and Vein, see those titles.

Primary activity. Concerted action such as a strike or picketing directed against the employer with whom it has a dispute. Compare, secondary activity.

Primary allegation. The opening pleading in a suit in the ecclesiastical court. It is also called a "primary plea."

Primary beneficiary. In life insurance, the person named in the policy who is to receive the proceeds on the death of the insured if such person is alive. If deceased, the proceeds are payable to a secondary beneficiary also designated as such in the policy.

Primary boycott. Action by a union by which it tries to induce people not to use, handle, transport or purchase goods of an employer with which the union has a grievance. See also **Boycott.**

Primary disposal of the soil. In acts of congress admitting territories as states, and providing that no laws shall be passed interfering with the primary disposal of the soil, this means the disposal of it by the United States government when it parts with its title to private persons or corporations acquiring the right to a patent or deed in accordance with law.

Primary election. A preliminary election for the nomination of candidates for office or of delegates to a party convention, designed as a substitute for party conventions. Such elections are classified as closed or open depending on whether or not tests of party

TESTIMONY – PROTECTION AND ADVOCACY PROJECT

HB 1158 – HOUSE JUDICIARY COMMITTEE

HONORABLE DUANE DEKREY, CHAIRMAN

January 11, 2004, 9:00 a.m.

Chairman Traynor, and members of the ~~Senate~~ House Judiciary Committee, I am Bruce Murry, an employee of the North Dakota Protection and Advocacy Project (P&A).

For the Department of Labor to perform investigations in place of HUD, North Dakota's laws must be substantially equivalent.

In researching federal and state fair housing laws, I consulted with the HUD office that oversees substantial equivalency of state and federal laws. I also consulted with the North Dakota Department of Labor. Both the Department of Labor and the attorney general's office described the bill as limiting what sort of damages a hearing officer may award.

I am concerned the proposed changes threaten North Dakota's substantial equivalency status for the following reasons:

-HUD officials see the Department of Justice as representing both HUD and the individual, "aggrieved person."

-Some cases I reviewed showed damage awards for pain and suffering, emotional distress, and other "soft" damages awarded in the administrative process and affirmed on appeal.

For these reasons, I respectfully recommend the committee either ask the Department of Labor to further review substantial equivalency with HUD, or that the committee give the bill a "do not pass" recommendation.

HOUSE BILL NO. 1158
Notes – Doug Bahr

The Attorney General is the chief law officer of the State.

- He is the legal adviser for state officers
- He has a specific statutory duty to issue opinions to state officers

Represents Labor Department to enforce ND public policy against discrimination

- Typically Department's position will coincide with claimant's position
- Charging party may take a contrary position to Labor Department
  - Examples
- The Labor Department is the AG's client, not the claimant
  - Claimant cannot direct how AG proceeds in litigation, no attorney-client privilege with claimant, etc.

The Attorney General only represents the State, its agencies and officials

- 54-12-01
  - Represent the State in all cases where the State is an interested party
  - Initiate actions as necessary in the execution of the duties of a state officer
  - Defend actions against State officers
  - Provide legal opinions to State officials and legislators
  - Prepare contracts and other legal documents relating to subjects in which the State is interested
- 54-12-02
  - Handle all cases in which the State is a party
- 32-12.2-03
  - Defend State employees against claims arising from an alleged act within the employee's scope of employment
- **AT ALL TIMES AG'S CLIENT IS EITHER A GOVERNMENT ENTITY OR A STATE OFFICIAL OR EMPLOYEE**

Policy Reasons

- Policy established by the Legislature, and implemented through Labor Commissioner
  - Labor Commissioner is responsible to the Governor, who is responsible to the people
- Labor Commissioner makes policy decisions regarding how to proceed in housing discrimination cases
  - If individual the client, individual controls policy decisions
    - Claimant could make decisions contrary to State policy, as adopted by Legislature and implemented by Labor Commissioner
    - Claimant could advocate position contrary to Labor Department in current case/other cases
- State's resources should be used to further State policy, not private interests
  - Legal services from the AG's office is a limited and valuable State resource
    - Labor Commission and AG should determine how to best use legal and other resources to further State objectives
    - Individual should not be able to commandeer State's resources (legal services and significant costs of litigation) for private purposes (contrary to State's policy)
      - Claimant cannot use state resources/AG's office to argue position contrary to State's position
      - Claimant should not be able to determine how state resources are used in litigation.
        - Very expensive process.
        - If individual has no financial stake in decision, they have no reason to use sound judgment.

- Ethical concerns
  - Representation of a private individual could create numerous ethical dilemmas
  - Conflict between advocating interests of the State/public versus someone's private interest
  - AAGs Exposure to civil liability (and ethical complaints) due to private representation

AH #1

John Hoeven
Governor

Leann K. Bertsch
Commissioner

NORTH DAKOTA
Department of
LABOR

State Capitol - 13th Floor
600 E Boulevard Ave Dept 406
Bismarck, ND 58505-0340

discovernd.com/labor
discovernd.com/humanrights

Testimony on HB 1158
Prepared for the
Senate Judiciary Committee

February 15, 2005

Chairman Traynor and members of the Senate Judiciary Committee, good morning. For the record, I am Leann Bertsch, Commissioner of Labor.

HB 1158 proposes clarifying language to Chapter 14-02.5 of the North Dakota Century Code. This is the Chapter which contains the North Dakota Housing Discrimination Act. This bill addresses administrative hearings, and representation of parties in enforcement actions.

The North Dakota Housing Discrimination Act was carefully drafted with intent that it be "substantially equivalent" to the federal Fair Housing Act. State and local agencies enforcing laws that are deemed by the U.S. Department of Housing and Urban Development (HUD) to be substantially equivalent to the federal law are eligible to contract with that agency to investigate cases for them. Substantial equivalency is crucial because it, first, provides the Department of Labor with federal funding for our program. Secondly, it ensures that there will be only a single investigation of a complaint rather than two separate investigations of the same complaint by state and federal agencies. Finally, it provides for a large measure of local control over the investigation and disposition of cases file in the state.

The standard for substantial equivalency is that the state or local law must offer at least the same protections and same remedies as the federal law. Our law has been reviewed by HUD and has been deemed to be substantially equivalent. The amendments to the North Dakota Housing Discrimination Act proposed in HB 1158 do not reduce the protections or remedies of the statute, but merely clarify the provisions already in place.

The issues addressed in this bill relate to the participation and representation of an aggrieved person in administrative hearings and in district court. House Bill 1158 makes it clear that when an aggrieved person requests an administrative hearing, the aggrieved person is party to the administrative proceeding. As a party, the aggrieved person will be served a copy of all pleadings and correspondence sent to the administrative law judge. As a party, the aggrieved person will also be involved in any settlement discussions or other attempts to resolve the matter and will able to participate in the litigation.

The added language clarifies that the attorney general represents the Department, not the aggrieved person. Although the attorney general's representation of the Department is to advocate for the Department's finding of probable cause, the representation is also for the purpose of seeking relief for the benefit of the aggrieved person. Hearings under the Housing Discrimination Act are commenced to enforce North Dakota's policy against discriminatory housing practices, and therefore are commenced for the benefit of the public generally and the aggrieved individual. As such, the aggrieved person's position regarding prosecution and settlement of claims are important and will be considered by the Department in seeking resolution of the claim. This bill makes it clear that the Department of Labor is the Attorney General's client and the Attorney General takes direction from the Department. However, because the role of the Department is to eliminate discrimination, including the discrimination alleged by the aggrieved person, the Department has a strong interest in considering the input and feelings of the aggrieved person. The added language makes clear that the aggrieved person may participate in the hearing on his or her own behalf and be represented by private counsel. This provision is consistent with the federal Fair Housing Act.

Thank you for your time and patience. I would be pleased to answer any questions you may have.

Att #2

ENGROSSED HOUSE BILL NO. 1158

Notes – Doug Bahr
Office of Attorney General

The Attorney General is the chief law officer of the State.

- He is the legal adviser for state officers
- He has a specific statutory duty to issue opinions to state officers

Represents Labor Department to enforce ND public policy against discrimination

- Typically that will coincide with claimant's position
  - JSND example
  - Criminal case
- Charging party may take a contrary position, however
  - Legally – interpret law different than AG/Labor Department
  - Factually – argue contrary to Department's findings
  - Nothing wrong with this.
- The Labor Department is AG's client, not the claimant
  - Claimant cannot direct how AG proceeds in litigation
  - No attorney-client privilege/relationship

The Attorney General only represents the State, its agencies and officials

- 54-12-01
  - Represent the State in all cases where the State is an interested party
  - Initiate actions as necessary in the execution of the duties of a state officer
  - Defend actions against State officers
  - Provide legal opinions to State officials and legislators
  - Prepare contracts and other legal documents relating to subjects in which the State is interested
- 54-12-02
  - Handle all cases in which the State is a party
- 32-12.2-03
  - Defend State employees against claims arising from an alleged act within the employee's scope of employment
- At all times the AG's client is either a government entity or a State official or employee

Policy Reasons

- Policy is established by the Legislature, and implemented through the Labor Department
  - Labor Commissioner is responsible to the Governor, who is responsible to the people
- Labor Commissioner makes policy decisions regarding how to proceed in housing discrimination cases
  - If individual the client, individual controls policy decisions
    - Could make decisions contrary to State policy, as adopted by Legislature and implemented by Labor Commissioner
    - Could advocate position contrary to Labor Department in other cases (inconsistent)
- State's resources should be used to further State policy, not private interests
  - Legal services from the AG's office is a limited and valuable State resource
    - Labor Commission and AG should determine how to best use legal and other resources to further State objectives
    - Individual should not be able to commandeer State's resources (legal services and significant costs of litigation) for private purposes (contrary to State's policy)
      - Argue position contrary to State's position
      - Dictate litigation process (experts, depositions, etc.). Very expensive process.
      - Proceed with expensive litigation rather than accept reasonable settlement that serves public purpose
      - Appeal case State determines should not be appealed (purely factual not likely to be reversed; sound legal analysis)
        - If an individual has no financial stake in decisions, they have less incentive to reasonably evaluate the case when making decisions

Ethical concerns

- Representation of a private individual could create numerous ethical dilemmas
- Conflict between advocating interests of the State/public versus someone's private interests
  - AAGs could not assist LAND (TELA) due to ethical concerns
- Exposure to civil liability (and ethical complaints) due to private representation

Concerns with communications

- Significantly addressed because aggrieved person made a party to the proceeding
  - All parties all copied on all pleadings, participate in settlements, etc.
  - Furthermore, parties can introduce evidence, cross-examine witnesses, file pleadings, make arguments, etc.
- OAG and Department have discussed how to get input from aggrieved party in decisions
  - Investigator liaison between AAG and Department
  - Investigator liaison between Department and aggrieved party
    - Investigator, not AAG, would communicate with aggrieved party. Department would consider aggrieved party's position. Department would communicate to AAG its position.

AH #3

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Testimony before the
Senate Judiciary Committee
on House Bill 1158
by the North Dakota Fair Housing Council
February 15, 2005

Mr. Chairman, and members of the Committee, my name is Amy Schauer Nelson and I am the Executive Director of the North Dakota Fair Housing Council (NDFHC). The NDFHC is a non-profit agency who provides support, encouragement and assistance to those seeking equal opportunity in housing. The NDFHC educates the public on Fair Housing Laws and also investigates allegations of housing discrimination. When discrimination is found, we assist complainants in filing complaints of housing discrimination and throughout the administrative process. As a result of our assistance in complaint filing, we often work with the North Dakota Department of Labor because it is the state agency charged with receiving complaints and enforcing violations. We strongly support their efforts in working to eliminate housing discrimination in North Dakota.

However, we oppose House Bill 1158, because of its addition into law that the North Dakota Attorney General's Office will not represent individuals whose complaints have been found to have Probable Cause that discrimination occurred. This proposed language would leave a complainant of housing discrimination in an impossible situation of not having someone representing their interests unless they hire private counsel. In the vast majority of complaints filed with the North Dakota Department of Labor, the reason the complaint is being filed with the North Dakota Department of Labor is because the individual cannot afford an attorney. If the individual could afford an attorney, they would pursue legal action through the court process instead of the North Dakota Department of Labor administrative process.

To give you some background, the North Dakota Attorney General's Office is the agency charged by the state to enforce violations (Probable Cause Rulings) identified by the North Dakota Department of Labor. Currently, the North Dakota Housing Discrimination Act states that the Attorney General must seek relief "on behalf of the aggrieved person." The NDFHC and other advocacy organizations believe this requires individual representation by the Attorney General's Office. The Attorney General's Office; however, has taken the position that they only represent the North Dakota Department of Labor and cannot represent individuals in situations where the North Dakota Department of Labor has found Probable Cause on an individual's complaint and is pursuing enforcement. There has been no official opinion by the Attorney General if this is a correct interpretation. The North Dakota Fair Housing Council and a number of other interested parties were in process of requesting an Attorney General opinion on this matter because we believe the Attorney General is required to represent individuals in Probable Cause Rulings and is legally obligated to do so. Unfortunately, this bill was filed before such an opinion could be requested.

When the North Dakota Department of Labor requests the Attorney General's Office enforce a Probable Cause ruling, the action which is filed by the Attorney General's Office is filed ONLY on behalf of the North Dakota Department of Labor. The complainant's name is not listed on the filing and the complainant no longer has any control over their complaint. Despite several requests from the NDFHC, the Attorney General's Office has not directly provided complainants with any correspondence or copies of actions on their filings except in a few circumstances where the complainant has hired an attorney to intervene. The complainant has only received copies of

actions and results on the filing if the North Dakota Department of Labor has provided copies to them. Although we appreciate the North Dakota Department of Labor providing this correspondence to complainants, they are relying on the Attorney General's Office to provide them with the correspondence which does not occur unless they ask for it. Although the North Dakota Department of Labor states it will attempt to work toward the same goals as the complainant, this is not guaranteed. The Attorney General's Office states it only represents the North Dakota Department of Labor which leaves the complainant dependent upon the North Dakota Department of Labor for the remedy the complainant may be seeking. Unfortunately, we have seen problems with this relationship in additional to the lack of correspondence. In October, 2004, a Minot client who had filed a complaint of housing discrimination which was found to have Probable Cause by the North Dakota Department of Labor and referred to the Attorney General's Office for enforcement, had her complaint settled without consulting with her. She was simply notified one day that her complaint had been settled and was surprised to find out such since she had received no recent correspondence regarding what she was seeking for settlement or that settlement was being negotiated. This was able to occur because the complainant was not named on the filing and no correspondence was being provided to her by the Attorney General's Office.

The Attorney General must be required to enforce the Department's findings of probable cause. Without this enforcement, the discriminatory action will continue to occur. The Attorney General must also be required to advocate for the rights of a complainant and represent their interests. Currently, the US Department of Justice (DOJ) and the US Department of Housing & Urban Development (HUD) advocate for the United States of America AND the individual who filed the complaint when there is a Probable Cause Ruling. The complainant is copied directly by HUD/DOJ on any correspondence regarding the case. The complainant is also consulted on conciliation requests, case status and progression to closure. HUD and DOJ both acknowledge that they only represent the United States as an action proceeds, but they both see their roles as enforcing the Fair Housing Act for the United States of America and the complainant. We seek to have similar policy put in place for the North Dakota Attorney General's Office to follow and adhere to. The complainant also has the option of hiring private counsel who HUD/DOJ would work with. Page 2, line 8 amends current language from "on behalf" to "for the benefit" of the aggrieved individual. This proposed language change in this bill is a deviation from the Federal Fair Housing Act (attached) which clearly states "on behalf". In addition, the Federal Fair Housing Act does not state that HUD/DOJ etc. only represent the federal agency in actions as this bill seeks to do. Deviations from the Federal Fair Housing Act could lead to the elimination of state substantially equivalency and the loss of funding to the North Dakota Department of Labor by the US Department of Housing & Urban Development. The NDFHC has requested that HUD review this bill for effects on substantial equivalency but has not received a response to date.

The North Dakota Attorney General's Office has stated in earlier testimony on this bill that they will now develop policies to enable better communication with the North Dakota Department of Labor and individual complainants of housing discrimination. Although this is a step in the right direction, much work remains to better the enforcement process for those individuals of our state who have been found to be victims of discrimination. We have requested that these policies be drafted and immediately implemented given the number of housing discrimination cases currently pending at the Attorney General's Office and the many problems identified to date with the current process.

The North Dakota Fair Housing Council asks that you vote "Do Not Pass" on this bill. I thank you for the opportunity to provide testimony today and please let me know if you have any questions. Thank you.

#4

North Dakota Human Rights Coalition

P.O. Box 1961, Fargo, ND 58107-1961 (701) 239-9323 Fax (701) 478-4452 www.ndhrc.org

Testimony
House Bill 1158
Senate Judiciary Committee
February 15, 2005

Chairman Traynor and members of the Committee, thank you for the opportunity to present testimony in opposition to House Bill 1158. I am Cheryl Bergian, Director of the North Dakota Human Rights Coalition. The Coalition includes a broad-based, statewide membership of individuals and organizations interested in the furtherance of human rights in North Dakota; the Coalition's mission is to effect change so that all people in North Dakota enjoy full human rights.

We support the work of the Division of Human Rights in the North Dakota Department of Labor for the enforcement of the North Dakota Human Rights Act and North Dakota Housing Discrimination Act. However, we have some objections to changes the Labor Commissioner is proposing to the North Dakota Housing Discrimination Act.

An issue has arisen regarding enforcement of the North Dakota Housing Discrimination Act and the interplay among the North Dakota Department of Labor, the North Dakota Attorney General's Office, and the person while has filed a complaint under the North Dakota Housing Discrimination Act. The Attorney General's Office has taken the position that they do not represent the complainant in enforcement actions under the Act, and that they only represent the State of North Dakota (the Labor Department). This has resulted in the Attorney General's Office's refusal to communicate with the complainant after a probable cause determination has been issued by the Labor Department, and to only communicate with the Labor Department. The ultimate result is that the Attorney General's Office and the Labor Department have actually settled a complaint under the Act without informing the complainant that the settlement was in the offing, and without conferring with the complainant regarding that settlement.

This is not how the federal government acts when the U.S. Department of Justice and the U.S. Department of Housing and Urban Development enforce the federal Fair Housing Act, upon which the North Dakota Housing Discrimination Act is modeled. The DOJ files complaints in the name of the complainant and HUD, and confers with the complainant and HUD regarding the progress of the complaint and any settlement prospects. In fact, the Fair Housing Act calls for the Department of Justice to bring a civil action "on behalf of the aggrieved person." The NDHRC believes that this is the appropriate way to enforce discrimination laws in North Dakota. The DOJ does acknowledge that it represents only HUD as it proceeds, but it sees its role as enforcing the Fair Housing Act for both the complainant and HUD. That should be the role of the Attorney General's office in North Dakota, also.

We ask for a do not pass recommendation on House Bill 1158. I appreciate this opportunity to testify on behalf of the North Dakota Human Rights Coalition.