

2021 SENATE JUDICIARY

SB 2322

2021 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2322
2/1/2021

A BILL for an Act to create and enact a new section to chapter 32-12.2 of the North Dakota Century Code, relating to state employee claims for wrongful criminal investigation or prosecution; to provide for retroactive application; and to declare an emergency

Chairwoman Larson opens the hearing, all senators are present: Myrdal, Luick, Dwyer, Bakke, Fors, Heitkamp, and Larson

Discussion Topics:

- Restitution to state employees and their legal fees
- Retroactive application of this measure

Senator Curt Kreun- District 42 [2:39]
Introduced the bill

Tag Anderson- Director, Risk Management Division of OMB [3:10]
Testified in favor - #4997

Additional Written Testimony:

Michelle Kommer provided neutral testimony #4902
Jamal Omar, Committee Clerk

PROPOSED AMENDMENTS TO SENATE BILL 2322

Page 1, after line 18, insert:

- "3. Payments under this section are limited to investigations and prosecutions involving alleged conduct that is directly related to the state employee's employment or office. Traffic and motor vehicle offense investigations and prosecutions are not eligible for payments under this section. No Payment may be made if there exists a reasonable possibility that criminal charges could subsequently be brought or charges are dismissed or not brought for reasons unrelated to the innocence or guilt of the state employee.

From: Larson, Diane K.
To: NDIA, Intern 04 - Fordehl, Liz
Subject: Fwd: Thank you & additional comment
Date: Monday, February 1, 2021 8:31:46 PM
Attachments: LAFRC 10-7-2020 COPY.pdf

From: Larson, Diane K. <dklarson@nd.gov>
Sent: Monday, February 1, 2021 8:30:02 PM
To: NDIA, S JUD - Omar, Jamal <sjud@nd.gov>
Subject: Fwd: Thank you & additional comment

From: Michelle Kommer <mkommer99@gmail.com>
Sent: Monday, February 1, 2021 8:24:54 PM
To: Larson, Diane K. <dklarson@nd.gov>; Dwyer, Mike A. <madwyer@nd.gov>; Bakke, Jo Nell <jbakke@nd.gov>; Fors, Robert <rfor@nd.gov>; Heitkamp, Jason <jasonheitkamp@nd.gov>; Luick, Larry E. <lluick@nd.gov>; Myrdal, Janne <jmyrdal@nd.gov>
Cc: Kreun, Curt E. <ckreun@nd.gov>
Subject: Thank you & additional comment

***** CAUTION: This email originated from an outside source. Do not click links or open attachments unless you know they are safe. *****

Chair Larson and members of the Senate Judiciary Committee,
 My name is Michelle Kommer and I recently served as the Commissioner of Commerce. I observed today's hearing remotely, and I want to thank Senator Kreun and the sponsors for advancing SB2322, and you for your thoughtful consideration of the bill. As you may know, I was one of the state employees forced to retain counsel when the State Auditor referred our audit for criminal investigation, not having identified any legitimate basis for doing so.

I am attaching my testimony that was presented to the Legislative, Audit, and Fiscal Review Committee (LAFRC) on October 7, 2020. In it you will find a thorough chronology of the Department of Commerce's experience, including a number of procedural abnormalities, as well as the questions that remain in the aftermath. I trust you will find it very disturbing. If you prefer to watch the testimony, it can be found [here](#), at about 11:58 (there are a few seconds of sound difficulty, but it is quickly corrected).

I read Jack Dura's coverage of today's hearing in the Bismarck Tribune, and it is another reminder of how facts, without context, are not the truth, and how the damage from the events in the last year is a "gift that keeps on giving". What was reported (from today's story), is essentially:

- **Headline:** "North Dakota lawmakers push to reimburse state officials caught up in audits' criminal probes."
 - Click bait to cause the reader to learn more about why in the world lawmakers would seek to reimburse state officials for anything smelling of a crime, without mention that there were never any crimes identified, or as Tag politely put it today - the audit was referred for investigation "prematurely".
- "Gallion said he had an obligation to advance the audit findings for investigation."
 - While not a false statement, the rest of the truth is that Gallion ignored the specific statute that required him to refer requests for investigation to the LAFRC (and in the process ignored the doctrine of separation of powers that our government is founded upon), instead, piecing together words from a statute relating to Purchasing Cards to create an obligation for himself. He has yet to answer the question "why did you bypass LAFRC?" and "why did you use the Procurement Card statute to refer the Commerce and Library audits for investigation when there was no purchasing card use at issue?"
- "No criminal charges resulted."
 - Indeed no criminal charges resulted, because at no point was it ever identified *who* may have broken *which law*...ever. The mere statement "no criminal charges resulted" suggests for the general public that there was reason to believe there was concern. Even if all four of Gallion's audit findings from the Department of Commerce audit were correct (they were not - 3 were incorrect, not as a matter of opinion but a matter of law, which receives no attention), the fourth finding was at worst a policy violation, with all Commerce employee having acted in good faith, believing they acted properly. This point is likewise never mentioned.
- "They didn't commit crimes, they were accused of crimes..." (Quote from Mark Friese, private attorney).
 - We were accused of crimes only by the media. As noted above, there was never any basis to support the concern a crime was committed. We are simply asking for reimbursement for expenses that should never have been incurred.

This is about the seventh of a series of stories that re-state the same story line. *Commerce Department Audit referred for criminal investigation. Employees retain attorneys. Gallion says he had an obligation to refer to the attorney general. No evidence found of crimes committed. Employees want reimbursement for attorneys' fees.* We all know how the general audience will read this, with at best, suspicion of the circumstances, with no reason to wonder what "really" happened. And sadly, pretty soon the story becomes the truth.

This said, I am not looking for your sympathy. I could have chosen a different path - I served as the Commissioner of Commerce for a fraction of the 2-year audit scope, had no personal involvement in the matters raised in the audit (didn't work there at the time) -- I could have disclaimed any responsibility and said - "wasn't me". And yet I found it more important to lead. To me, this meant taking ownership (it's my job now), carefully examining the circumstances identified in the audit, responding factually and without emotional attachment, ensuring we had an improvement plan in place (whether the findings were correct or not), and finally, protecting myself from distraction (hiring an attorney) so I could protect my team, which happens to be full of real human beings who nobly work every day in service to their state, with a passion and dedication that has changed me for the rest of my life. This brings me to the fact that I personally do not care about the money-- it's significant, yes, but I'd much rather just be done and walk away with the satisfaction that I did the right thing by re-focusing despite this manufactured distraction, and find satisfaction in the result - my team was highly effective in addressing enormous issues for our state during an important time. But I DO care about the fact that *other Commerce employees that similarly retained attorneys, who have not yet requested reimbursement, as they are understandably waiting to see a positive resolution for my request.* I admit I also quietly wish that Jack Dura might someday take notice of these facts.

Senator Bakke - I appreciated your question about "why did they get attorneys if not charged with a crime?" It's a fair and just question. The answer is simply this - as a licensed attorney myself, I can tell you that no one needs an attorney MORE than someone that has just been advised that their agency is under "criminal investigation" using improper authority, for crimes committed by perpetrators that have not been identified. I can't begin to describe the terror of this series of actions that "should not have been possible". There were more laws broken in the process that began with the referral for criminal investigation than were ever in question pertaining to the audit. Put simply, what happened was un-American.

Senator Dwyer, I too agree that there could be an amendment that addresses concerns raised today, to make sure the state does not find itself in a position to pay for legal fees where not warranted. That said, I have seen the amendment offered with good intention by Tag and fear that it also leaves gaps for interpretation, as gaps in interpretation are what got us here (possibly mixed with some unbridled political ambition with a dash of poor character--Gallion). I am thankful that the committee is interested in arriving at a sensible solution and I firmly believe that with good intentions and smart heads together, this can be achieved.

Finally, while I am so thankful for SB2322, Senator Dwyer is correct that it does not address the root cause of the issue, but the good news is that there is still an opportunity to do so, if the Senate is willing to amend HB1127. This bill has honorable intentions, but does not, in its present form, fill the gap exploited by the State Auditor. Below I offer some thoughts for how that can be accomplished - it is an important and timely opportunity that I hope you seize.

Thank you once again for your thoughtful consideration of this matter. As I watched today's hearing, I was reminded of how much energy and effort is required to do your jobs, and I'm so thankful that you make this choice every day. It was an honor to work among you, and am humbled by the complexity of your work.

Best,
 Michelle Kommer

PROBLEM STATEMENT

In order to refer the Department of Commerce's audit to the Attorney General for investigation, the State Auditor bypassed his responsibility under N.D.C.C. § 54-35-02.2 to refer such

matters through the LAFRC, and improperly relied upon a tortured interpretation of NDCC §44-08-05.1 entitled “Payments – Purchasing card authority – Penalty”:

1) Use of the statute NDCC §44-08-05.1 governing payments for purchasing cards or other payments cannot be used to circumvent the *specific processes* for review of audit information vested in the North Dakota Legislative Audit and Fiscal Review Committee. See N.D.C.C. § 1-02-07; Johnson v. Nodak Mut. Ins. Co., 2005 ND 112, 699 N.W.2d 45 (a specific statute controls a general statute).

2) In addition to improperly using NDCC §44-08-05.1 to refer the Commerce Department’s audit for criminal investigation, the State Auditor ignored his obligations under N.D.C.C. § 54-35-02.2, which requires referral to the Legislative Audit and Fiscal Review Committee

- Under the statute, the Committee “shall study and review audit reports.” Further, “Whenever the committee may determine or have reason to believe that there may have been a violation of law relating to the receipt, custody, or expenditure of public funds by any state officer or employee, the committee shall present such evidence or information as may be in its possession to the attorney general.” The statute further provides, “The attorney general shall receive and accept such evidence or information and shall immediately commence such additional investigation as the attorney general determines necessary.” By its plain terms, N.D.C.C. § 54-35-02.2 requires an initial investigation by the Committee, and directs subsequent investigation by the Attorney General only after a determination of reasonable cause and a request by the Committee. The statute makes sense. It recognizes and honors separation of powers. It requires a state officer to seek Legislative review, and vests with Legislature—not the auditor—authority to refer matters for criminal investigation.

PROPOSED REMEDY

The current amendments proposed by HB1127, while honorable in spirit, do not fill the gaps to prevent the State Auditor's continued mis-use of N.D.C.C. §44-08-05.1, and failure follow N.D.C.C. § 54-35-02.2, which assures appropriate separation of powers.

NDCC §44-08-05.1

5. Any public officer, employee, or any other individual who has knowledge of an actual or possible violation of **this section**,

[INSERT LANGUAGE TO CLARIFY THAT THIS SECTION IS ONLY TO BE USED TO REPORT AN ACTUAL OR POSSIBLE VIOLATION RELATING TO PURCHASING CARD USE – THAT IS WHAT WAS MEANT BY “THIS SECTION”... NO PURCHASING CARD USE WAS EVER IN QUESTION]

...shall make that information known to the attorney general or the appropriate state's attorney. The attorney general or appropriate state's attorney shall investigate any alleged violation. If there is probable cause to believe that a violation has occurred, the attorney general or appropriate state's attorney shall initiate a criminal prosecution under title 12.1 or a civil suit against the public officer or employee for the recovery of the funds as may actually have been improperly paid, or may initiate a prosecution and a civil suit. Any public officer, employee, or any other individual who has provided information to the attorney general or a state's attorney under this subsection shall keep the information confidential until a determination is made as to whether a criminal prosecution is warranted.

[INSERT LANGUAGE TO EXCLUDE THE STATE AUDITOR'S USE OF THIS SECTION TO REFER AUDITS FOR INVESTIGATION, AND TO SPECIFICALLY DIRECT THESE MATTERS THROUGH THE APPROPRIATE PROCESS – LAFRC.]

For example:

For the purposes of this section, the State Auditor is explicitly directed to refer to any matters to the Legislative Audit and Fiscal Review Committee pursuant to NDCC § 54-35-02.2

Legislative Audit and Fiscal Review Committee
October 7, 2020
Michelle Kommer

Good morning Chairman Klein and member of the Legislative Audit and Fiscal Review committee. I stand before you as the former Commissioner of Commerce. It is a pleasure to see you. Thank you for the time you have provided to me today.

My purpose in driving to Bismarck for this Committee meeting is to share a story that needs to be told. Today, I have three goals:

First, I will share our experiences relating to this audit and the investigation that followed, as I think there are many lessons that have been learned, and those that still need to be learned.

Second, I will highlight a number of questions that remain unanswered, where the answers are not only deserved, but crucial to ensuring a transparent government.

Third, I will leave you with a call to action.

To begin, a word about the audit of the Department of Commerce, as there may be those who will try to shift the focus of my remarks by saying it is “sour grapes” or “they got caught doing something wrong”. This is simply not the case.

As a reminder, I served as the Commissioner of Commerce for only a small portion of the 2-year audit period, so I was able to look at the audit findings with an objective eye, and without emotional attachment, determine what could be learned.

There were four audit findings that together represented a fraction of 1% of the entire Commerce budget. Two of the four findings addressed the same issue, leaving what was really three remaining audit findings. Of these three, two were incorrect. The auditor was wrong, not as a matter of opinion but as a matter of North Dakota law. The third (and fourth) finding was at worst, a violation of accounting policy. *Remember this because it's important to what comes next.*

As to that audit finding, it has been agreed, that even if there were a violation of accounting policy, the payment to Grand Forks County was made properly, to the right party, and for work properly contracted. Furthermore, it is understood that there were at least TWO mechanisms by which that payment could have been made and properly charged to the prior biennium. The Department didn't avail itself of those mechanisms because staff believed it had been done it correctly.

The result: No money improperly changed hands; there was no evidence, observation, or suggestion of any malice or crime in the process; the money would have moved at the time that it did, and been charged to the biennium to which it was charged, regardless of this audit. However, that is not the story. I hope to share the **real** story, **335 days** from when we last assembled here.

Let me begin with a re-cap of the events leading up today:

- To begin, at the LAFRC meeting prior to the November 6th, 2019 meeting, the State Auditor asked you to refer the NDSCS audit for criminal investigation. This committee declined.
- On October 16, only a few weeks before the November 2019 LAFRC meeting, instead of bringing the Department of Commerce audit report to you to determine whether or not criminal investigation was appropriate required by statute, in an unprecedented action, the auditor requested the Attorney General's office conduct an investigation under an obscure and never-before used statute related to purchasing cards. There was no purchasing card use at issue in the Commerce Department audit.
- On October 23rd, I was advised that the audit had been referred for "criminal investigation". It was not made clear to me the statutes that were suspected to have been violated and by whom, criminally or in any other respect.
- On October 24th, I was advised that the AG's office would not provide counsel to the Commerce Department. We were each on our own.
- Unbeknownst to us, but learned from an open records request after the conclusion of the investigation, even though the AG's office had requested an independent investigation with the help of a SD investigator, an attorney from the North Dakota AG's Criminal Division provided information to the SD investigator *during the investigation*.

Attachment

- Beginning on November 1, I made 3 attempts to secure answers to specific questions outlined in an email from Deputy Attorney General Seibel. We needed guidance, in writing, quickly. The Deputy Attorney General did not respond until my 4th request, and then, he only responded with "is there a good time to talk?" Attachment.
- In the week that followed, as several of the peculiarities became clear, such as the deviation from the LAFRC process, use of an obscure statute, failure to identify the statute was violated criminally and by whom, and the lack of representation from the AG's office, concerns escalated in the Department, causing others and I retained counsel.
- Meanwhile, as is a customary practice in the professional field of audit, on November 4th, I requested a meeting with the Auditor to discuss our post-audit plan for improvements to our control environment. He refused to meet with me, stating that everything that needed to be discussed between us had been covered in the exit meeting. He did not attend the exit meeting. Attachment.
- This brings us to the LAFRC meeting on November 6th. Here are a few pertinent facts relating to that meeting:
 - As reflected in the LAFRC minutes, neither the AG nor Auditor took responsibility for the unprecedented use of the purchasing card statute in referring the audit for criminal investigation, and in fact, both denied it. The Auditor, when asked this same question by the media following the November LARFC meeting said that his attorney had advised him not to answer that question.
 - No light was shed on the statute that was assumed to have been criminally violated. Yet when Representative Nathe inquired as to why Commerce

employees could not be represented, DAG Seibel responded “when you have a situation like this where you have allegations of criminal activity, unfortunately those allegations themselves are alleging that the employees involved acted outside the scope of their employment.” He went on to state that statute prevents AG representation in these cases.

- As a reminder to LAFRC members, at no point was it ever clear to the Department of Commerce the specific statute that was what law was suspected to have been violated and by whom, criminally, with intent. There was no allegation of criminal activity. This, committee members is an example of circular reasoning.
- When Representative Nathe asked if legal fees would be reimbursed, DAG Seibel answered in the affirmative, responding “Yes, in the event that they are exonerated.”
- November turned to December to March and the beginning of a pandemic, with no answers.
- As the days and months passed, the weight of possible litigation became too heavy to bear for some members of the Commerce team, whose physical and mental health were dramatically taxed.
- On April 20, 2020, nearly six months after I first became aware of the investigation a declination letter was issued by Julie Lawyer, Burleigh County State’s attorney. She concluded there was no criminal activity discovered in the course of the investigation. To this day, it remains a mystery to my staff members or I, who was suspected to have violated ND statute, and how.

As if we need this to be any weirder, or sadder, I’ll add some additional detail that you may find interesting:

- The auditor’s deputy is a former Commerce Department employee whose employment was terminated through a reduction-in-force in in the year prior to my arrival at the agency. While I do not know her, I am told that she departed with a significant amount of animosity. Based on open record request made by my attorney after the investigation concluded, once can deduce that she is one of the main “informants” interviewed by the SD investigator. Interestingly, only three people were ultimately interviewed over the course of the six-month investigation, including zero current Commerce employees. *As a side note, the SA’s report inaccurately reported that I refused to visit with the investigator – I offered enthusiastically to visit with him, with my attorney present.*
Attachment.
- It was unfortunate that the Attorney General referred the investigation to SD and promptly left for China for several weeks, unavailable to answer any questions.
- And finally, we also learned AFTER the we became aware of the referral for criminal investigation, that the same Assistant Attorney General represented the Commerce Department also Audit Department simultaneously, without prior notice, which is a violation of the Rules of Professional Conduct for attorneys. Coincidentally, she is also the attorney for the Ethics Commission.

Considered together, this is “Netflix-grade content”. It would be mildly entertaining if this had not been my family’s, my team’s, and my reality for the past year, and we weren’t playing games at the expense of North Dakota citizens.

But with all of this hanging over our heads, the extraordinary performance of the Commerce Department staff in this past year is even more remarkable. Despite a system that failed us, we persisted, and went on to support North Dakota businesses during this pandemic in a way that will affect our State in a positive way for years to come.

II. Remaining Questions

Now, on to the important questions that remain. There are eight:

- 1) Whose idea was it to treat ND statute like a word search game, to use a purchasing card statute to refer the audit for investigation (where there were no purchasing cards used)? Why? Why now? The minutes from your last meeting show the Auditor and AG both saying “not me”, “not my idea”. Then who? As an attorney licensed to practice here, who has taken an oath to uphold our laws, it offends me that these statutes, crafted by you, for the people, would be mocked in this way.
- 2) Where was there ever any suggestion of who broke which law and how?
 - I’ll answer this one for you – there wasn’t. Even though our law requires it. Any investigation by the Attorney General’s office must “particularly specify... the office, department, or person to be investigated and the scope and purposes of the investigation.” So the real question is, why did we waste what is likely hundreds of thousands of dollars in expense and lost time and other expenses we will never be able to calculate? What country are we living in, members of the committee, where one can suffer the public pain and humiliation of a “criminal investigation” with no crime ever having been identified – never a suggestion that anyone acted outside the scope of their employment?
- 3) Which leads us to - Who’s responsibility is it to determine whether “criminal activity” is suspected? Members of the committee – it must be someone’s?
 - Both during and after the LAFRC meeting on November 6, 2019, the Auditor says “not mine”, “wasn’t me”. And in political speeches he has said he is just “(shucks), doing his job”. But just a few months earlier, an email was sent from his office to the Cass County attorney relating to the NDSCS audit, the subject line being “seeking charges”, wherein his office requested the pursuit of specific criminal charges.... Is he lying? Or irresponsibly unaware of the operations of his office? It’s one or the other. Attachment.
 - In any event - whose job is this? Before the state spends a shocking amount of time, energy and money on a “criminal investigation”, mustn’t someone describe

what law was thought to have been broken and by whom? The answer to that question is yes – North Dakota law requires this – but that never happened here.

- This is a mockery of due process. A mockery that lasted 187 days. The Commerce Department’s audit was sent for “criminal investigation”, people were hurt, and **nobody** knows who was suspected to have done anything wrong? Please pause and imagine what that felt like.
- 4) We were refused representation by the AG’s office because there was accusation of criminal activity... but as I just mentioned - there was not – no one had identified who was thought to have acted outside the scope of their employment, having intentionally broken a law. Why then, didn’t the AG’s office provide representation?
 - 5) The AG’s office told the governor’s office it outsourced the investigation to SD due to a conflict of interest, because their office represented both agencies. But later, the AG’s office was aggressively insistent that no conflict existed when its AAG represented the Commerce Department and the Auditor’s office through the duration of the audit. These positions cannot both be true at the same time. What conflict existed that required the investigation to be outsourced to SD? Or was it perhaps referred to South Dakota’s Department of Criminal Investigation because it was more “interesting”?
 - 6) Why, if remaining independent because of a conflict of interest, did AG’s office provide direction to the SD investigator during the course of the investigation?
 - 7) While I don’t wish this upon my colleagues at the State Library, why was it that under nearly identical circumstances, the State Library audit was not also referred for criminal investigation? We have no answers here.
 - 8) Why were my attorney’s fees denied when Troy Seibel assured you attorney’s fees incurred by Commerce personnel would be reimbursed?
 - And when there is backpedaling on this, I urge you to be cautious of the explanation that the law doesn’t permit for this. This statement would be based, at best, on an aged and improper AG opinion, which has since been abrogated, and at worst “because I said so.” It is plainly wrong.

Members of the committee, sadly, this is only a start. But it should be enough. Enough to deeply disturb you and all the citizens of North Dakota. Enough to compel you to take action so that this can never happen again. Enough to strike the curiosity of the press to seek answers, real answers, not placating, superficial “because I said so” responses. The people of North Dakota deserve better.

III. Call to action

Finally, I'll end with a call to action for you, the legislative body, the AG's office, the auditor, the press, and the people of North Dakota.

- **LAFRC.** Committee members, I hope you will secure answers to the questions I've presented to you today and work with the legislative body prevent this from ever happening again.
- **Auditor.** As for the State Auditor, after all of this, I believe that in part, this is a problem of character, the State Auditor's character, which unfortunately, none of us can change. But we can require a person who holds this office to possess the qualifications necessary to do it. That would have made a difference here. Then, the scope of the audit would have been based on risk and materiality instead of what would receive the most attention in the media. His work product is an embarrassment to the profession (regardless of accolades from an echo chamber of peers). This can be fixed. So my call to action for the auditor is to carry a bill into the next session requiring the top auditor to possess the credentials necessary to lead the function, require the same of staff, participate in the same continuing education and training as a private sector auditor must in order to conduct government audits, and reform audit reports to comply with the standards of the profession. To refrain from insulting the people of North Dakota by suggesting they need pictures to understand an audit report, and to include more facts, and less adjectives. To humble himself and measure success by how state government was improved by his Department's efforts rather than measuring success by how many times **his** name appeared in the newspaper. To change his approach, so that the work of the office creates value instead of terror.
 - And, finally, my call to action for the State Auditor is for an apology to me, my team, to you, and to the people of North Dakota. His efforts to create a stage for himself backfired at great cost to North Dakota.
- **Attorney General's office.** A little time into this journey, I had to stop "trying to make sense of this" – because (as you've heard) there was no sense to be found. There were too many inconsistencies and too few explanations. It was devastating to be forced to conclude that, in the end, this situation was about politics. Who lost or won an election. Who wants to win an election and who is willing to use the power of an office to set off a giant **glitter bomb** with VERY real expense and real consequences. We at Commerce, and ultimately all state employees were simply collateral damage. The Attorney General's office had a chance to stop this charade before it started, and to do the right thing by the law and the people of North Dakota. They got it right the second time (with the State Librarian's audit). My trust in the leadership of this office is gone. So this call to action is to the people of North Dakota. Do not assume the best. The bearing of an important title does not translate to fact or truth or an ability to place people before politics.
- **Press.** I understand that journalism has changed in recent years. In essence, you must either find a scandal or create it in order to get the clicks. This is not necessarily your fault. We are a distracted and divisive society. But there are still people who rely on you

for truth, and just because the words you print cannot be called lies - without context, chronology, and the “rest of the story” – you are not telling the truth. This headline was never the story. That was as obvious on November 6th as it is today, but it made a more interesting headline? Tell the whole story, even if it’s complicated, even if it’s not sexy. North Dakota citizens are smart. They care about the whole truth, and deserve it.

- **Legislators.** For all our legislators, although the statutes at issue here are perfectly clear regarding the laws that provide for how an audit is properly referred to the Attorney General’s office where necessary; how employees acting in the scope of their employment should be protected from personal liability; and conflicts of interest pertaining to representation by an attorney, unfortunately, this didn’t stop the abuse, so your help is needed. Again, I will not acknowledge that there are gaps. There aren’t, assuming we are dealing with well-intentioned and competent professionals. Instead, this is more of a situation of needing to have a belt and suspenders, or a lock and a deadbolt. It should make us sad that we have to protect ourselves against these elected officials, but it’s been demonstrated that we must. In this next legislative session, please:
 - Make clear the circumstances under which an audit would be referred for criminal investigation, who has that power, and also, require the scope to be clear;
 - Eliminate the possibility that an AAG can represent the auditor and auditee without notice and a particular controls in place;
 - And finally, make sure that state employees can come to work every day without the fear of personal liability for doing their jobs.
 - On that note – I’d like my money back – not because I care about the money, but because it is a symbol, that reason prevails over chaos, good over evil. There are others who retained counsel as well, and I’ve done my absolute best to shield them and my entire team from this travesty. The return of my fees will inspire others who will not come forward without that action to do so, without being fearful.
- **State Employees.** Finally, one of the greatest gifts of these past four years, has been, for me to learn that “state government employee” is a badge of honor. For those who are here or listening, I see you, I thank you. Please do not give up. Even when you may feel like it, because your work matters.
 - Specifically, I would like to thank the team at the Department of Commerce. I would do this all over again – for you. Keep up the great work and stay on the high road.

Closing

I hope you are deeply disturbed by what you have heard. I hope that you will take action to make sure that this never happens again. I hope there will be accountability for elected officials who abused their power, wasted taxpayer dollars, and made a mockery of our state’s laws and our democratic system, including you.

With all of that being said, I have one final remark, and it is one of gratitude. I want you to know that while there were many times throughout this past year that I called out to God, asking

“what are you teaching me?”. But today, I am at peace. I am thankful for this experience because it taught me one of the most important lessons of my life – that real leadership matters, that telling the truth, and rising above is always the right path, and that I am stronger than I thought.

Thank you for your time.

References:

See [NDCC §54-35-02.2](#) Powers and Duties of the Legislative Audit and Fiscal Review Committee, the **controlling statute**, which defines the proper process where the auditor believes an audit should be referred to the Attorney General’s office for further investigation.

See [NDCC § 44-08-05.1](#) Payments – Purchasing card authority – Penalty, for the statute that the Statue Auditor treated like a “word search game” and abused in order to bypass the LAFRC.

2021 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee
Peace Garden Room, State Capitol

SB 2322
2/8/2021

Relating to state employee claims for wrongful criminal investigation or prosecution; to provide for retroactive application; and to declare an emergency.

Senator Larson called the committee to order at 3:30 PM. All senators are present: **Myrdal, Luick, Dwyer, Bakke, Heitkamp, Fors, and Larson.**

Discussion Topics:

- Restitution to state employee claims for legal fees
- Recommended language for amendment (3:40)

[3:32:02] **Troy Seibel, Chief Deputy Attorney General**, was summoned by **Senator Heitkamp** to provide clarification on the bill.

[3:32:40] **Senator Dwyer** introduced and explained the reasons for introducing the amendment. #5959

[3:58] **Senator Myrdal** moved DO NOT PASS

[3:59] **Senator Heitkamp** seconded DO NOT PASS.

[4:00:47] **Senator Myrdal** withdraws her motion until amendment language is adjusted.

[4:00:55] **Senator Heitkamp** withdraws his second.

[4:02] Senator Larson adjourned the hearing.

Rose Laning for Sheila Froehlich, Committee Clerk

21.1024.02001
Title.

Prepared by the Legislative Council staff for
Senator Dwyer

February 2, 2021

PROPOSED AMENDMENTS TO SENATE BILL NO. 2322

Page 1, line 10, after "investigation" insert "that was initiated by an executive branch agency"

Page 1, line 15, after "investigation" insert "that was initiated by an executive branch agency"

Renumber accordingly

2021 SENATE STANDING COMMITTEE MINUTES

Judiciary Committee Peace Garden Room, State Capitol

SB 2322
2/9/2021

Relating to state employee claims for wrongful criminal investigation or prosecution
--

Senator Larson called the hearing order at 9:21 AM. All senators are present: **Myrdal, Luick, Dwyer, Bakke, Heitkamp, Fors, and Larson.**

Discussion Topics:

- Amendment

[9:21] Senator Dwyer introduced and explained amendment 21.1024.02002.

[9:33:17] Senator Luick moved to adopt the amendment.

[9:33:27] Senator Dwyer second.

[9:33:37] Roll Call vote.

Senators	Vote
Senator Janne Myrdal	Yes
Senator Michael Dwyer	No
Senator JoNell A. Bakke	Yes
Senator Robert O. Fors	Yes
Senator Jason G. Heitkamp	No
Senator Larry Luick	Yes
Senator Diane Larson	No

The motion passes 4-3-0.

[9:34] Senator Myrdal moved DO NOT PASS AS AMENDED.

[9:34] Senator Luick second.

Roll Call vote on DO NOT PASS AS AMENDED ON SB 2322.

Senators	Vote
Senator Janne Myrdal	Yes
Senator Michael Dwyer	Yes
Senator JoNell A. Bakke	Yes
Senator Robert O. Fors	Yes
Senator Jason G. Heitkamp	Yes
Senator Larry Luick	Yes
Senator Diane Larson	Yes

The motion passes 7-0-0.

[9:34] Senator Myrdal will carry the bill.

Senator Larson adjourned the hearing at 9:34 AM.

Rose Laning for Sheila Froehlich, Committee Clerk

February 8, 2021

CS
2A
1021

PROPOSED AMENDMENTS TO SENATE BILL NO. 2322

Page 1, line 3, replace "to provide for retroactive application" with "to amend and reenact subsection 4 of section 44-08-05.1 of the North Dakota Century Code, relating to the disclosure of a pending investigation"

Page 1, line 10, after "investigation" insert "that was initiated by an executive branch agency"

Page 1, line 15, after "investigation" insert "that was initiated by an executive branch agency"

Page 1, after line 18, insert:

- "3. Payments under this section are limited to an investigation and prosecution involving alleged conduct directly related to the state employee's employment or office. An investigation and prosecution relating to a traffic and motor vehicle offense is not eligible for payment under this section. Payment may not be made if a reasonable possibility exists that subsequent criminal charges could be brought or charges are dismissed or not brought for reasons unrelated to the innocence or guilt of the state employee."

Page 1, replace lines 19 and 20 with:

"SECTION 2. AMENDMENT. Subsection 4 of section 44-08-05.1 of the North Dakota Century Code is amended and reenacted as follows:

4. Any public officer or employee who fraudulently uses a purchasing card or knowingly approves a payment for false or unlawful claims or which does not otherwise meet the requirements of this section for approval may be subject to criminal prosecution under title 12.1. Any public officer or employee who, without the use of ordinary care and diligence, uses a purchasing card or approves a payment for false or unlawful claims or which does not otherwise meet the requirements of this section for approval is personally liable for any funds improperly expended. Any public officer, employee, or any other individual who has knowledge of an actual or possible violation of this section shall make that information known to the attorney general or the appropriate state's attorney. The attorney general or appropriate state's attorney ~~shall~~may investigate any alleged violation. If there is probable cause to believe that a violation has occurred, the attorney general or appropriate state's attorney shall initiate a criminal prosecution under title 12.1 or a civil suit against the public officer or employee for the recovery of the funds as may actually have been improperly paid, or may initiate a prosecution and a civil suit."

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2322: Judiciary Committee (Sen. Larson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2322 was placed on the Sixth order on the calendar.

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Renumber accordingly