

FISCAL NOTE
Requested by Legislative Council
02/20/2015

Amendment to: SB 2185

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

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

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
Counties	\$0	\$0	\$0
Cities	\$0	\$0	\$0
School Districts	\$0	\$0	\$0
Townships	\$0	\$0	\$0

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

SB 2185, if passed, will eliminate a financial risk exposure to the Board of Registration.

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

SB 2185 removes a provision that requires the Board to pay a registrant's legal fees if the registrant is the prevailing party in an appeal. The amendment to SB 2185 removes the ability for the Board to recover legal costs from a registrant who is disciplined by the the Board.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

It is not possible to determine the exact effect of the amendment to this bill on the Board's revenues. The impact on revenues is dependent upon an whether the registrant enters into a stipulated agreement with the Board, requests a full hearing, appeals the Board's decision, the outcome of the appeal, the complexity of the issues, and the degree to which a registrant utilizes legal counsel.

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

It is not possible to determine the exact effect of this bill on the Board's expenditures. The impact on expenditures is dependent upon an whether the registrant appeals the Board's decision, the outcome of the appeal, the complexity of the issues, and the degree to which a registrant utilizes legal counsel.

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

Name: Candie L. Robinson

Agency: ND State Board of Registration for PE/LS

Telephone: 7012580786

Date Prepared: 01/21/2015

FISCAL NOTE
Requested by Legislative Council
01/14/2015

Bill/Resolution No.: SB 2185

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0		\$0		\$0	
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

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

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
Counties	\$0	\$0	\$0
Cities	\$0	\$0	\$0
School Districts	\$0	\$0	\$0
Townships	\$0	\$0	\$0

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

SB 2185, if passed, will eliminate a financial risk exposure for the Board of Registration.

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

SB 2185 removes a provision that requires the Board to pay a registrant's legal fees if the registrant is the prevailing party in an appeal.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

It is not possible to determine the exact effect of this bill on the Board's expenditures. The impact on expenditures is dependent upon whether the registrant appeals the Board's decision, the outcome of the appeal, the complexity of the issues, and the degree to which a registrant utilizes legal counsel.

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

Name: Candie L. Robinson

Agency: ND State Board of Registration for PE/LS

Telephone: 7012580786

Date Prepared: 01/21/2015

2015 SENATE GOVERNMENT AND VETERANS AFFAIRS

SB 2185

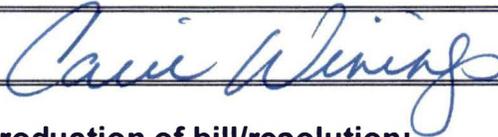
2015 SENATE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee Missouri River Room, State Capitol

SB 2185
1/22/2015
Job # 22382

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact sections 43-19.1-25 and 43-19.1-26 of the North Dakota Century Code, relating to disciplinary action procedure for professional engineers and land surveyors.

Minutes:

Attachments 1-3

Chairman Dever: Opened the hearing on SB 2185.

Senator Burckhard, District 5: Testified as sponsor of the bill. Introduced the bill and referred to the experts to explain the bill.

(1:06) Roger Kluck, Vice Chair, ND Board of Registration for Professional Engineers and Land Surveyors: See Attachment #1 for testimony in support of the bill.

(6:55)Chairman Dever: In regards to the fiscal note, in section 1 we are possibly increasing the financial risk to the board, and the fiscal note states that that it would eliminate a financial risk exposure for the board of registration.

Roger Kluck: That is correct.

Chairman Dever: In your testimony you state, "when a district court judge misinterprets the law", I am not sure that we are allowed to make that consideration.

Roger Kluck: I am speaking as an engineer. If you will bear with me, I am not an attorney by any means. We found that in all cases when these complaints come in, they are highly technical and nothing against our judges, but we as a board make sure that our investigators are licensed professionals so that if there is a complaint it is being investigated by the peers that know the details. Unfortunately when it ends up in the hands of the district judge, they are looking at the wording of the law rather than the facts of the case in most cases. It is hard for them to understand the level of detail of what is going on from the board standpoint rather than what they are looking at what the law reads.

Chairman Dever: Do you regulate all engineers?

Roger Kluck: Yes, all the engineers that are required to be registered in the state of North Dakota and all surveyors are administered by our board. There are certain exemptions for

industry and groups that fall outside of that. Generally if you practice in the state you would come underneath the laws that we administer as a board.

Chairman Dever: I imagine that registration has grown with the Bakken?

Roger Kluck: Yes probably 5 to 10 times what it was just a few years ago. The ones we have to deal with primarily are the ones that don't register.

Chairman Dever: How many are registered, and how often do you have disciplinary procedures?

Roger Kluck: Fortunately we do not have a lot of disciplinary hearings. I believe our registration numbers are over 9,000. We do receive complaints from the public that we investigate. We also allow the registrants to comment back on those complaints and in most cases they are handled administratively and they are taken care of. And even those that we feel are serious enough to go forward; many of them are often settled between their attorney and our attorney. Very rarely do we go to a hearing. This past year we have had 2. Of those 2, one still pending and one went against us very substantially. The legal fees are significant.

(11:23) Curtis Glasoe, National Society of Professional Surveyors, ND Society of Professional Land Surveyors: See Attachment # 2 for testimony in support of the bill.

(15:25) Chairman Dever: I do not remember the bill in 2009. Can you tell me what the arguments were?

Curtis Glasoe: I don't either. I am the legislative chairman for the surveyor's society and it was brand new to me too. I understand that it was an amendment on the floor and we did not know about it.

Michael Gunsch, North Dakota Society of Professional Engineers: Testified in support of the bill. When you look at what the two provisions are, obviously one is a financial provision and there is another that is a procedural. Probably the most critical of the two is the procedural provision because that allows the board the flexibility after they move forward with the charges or the issues as it is presented against a registrant for doing something improper, that they have the flexibility to move forward on those. I think what is critical in our discussion with the board of registration is that they take very careful review of all this stuff. The key issue in the beginning of any process of any complaint that is filed with them is compliance with the law. That is why you don't see a lot of these things actually getting to the legal standpoint and taking disciplinary action. The real issue is compliance with the law and protecting the public interests. When you look at the legal costs, I understand the background provided with other states. We need to not, as a board, to be making decisions based on potential legal costs.

Chairman Dever: If there is a case still in litigation, how is that impacted by the status of this bill?

Michael Gunsch: I believe that it would be subject to the current provisions, not the new ones.

(19:05) Bonnie Staiger, American Council of Engineering Companies: See Attachment #3 in support of the bill.

(20:55) Chairman Dever: Did you represent this organization in 2009?

Bonnie Staiger: Yes, but I do not recall the bill at the time.

(21:29) Gregory Johnson, licensed land surveyor in North Dakota: I am a retired surveyor but do I contract work from time to time. I have been hired from the board to be their investigative surveyor in the field. I was involved with this last one that we had issues with. I could see the results of the board not having the funding available to them to complete their mission in protecting the public's health interests and welfare. We as surveyors take an oath also make sure that the public is not harmed in surveying procedures. I am also the manual chairman for writing standards of practice for North Dakota Society of Professional Land Surveyors. We are currently reviewing our manual and getting it up to date. It is because we have new technologies out there that are not addressed in the old manual such as GPS surveying. The frustration I want to bring forward to you is that we did a lot of investigation on a particular issue in western North Dakota involving a pipeline company and they had ample opportunity to fix the issues that we found in the field that were incorrect and they elected not to. Then we ended up in a situation where the lawsuit came about. The administrative law judge reviewed it - all the technical things that were brought forward and the administrative law judge favored the board of registrations investigation and the findings of the board attorney. The district law judge overturned that ruling and that company came back to the board for excessive amounts of money to take it to the next level. I know our membership wanted the board to continue with the legal process and take it to the Supreme Court, but there was no funding for us to proceed with our beliefs that the rules were broken. We are not picking on any non-North Dakota residents. We welcome all surveyors and engineers in this state, but we went from 149 resident land surveyors to over 501. A lot of them are from out of state. We welcome them here to do the work because there are not enough of us to do the work, but we just want them to do it the right way. They have to follow the rules and regulations and we need to have the ability to take them to task properly.

(25:30) Senator Flakoll: Asked a question if Greg knew how many of the Dakota markers along the state lines have survived.

Gregory Johnson: Gave the history and what has happened with them. They are federally protected and a retired surveyor did a recovery of them for the North Dakota/South Dakota border.

(29:00) Tony Wieler, Executive Director, State Bar Association of North Dakota: Testified in opposition of the bill. It comes down to a fairness issue for us. Particularly removing attorney's fees and costs for a prevailing registrant while at the same time leaving those in for the board. The legislative history that I have goes back to 2003. In 2003 when the legislation first came into play, it was looked at as a fairness issue. Senator Klein talked about the bill giving the board the ability to recoup their attorney's fees should the defendant be found guilty; the discussion centered around the issue of whether or not the board should be able to collect and the registrant cannot should they be found innocent. At that time, Senator Munch asked, if a person is reprimanded and he challenges a complaint, who is responsible for the legal fees.

In this case here, the board, Munch stated that he felt that was unfair. Representative Froseth talked about amending the bill and his amendments were to have legislative council put something to the effect "unless disciplinary action is found unproven, the board will assume legal costs, i.e. loser pays." Following that, the amendment in the current language that you have that is being removed in section 1 was put in. At that time, the center was on fairness, fairness in these complaints, and fairness in who has to pay for attorney's fees should a party prevail. Specifically that is what this body dealt with in 2003. We are arguing that we oppose this because of the same fairness level. The second section amendment, while someone could couch it as being technical, I think it is more of a due process issue. Due process requires that you have notice and that you have an opportunity to defend yourself against claims that are being brought. So often when we see these in the legal profession it is a due process issue. If I file a civil complaint, I cannot amend that complaint without leave of the court because the other party may not have had notice of that and opportunity to prepare and defend. In this case, the registrant should know what the complaint should know what the complaint is and should be able to defend on that and it shouldn't be a moving target. I am not accusing the board of this and I am not saying that the board would do this but they could amend a complaint at any time, even after the investigation is started.

(32:47) Chairman Dever: Is due process spelled out elsewhere? I am wondering if a board can change the rules?

Tony Wieler: I do not know that they are spelled out that way. I have not read the district court opinion that the proponents testified to indicating that they could not amend after the complaint was filed. I certainly would not stand up and talk about a district court judge misrepresenting the law. I am not saying you do not have due process throughout this proceeding but to me when you allow someone to amend a complaint or to bring in other allegations after the original complaint that might become a due process issue where you are not prepared to defend against allegations that are brought after the original complaint is filed.

Chairman Dever: If we were to change the law to say that the registrant does not have to pay the board, would that change your position?

Tony Wieler: I thought about that too. In most cases, boards and commissions that are tasked with professional licensing and making sure that the public is protected. It is no different for lawyers and attorneys. If you are found to be violating your professional responsibilities or if you are disciplined similar to an attorney being disciplined by the state disciplinary board, there are costs and fees associated with that that you are taxed with and require to pay. I would believe that is consistent throughout all the professional licensing boards in the state that if you are found to have violated the rules then you would have to pay those. I would not want to say that goes away too because to me that is consistent throughout the code.

Senator Davison: What would your thoughts be to amending the bill to put a cap on the attorney fees that would be recoverable from the board?

Tony Wieler: I have not thought about that. I do not know about the size of the complaints that have been referred to here. I would have to think about that and I would rather not say that my

association supports that or not. We would be interested in discussing that if it is something that the committee would like to consider.

Vice Chairman Poolman: We heard from the supporters of the bill that this is the only state board of this type that has this rule where they have to pay the attorney fees if they lose. Are you aware of any boards with in the state of North Dakota that also have this rule?

Tony Wieler: I do not know. It is possible.

Chairman Dever: I asked a question earlier about changing a bill during cases in litigation and if it would be affected?

Tony Wieler: Generally, unless you put something on legislation that indicates it's effect if retroactive, then if the complaint is filed prior to that bill taking effect, it would not have retroactive application.

Chairman Dever: It is when the litigation is started?

Tony Wieler: Yes.

Senator Flakoll: How does that work then if the issue is resolved under old law but if the appeal happens under new law?

Tony Wieler: It would still be based on when it started unless I am missing something technical.

Chairman Dever: Who in Attorney General's office represents the board and who in legislative council drafted this bill?

Todd Kranda, Kelsh Law Firm: Representing the board legislatively in terms of government relations. They have special council, Lyle Kermis who is their board council. I am not sure who drafted this. I would be happy to answer anything else. I see that I am against my own bar association supporting this bill. I think the point was well made on whether other boards have this type of loser pay at this point. In terms of due process; the notification is in there that the time and place for the hearing in lines 13-15, page 2, show that it has to be provided to the registrant, as to the specification of the issues to be considered at the hearing. So, depending on the timing of discovery during the process, you notify them before the hearing what those issues are even including those additional matters that are found in the investigation.

Chairman Dever: It might be a while before we get back to this one.

Roger Kluck: On your question of whether the board would be in support of taking away our ability to recover costs and we would be ok if it were amended to state that each side pay their own fees. I think that would be very prudent.

Senator Flakoll: Can you provide us later with your annual budget total for the year?

Roger Kluck: I can do that.

Chairman Dever: Closed the hearing on SB 2185.

2015 SENATE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Missouri River Room, State Capitol

SB 2185
1/22/2015
Job # 22412

- Subcommittee
 Conference Committee

Committee Clerk Signature



Minutes:

Attachments 1

Chairman Dever: Opened SB 2185 for committee discussion.

Senator Cook: Moved a Do Not Pass.

Vice Chairman Poolman: Seconded.

Chairman Dever: Asked the committee for discussion.

Vice Chairman Poolman: I do not disagree with the do not pass but I do question the fact that if we do not pass it that the board can still direct a registrant to pay the board a sum not to exceed the reasonable and actual costs of their attorney's fees as well. Do other boards do that?

Committee: The committee proceeded to discuss whether or not to go forward with the motion or try to do something with the bill. *See Attachment #1 for copy of code discussed

A Roll Call Vote Was Taken: 2 yeas, 5 nays, 0 absent.

Motion Failed.

Chairman Dever: Closed the discussion on SB 2185 for further review.

2015 SENATE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Missouri River Room, State Capitol

SB 2185
1/23/2015
Job # 22461

- Subcommittee
 Conference Committee

Committee Clerk Signature 

Minutes:

Attachment 1

Chairman Dever: Opened SB 2185 for committee discussion.

Todd Kranda, Kelsh Law Firm, North Dakota Board of Registration for Professional Engineers and Land Surveyors: See Attachment #1 for additional information for the committee.

(2:12) Vice Chairman Poolman: Do other boards require them to pick up the tab?

Todd Kranda: I am not sure but I would like to have Candy Robinson answer that. There are two parts to the bill. The one that we are not changing; where they have to pay for the boards cost. There is a chart in there about what the board has assessed under that provision which is remaining in the bill.

(3:18) Candy Robinson, Executive Director, Board of Registration: I reviewed the statutes on that chart last night. My recollection is almost 50% of the boards can recover legal costs if they assess discipline against a registrant. I can re chart that out to you if you like.

Chairman Dever: In the section that we are deleting, it says "notwithstanding section 28-32-50" which is entitled Actions Against Administrative Agencies Attorney's Fees and Costs. How does that play into this?

Candy Robinson: I apologize. I did not bring that section with me. I am not certain I can answer that.

Chairman Dever: We will set this aside and allow the committee members to have the opportunity to look through the information and bring it back up. Closed the discussion on SB 2185.

2015 SENATE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Missouri River Room, State Capitol

SB 2185
2/19/2015
Job # 24154

- Subcommittee
 Conference Committee

Committee Clerk Signature



Minutes:

No Attachments

Chairman Dever: Opened SB 2185 for committee discussion and reviewed the purpose of the bill. There are two issues: fee payments and complaint issues. (Asked Todd Kranda to answer a couple of questions.)

Todd Kranda, Board Representative: The provision before that allows reimbursement for the board in the event that the registrant is disciplined and the provision after that this is the only board in the state that allows the reverse. The registrant can apply back and receive reimbursement back. That is the inconsistency that the bill is trying to address. There was a request by Senator Poolman to follow up about that first provision where the board can assess the registrant and I think there was a chart that provided that some do and some don't. It is not as consistent of who does have that bad actor reimburse but it is pretty clear as far as the documentation that this is the only one that has what we are trying to strike out and we want to be consistent.

Chairman Dever: Is section two then just language that would be necessary to implement section 1.

Todd Kranda: Section 2 is a second concept. There was a problem with the amending of the complaint when they do the investigation in finding new information, so section 2 allows the process to go forward with all of the charges and the original complaint and anything else that is found that are set forth in the specification of the issues for the hearing. There was concern about the court case needing to start over for due process reasons but this would allow them to include it in the specification of issues to notice the offending party before the hearing so that they can throw the things into the complaint that they found during the investigation.

Chairman Dever: So each section would stand alone then?

Todd Kranda: Technically, yes they are two different topics that are addressing two different concerns.

Chairman Dever: What if we struck the other language?

Todd Kranda: I think Kandi Robinson came back, she is the executive secretary of the board and I do not think she had serious worries about that if this committee wanted to strike that first sentence. I think that she indicated that they do not charge much anyways. There is a small amount that they incur for their legal fees and processing. I think she did not have a problem if you wanted to take that too.

Chairman Dever: If we struck that then, each side would be responsible for their own expenses.

Todd Kranda: That is how I would read it. I understood that the board was ok with that because they could better manage if that second one that gives them heartache where gone.

Chairman Dever: I do not recall any concern over section 2.

Todd Kranda: I recall that as well.

Senator Poolman: I agree with your comments on making everyone pay their own fees. I would like to see us amend that by striking Line 9 after "registrant" to Line 13 to the period after "case".

Senator Poolman: Moved Stated Amendment.

Senator Davison: Seconded.

A Roll Call Vote Was Taken: 7 yeas, 0 nays, 0 absent.

Motion Carried.

Senator Davison: So it does not need to say anything - it is just assumed that people will just pay for their own attorney fees? Is that common within other boards?

Chairman Dever: They will pay their own fees. It sounds like currently, this is the only board where the board has to pay the registrants fees.

Senator Davison: That is just assumed and common so I am good with that.

Senator Davison: Moved a Do Pass As Amended.

Senator Cook: Seconded.

A Roll Call Vote Was Taken: 7 yeas, 0 nays, 0 absent.

Motion Carried.

Senator Davison will carry the bill.

fd
2/19/15

PROPOSED AMENDMENTS TO SENATE BILL NO. 2185

Page 1, line 9, overstrike "In an order or decision issued by the board in resolution of a"

Page 1, overstrike lines 10 through 12

Page 1, line 13, overstrike "in the investigation and prosecution of the case."

Renumber accordingly

Date: 1/22
 Roll Call Vote #: 1

**2015 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2185**

Senate Government and Veterans Affairs Committee

Subcommittee

Amendment LC# or Description: _____

- Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Cook Seconded By Poolman

Senators	Yes	No	Senators	Yes	No
Chairman Dever	✓	✓	Senator Marcellais		✓
Vice Chairman Poolman	✓		Senator Nelson		✓
Senator Cook	✓				
Senator Davison		✓			
Senator Flakoll		✓			

motion fails

Total (Yes) 2 No 5

Absent _____

Floor Assignment _____

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

2/19

Date:
Roll Call Vote #: 2

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2185

Senate Government and Veterans Affairs Committee

Subcommittee

Amendment LC# or Description: 15.8167.01001

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar

Other Actions: Reconsider _____

Motion Made By Davison Seconded By Cook

Senators	Yes	No	Senators	Yes	No
Chairman Dever	✓		Senator Marcellais	✓	
Vice Chairman Poolman	✓		Senator Nelson	✓	
Senator Cook	✓				
Senator Davison	✓				
Senator Flakoll	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Davison

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

REPORT OF STANDING COMMITTEE

SB 2185: Government and Veterans Affairs Committee (Sen. Dever, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2185 was placed on the Sixth order on the calendar.

Page 1, line 9, overstrike "In an order or decision issued by the board in resolution of a"

Page 1, overstrike lines 10 through 12

Page 1, line 13, overstrike "in the investigation and prosecution of the case."

Renumber accordingly

2015 HOUSE GOVERNMENT AND VETERANS AFFAIRS

SB 2185

2015 HOUSE STANDING COMMITTEE MINUTES

Government and Veterans Affairs Committee
Fort Union, State Capitol

SB 2185
3/12/2015
24729

- Subcommittee
 Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to disciplinary action procedure for professional engineers and land surveyors

Minutes:

Attachments 1-3

Chairman Kasper opened the hearing on SB 2185.

Senator Randy Burckhard appeared in support of this bill.

Roger Kluck, Vice Chairman of the North Dakota Board of Registration for Professional Engineers and Land Surveyors, appeared in support. Attachment 1. (1:30-8:07)

Rep. Wallman Who pays for the legal fees for the registrants if it isn't your organization?

Roger Kluck The registrant pays. Along with that are fees that we charge for licensing every two years that goes into the fund, so we as registrants also pay for the board's attorney.

Rep. Schneider Do you know if there was a particular incident that gave rise to that attorney language in there in the first place?

Roger Kluck I know at the Senate hearing the attorney that spoke had some deeper history than I have. I don't have any first-hand knowledge of why that came in.

Rep. Schneider You don't know of any pattern or practice that gave rise to this unusual requirement that fees be paid on both sides?

Roger Kluck No.

Rep. Amerman I don't know if you were involved in 2009 when this language you stated was put in against the board's objection. Do you know if there was a reason or who put that in?

Roger Kluck I don't know what the reason was. I have been on the board four years, and most of the time I have been on the legal and investigative committee. The vast majority of the concerns that come in are handled administratively or we handle with the registrant. Most times, they are dismissed. We investigate them very diligently, and we always assign a registered professional that is not on the board to actually do the investigations. If an allegation does come in, you are investigated by one of your peers.

Rep. Karls You register them?

Roger Kluck We register them under the state law.

Rep. Karls This is professional engineers as well as land surveyors?

Roger Kluck Yes.

Rep. Karls How many registrations do you handle per year? Is it a yearly basis and what is your fee?

Roger Kluck We have nearly 6,000 registrants, and we register every two years. It is \$100 per year and plus we have a continuing education fee on there for the board staff to review our continuing education we are required to take every year.

Rep. Steiner What is the procedural error that the district court identified?

Roger Kluck During investigation in this registrant specifically we amended the charges based upon the investigation. We found out there were more what we deemed problems in the work that was done. We notified the registrant and his attorney, gave them sufficient time to respond, but it went to hearing. The registrant was given some requirements to correct the errors, and it was overturned by the judge partly because of a technical issue. It was on the technicality that it was not sworn, even though both sides had sufficient time to review it.

Rep. Wallman How often is the registrant in the last year or two are the prevailing party in an appeal?

Roger Kluck We have had only one appeal in the last two years, and they won.

Rep. Wallman Do you have any idea what the legal fees were?

Roger Kluck It was beyond \$100,000. The judge did pare down. He asked for \$227,000.

Stacy Krumwiede, American Council of Engineering Companies, appeared in support. We are okay with the Senate changes. We had some opposition to certain sections on the Senate side and those have been addressed.

Rep. M. Johnson How many firms are there in North Dakota?

Stacy Krumwiede The board may have the actual number of firms. We have about 30 firms representing our organization.

Rep. M. Johnson In an action under this statute, would the firm also be a defendant, or is it just the individual engineer on their own?

Stacy Krumwiede I am going to defer to the board for that question as to who they would discipline.

Roger Kluck There are 1,700 firms that are registered to do engineering or land surveying within the state of North Dakota. That doesn't necessarily mean that they are in residence in North Dakota, but they have registered with the intent of doing business in the state.

Rep. M. Johnson Have you disciplined firms or just individual engineers or land surveyors?

Roger Kluck We have done both. It depends upon the allegation. For example, if it is an engineer that works for a firm, makes a mistake, alleges up and down that he or she is correct, I would venture to say it would just be the individual. If that individual is working for an engineering company, and the engineering company is saying I want you to continue to make these mistakes, there is a pattern that is set forth by the board. Then the board of directors of the company or the company itself can be sanctioned as well as the individual.

Rep. M. Johnson Does malpractice insurance cover the cost of a disciplinary action?

Roger Kluck Not necessarily. If I were sanctioned as an engineer and my company was sanctioned, chances are they wouldn't pay, because that would show that not only I messed up, human error, that there was a pattern of errors that were being sanctioned. They reserve the right not to pay dependent on the severity and the instance. If it is a human error, chances are they would help cover the cost, but typically if it is a pattern, then they won't.

Rep. B. Koppelman If an individual or a company that has action taken against them by the board and an administrative judge states there were no grounds for this action, and if we made the change you are suggesting and whatever legal bills they collected or earned are not covered by your malpractice insurance, what do you tell them?

Roger Kluck It goes on to a district judge. We as a board have a three-step process. First, it is investigated by either a land surveyor or an engineer depending on the claim. From there it goes before a legal investigative committee, and that is made up of two board members, our attorney, and our executive director. It doesn't go anywhere if we don't believe it is serious. It has to rise to a level where it is very dangerous to the public. The board will make the determination whether or not there should be sanctions or where it should go from there.

Rep. B. Koppelman You made a good case that the board is thorough and does what they think is right when it comes to making a sanction against somebody in some way. If the court determines that the board did not act appropriately and that company or individual,

because of that inappropriate action, obviously had legal expenses, you want us to say that the board is not responsible for those? Now this individual would have the privilege of paying for legal expenses when he was improperly sanctioned. Is that how it should be?

Roger Kluck We should both be on a fair playing field. I don't believe the registrant should have to pay for our legal fees and our costs of the investigation personally and as a board. We don't believe that we should be responsible if the registrant decides to hire a team of attorneys to work out whether or not they are guilty to pursue not going with the investigation. I want it to be an even playing field so that you are addressing the issue.

Rep. B. Koppelman I think your best argument is in the fact of possibly having limits to what that could be.

Roger Kluck We as a board are the registrants, so we are an even field. We try to err on the side of the registrant first. These typically come from somebody in the public that feels they have been wronged. It is extremely rigorous and pointed, and we as an investigative committee ask tough questions of the registrants before they ever see the light of day. There are very few that ever go forward. We have only had two in the four years that I have been on.

Rep. Schneider You want this out of here so you don't have an obligation. Is that correct?

Roger Kluck Because of recent history, we were shocked at the high cost of fees that could have been assessed to the board. Fortunately, the judge pared it down a bit. It was still a sizeable number.

Rep. Schneider You are not saying that this change would bind a district court judge who could order attorney fees against either party but usually doesn't because it is a chilling effect on your enforcement?

Roger Kluck Yes.

Rep. Schneider Is that possibly the reason why all these other entities don't have that language, because there is an innate ability where it is required by law and justice to allow the courts to assess attorney fees which they usually do not?

Roger Kluck That is my understanding.

Chairman Kasper There are 6,000 registrants in your group and their fees are \$100 per year. That is \$600,000 isn't it?

Roger Kluck Yes.

Chairman Kasper Are the 1,700 firms also licensed?

Roger Kluck Yes.

Chairman Kasper Do they also pay just \$100, or do they pay more?

Roger Kluck The 1,700 is included in the 6,000.

Chairman Kasper Does your board have a reserve fund?

Roger Kluck Yes.

Chairman Kasper Can you tell me how large your reserve fund is.

Roger Kluck A \$200,000 legal reserve.

Chairman Kasper Are your board members full-time board members or part-time? Tell me the makeup and the expenses of the board.

Roger Kluck We are part time. I am one of the board members. There are five of us on the board, and we get part of our cost covered when we have meetings. We typically meet most months either face-to-face or by teleconference. We have three on the staff and have an office space.

Chairman Kasper What is your annual budget for operating your organization?

Roger Kluck \$500,000 per year.

Candie Robinson, Executive Director of the Board of Registration, appeared.

Chairman Kasper You must be doing other things besides paying staff and office rental. Would you describe services you are providing for your membership so that we can see that you are wisely spending your dollars?

Candie Robinson We have a very proactive enforcement program. Proactive enforcement means getting out in the field, finding the problems, and getting people into compliance with the law. Discipline only happens when enforcement fails. Enforcement is strictly getting out there, especially up in western North Dakota, where the out-of-state firms weren't familiar with our laws, and getting those people into compliance with our law. As a result of that, we have had no disciplinary actions and almost 100% compliance. We are spending about \$60,000 a year on that alone.

Chairman Kasper What are you doing with the rest of your dollars?

Candie Robinson We are responsible for all our own office space, our own insurances for damage, and our own accounting fees. We currently are using an education program for public education. We are letting the public know that they have knowledge about what they are doing with their land so they can maintain clear title to their land. We participate in a national organization called the National Council of Examiners for Engineers and Surveyors. We send our board members to that meeting every year. We try to hammer out our differences so that mobility between states is very quick. We have a nationalized exam because of our participation in that program. We pay our own attorney fees. We pay our own salaries and our own health insurance and retirement. I can give you a copy of the full budget. Attachment 2.

Chairman Kasper You had an occurrence where the legal fees were over \$100,000. Was that recently?

Candie Robinson We amended the complaint during that process. The district court didn't find that we made an unfair ruling. They found that we shouldn't have amended the complaint. That is one of the changes we are asking for in this bill which is to give us a mechanism to amend the complaint. The individual that we had hearing with was from Oklahoma. He had a private jet. He flew his Oklahoma attorney back and forth. He hired a team of attorneys from here in town, and he asked for legal fees in excess of \$227,000. The discipline in this case was a 30-day suspension. The district court pared that back to \$93,000 and found that his private jet fees and out of state attorney fees weren't reasonable or prudent.

Chairman Kasper This is an unusual circumstance?

Candie Robinson This is a one time.

Rep. Karls On that case, was this an individual registrant or a company?

Candie Robinson It was both. They appealed the individual. The company was simply reprimanded, and they did not appeal the decision of the reprimand on the company. It was the suspension on the individual.

Chairman Kasper Did you survey your membership on the contents of this bill, and what type of result did you get from your survey?

Candie Robinson Yes. We had no opposition. There was some concern about our compromise with the Senate to remove our ability to recover legal costs from a registrant whom we discipline. Since our capability to recover legal costs went into this law, we have recovered less than \$10,000 in legal fees from registrants.

Chairman Kasper How many members answered your survey?

Candie Robinson The North Dakota Society of Professional Engineers has a legislative committee that represents their own constituency. We had unanimous consent from their committee. There are several thousand members.

Rep. B. Koppelman I was going to ask whether or not the board had recovered attorney fees when it had gone the other way. I think you answered that. Was there a survey of actual members, though?

Candie Robinson I do not know the internal procedures of the North Dakota Society of Professional Engineers.

Curtis Glasoe, National Society of Professional Surveyors Governor for North Dakota and the Legislative Co-Chairman of the North Dakota Society of Professional Land Surveyors, appeared in support. Attachment 3. (40:49- 45:02) Our society did pass a resolution at our

convention in February. There were 68 of the 300 members there. Everyone was in favor of following through with this passage of this bill.

Roger Kluck Our society is made up of our board selected from around the state, and they rotate amongst the major cities. We have a representative from all four quadrants going through the chairs as well as a representative on that board. Along with that, our membership includes most if not all of the engineering firms that are based in North Dakota. Most of those 6,000 we talk about are out-of-state firms that may or may not do business or they may do something for an oil company in two years. Regarding polling we are a pretty close knit group as engineers as well as the surveyors. We email back and forth every week. It was a topic of discussion. This poll was done with full knowledge of all the engineers within the state.

Rep. Mooney What changed between 2003 and 2015 that would want us to now bring it back?

Roger Kluck Back in 2003 we came in as a board with some technical changes to the law and this item was added in as an amendment.

Rep. Mooney That is not what I am reading. I am reading that this is actually what was presented. The amendments that were brought in took out the ability to raise above \$100 for your fees.

Roger Kluck Let me do some more research, and then we will get you an understanding of what happened back then. I wasn't on the board then.

Todd Kranda, Attorney at Kelsch Law Firm and a lobbyist registered on behalf of the North Dakota Board, appeared in support. Page 4 of Attachment 1 is the answer. The board is asking you to take us out of this column where we are standing alone. We are the only agency that allows Lines 13-17. We are 1 of 52 that are like that.

Rep. Karls When the lesser sanctions don't work and the registrant will not do the corrections, does it go to alj or does it go to court?

Todd Kranda I am the lobbyist for the board. The attorney for the board is special assistant attorney general Lyle Kermis. I don't think I can answer that for you.

Candie Robinson We have never had somebody not adhere to their sanctions.

Chairman Kasper What is the next step?

Candie Robinson It would be to go to the district court and apply for an injunction. The 2009 in the testimony should be 2003.

Tony Weiler, Executive Director of the State Bar Association, appeared. We were in opposition in the Senate because of the removal of basically Lines 13-16. We opposed it on fairness grounds. Looking at the legislative history from 2003, what I found was that when the language came in allowing the board to recover, there were several senators and

when it went to the House that agreed on fairness grounds that the respondent should be able to recover as well, so that was amended and added in there by this body. That was our opposition. Now with the change it appears to be more equitable and we no longer oppose it.

No opposition.

The hearing was closed.

Rep. Wallman made a motion for a DO PASS.

Rep. Steiner seconded the motion.

Rep. Mooney Why are we changing our minds now?

Rep. Amerman I don't think they ever anticipated in 2003 what attorney fees might cost you in 2015.

Rep. Laning I agree with Rep. Amerman.

A roll call vote was taken. 13 Yeas, 1 Nay, 0 Absent.

Rep. Laning will carry the bill.

Date: 3-12-15
 Roll Call Vote #: 1

**2015 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2185**

House Government and Veterans Affairs Committee

Subcommittee

Amendment LC# or Description: _____

Recommendation: Adopt Amendment
 Do Pass Do Not Pass Without Committee Recommendation
 As Amended Rerefer to Appropriations
 Place on Consent Calendar
 Other Actions: Reconsider _____

Motion Made By Wallman Seconded By Steiner

Representatives	Yes	No	Representatives	Yes	No
Chairman Jim Kasper	X		Rep. Bill Amerman	X	
Vice Chair Karen Rohr	X		Rep. Gail Mooney		X
Rep. Jason Dockter	X		Rep. Mary Schneider	X	
Rep. Mary C. Johnson	X		Rep. Kris Wallman	X	
Rep. Karen Karls	X				
Rep. Ben Koppelman	X				
Rep. Vernon Laning	X				
Rep. Scott Louser	X				
Rep. Jay Seibel	X				
Rep. Vicky Steiner	X				

Total (Yes) 13 No 1

Absent 0

Floor Assignment Laning

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

REPORT OF STANDING COMMITTEE

SB 2185, as engrossed: Government and Veterans Affairs Committee (Rep. Kasper, Chairman) recommends DO PASS (13 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2185 was placed on the Fourteenth order on the calendar.

2015 TESTIMONY

SB 2185

Testimony of
Roger E. Kluck, PE
In support of SB 2185

Chairman Dever, and esteemed members of the Senate Government and Veteran's Affairs Committee:

Thank you for this opportunity to present my testimony to you today. My name is Roger Kluck and I am from Minot. I stand before you today in support of SB 2185 and request your action to be a "do pass" recommendation. I am a licensed Professional Engineer and I am the vice-chairman of the North Dakota Board of Registration for Professional Engineers and Land Surveyors. Please allow me to briefly explain my position on this bill.

In N.D.C.C. 43-19.1-25, the Board desires to remove language that requires the Board to pay a registrant's legal fees if the registrant is the prevailing party in an appeal. Language creating this requirement was amended into the law during the 2009 legislative session. The Board did not support the amendment. The Board is the only regulatory agency in the state of North Dakota with this requirement and, to the best of our knowledge, the only engineering and land surveying licensure board in the United States with this requirement.

The Board reacts to complaints filed by members of the public against registrants. The Board is required to investigate the complaint. During the investigatory phase, the registrant is given the maximum protection afforded her/him by the law, including entering into a stipulated agreement rather than going to hearing. Frequently, the investigation shows that the complaint is trivial or unfounded and is dismissed. This process is sufficiently rigorous and robust to give the Board a high confidence level that, if the issue proceeds to a hearing, the preponderance of the evidence will lead to the Board prevailing on the case. However, when a district court judge misinterprets the law and overturns our decision, we are exposed to high financial risks.

Having such a provision exposes the Board to potentially large financial risk that could, conceivably, bankrupt the board. The Board's costs in these disciplinary cases are, for the most part, known and limited. We have one attorney, who charges us reasonable fees. We strive to be fiscally prudent, even during these hearings. We believe it would be an unfair penalty to a registrant if we racked up huge legal costs during the investigation and hearing for disciplining a registrant. Registrants, however, are not motivated the same way. Consequently, while the Board usually has moderate legal costs for a disciplinary proceeding, a registrant might have legal costs in an amount several times that of the Board.

When the Board does discipline a registrant and the registrant appeals, the registrant has an impetus to spend more money to prevail in the appeal. The Board, on the other hand, still has a fiduciary responsibility to all the registrants to be fiscally conservative. Is it fair that the Board, in executing its obligations to hear complaints, be exposed to 7 or 8 times the risk as the registrant?

This requirement, as it exists in the law today, creates a serious hindrance in the Board's abilities to carry out its responsibilities. The decision of whether or not to discipline a registrant must be based upon what is best for the public, not the financial capabilities of the Board.

The second change located in N.D.C.C. 43-19.1-26 is intended to correct procedural errors identified by the District Court. When a complaint is received in the Board office, usually from a member of the public, an investigation is conducted to determine the validity of any documents submitted with the complaint and to give the registrant against whom the complaint is made a chance to respond. Occasionally, during the course of the investigation, new information is discovered that warrants an additional charge. In past disciplinary actions, the Board has amended the complaint to include the new information. The District Court ruled that amending the complaint was not properly done by the Board.

The Board believes that this ruling by the District Court places an unfair burden upon the public as a whole. Following the rationale of the District Court, a member of the public who files a complaint against a registrant must be aware of all rules and regulations and word their complaint precisely to satisfy the requirements of the law. Or, the Board must swear out new charges and begin the process anew. The desired changes create a process by which the Board can amend a complaint after it has been received in the Board office. Bear in mind that the amended charges are given to the registrant along with all other documentation and a period of time is given to allow the registrant to refute or respond to any additional charges.

In summary, this bill seeks to eliminate financial risk exposure to the Board so that they may carry out their duty to protect the public based upon what is right rather than what it will cost. The bill also seeks to correct procedural errors in the Board's investigatory process identified by the District Court.

Thank you for this opportunity to present my testimony. Please vote to give SB 2185 a "Do Pass" recommendation.

Sincerely,

Roger E. Kluck, PE

clr



#2
NDSPLS ADMINISTRATIVE OFFICE
1811 East Thayer Avenue
Bismarck, ND 58501
Phone: 701-222-3499
Fax: 701-222-0103
E-mail: info@ndspls.org
Website: www.ndspls.org

SB 2185 Testimony

January 22, 2015

Chairman Dever and Committee Members:

My name is Curtis Glasoe. I was born and raised in North Dakota, graduated from NDSU in engineering, the home of the four time NDSU National Championship Football team, spent two years in the US Army during the Viet Nam era. I have practiced engineering and land surveying for over 46 years in North Dakota, South Dakota, Montana, and Idaho. I have resided in North Dakota for over 50 years. I am currently licensed to practice Land Surveying and Engineering in Montana, South Dakota, and the Great State of North Dakota.

I am the National Society of Professional Surveyors (NSPS) Governor for North Dakota and the Legislative Co-Chairman of the North Dakota Society of Professional Land Surveyors (NDSPLS). This State Society is made up of over 300 members. There are approximately 500 Registered Land Surveyors and over 50 dual registrants in Engineering and Land Surveying in North Dakota. Some 185 of these registered people live and practice in the State of North Dakota.

I am here to testify in favor of SB 2185. This Bill will put the proper process and procedure in place to protect the public and to help determine the disciplinary action taken by the Board. Checking with National Council of Examiners of Engineers and Surveyors (NCEES), North Dakota is the only state that has this law where a Board pays legal fees in the case of the registrant being the prevailing party in an appeal. In many civil cases it is not unusual for the losing party to have to pay some of the costs, but this should not apply to the State or any entity created by the State.

The real issue is getting the out-of-state or new professionals licensed in the State of North Dakota to follow the established practices for surveying and platting in our great state. The new surveyor's answer, when they are asked why he/she does not follow the North Dakota laws; they say "this is not the way we do it in Louisiana or Utah or Wyoming". Our answer is this is North Dakota and according to our laws and procedures, we do it a specific way to protect our citizens and landowners from being the victims of shoddy or incomplete work. We need to have a State Board that has the best interest of our North Dakota public in mind and not making decisions from a fear of paying legal fees.

Therefore, I urge this Committee to approve SB 2185.

Thank you

Curtis W. Glasoe, PE and PLS #2439
NSPS Governor
NDSPLS Legislative Co-Chairman

1/22

#3

Chairman Dever and Members of the Committee:

My name is Bonnie Staiger and I am representing ACEC (American Council of Engineering Companies) which supports SB 2185 with reservations. We did speak with Ms. Robinson prior to today's hearing so she and the board were aware in advance of our concerns.

First, ACEC recognizes and agrees that the bill (in Section 2) is necessary for the Board to fulfill its duty to both the registrants and public. The proposed language closes an administrative loophole in the current law.

This part of the bill allows the facts discovered during the investigation of the matter to be amended into the original enabling complaint and thus considered at the hearing.

The change proposed to Section 1 concerns ACEC members because it removes a protection extended to constituents in the current legislation. ^{Statute} The existing protection helps insure against frivolous claims or an incomplete investigation of the matters under scrutiny.

Absent this, or similar, language the registrant is penalized even if found to be free from fault during an administrative appeal.

Mr. Chairman and members of the committee, we bring this concern forward to spur additional conversation between all of you and the Board of Registration which will hopefully result in an amendment that is in the public interest.

28-32-47. Scope of and procedure on appeal from agency rulemaking.

A judge of the district court shall review an appeal from an administrative agency's rulemaking action based only on the record filed with the court. If an appellant requests documents to be included in the record but the agency does not include them, the court, upon application by the appellant, may compel their inclusion. After a hearing, the filing of briefs, or other disposition of the matter as the judge may reasonably require, the court shall affirm the agency's rulemaking action unless it finds that any of the following are present:

1. The provisions of this chapter have not been substantially complied with in the agency's rulemaking actions.
2. A rule published as a result of the rulemaking action appealed is unconstitutional on the face of the language adopted.
3. A rule published as a result of the rulemaking action appealed is beyond the scope of the agency's authority to adopt.
4. A rule published as a result of the rulemaking action appealed is on the face of the language adopted an arbitrary or capricious application of authority granted by statute.

If the rulemaking action of the agency is not affirmed by the court, it must be remanded to the agency for disposition in accordance with the order of the court, or the rule or a portion of the rule resulting from the rulemaking action of the agency must be declared invalid for reasons stated by the court.

28-32-48. Appeal - Stay of proceedings.

An appeal from an order or the rulemaking action of an administrative agency does not stay the enforcement of the order or the effect of a published rule unless the court to which the appeal is taken, upon application and after a hearing or the submission of briefs, orders a stay. The court may impose terms and conditions for a stay of the enforcement of the order or for a stay in the effect of a published rule. This section does not prohibit the operation of an automatic stay upon the enforcement of an administrative order as may be required by another statute.

28-32-49. Review in supreme court.

The judgment of the district court in an appeal from an order or rulemaking action of an administrative agency may be reviewed in the supreme court on appeal in the same manner as provided in section 28-32-46 or 28-32-47, except that the appeal to the supreme court must be taken within sixty days after the service of the notice of entry of judgment in the district court. Any party of record, including the agency, may take an appeal from the final judgment of the district court to the supreme court. If an appeal from the judgment of the district court is taken by an agency, the agency may not be required to pay a docket fee or file a bond for costs or equivalent security.

28-32-50. Actions against administrative agencies - Attorney's fees and costs.

1. In any civil judicial proceeding involving as adverse parties an administrative agency and a party not an administrative agency or an agent of an administrative agency, the court must award the party not an administrative agency reasonable attorney's fees and costs if the court finds in favor of that party and, in the case of a final agency order, determines that the administrative agency acted without substantial justification.
2. This section applies to an administrative or civil judicial proceeding brought by a party not an administrative agency against an administrative agency for judicial review of a final agency order, or for judicial review pursuant to this chapter of the legality of agency rulemaking action or a rule adopted by an agency as a result of the rulemaking action being appealed.
3. Any attorney's fees and costs awarded pursuant to this section must be paid from funds available to the administrative agency the final order, rulemaking action, or rule of which was reviewed by the court. The court may withhold all or part of the attorney's fees from any award if the court finds the administrative agency's action, in the case of a final agency order, was substantially justified or that special circumstances exist which make the award of all or a portion of the attorney's fees unjust.

4. This section does not alter the rights of a party to collect any fees under other applicable law.
5. In any civil judicial proceeding involving adverse parties to an appeal or enforcement action involving an environmental permit issued under chapter 23-20.3, 23-25, 23-29, or 61-28 in which two or more of the adverse parties are not an administrative agency or an agent of an administrative agency, the court may award the prevailing nonagency party reasonable attorney's fees and costs if the court finds in favor of that party and determines that the nonprevailing nonagency party acted without substantial justification, or on the basis of claims or allegations that are factually unsupported. The court shall award reasonable attorney's fees and costs if the court determines that the nonprevailing nonagency party's claims or allegations are frivolous as provided in section 28-26-01. If the appeal or civil judicial proceeding covered by this subsection involves multiple claims or allegations, the court may apportion attorney's fees and costs in proportion to the time reasonably spent by a prevailing party relating to claims pursued by the nonprevailing party that were frivolous, factually unsupported, or without substantial justification.

28-32-51. Witnesses - Immunity.

If any person objects to testifying or producing evidence, documentary or otherwise, at any proceeding before an administrative agency, claiming a privilege against self-incrimination, but is directed to testify or produce evidence pursuant to the written approval of the attorney general, that person must comply with the direction but no testimony or evidence compelled from that person, after a valid claim of privilege against self-incrimination has been made, may be used against that person in any criminal proceeding subjecting that person to a penalty or forfeiture. No person testifying at any proceeding before an administrative agency may be exempted from prosecution and punishment for perjury or giving a false statement, or for contempt committed in answering, or failing to answer, or in producing, or in failing to produce, evidence pursuant to direction given under this section.

28-32-52. Elected official authority.

This chapter does not prohibit an elected official from presiding at that agency's cases, nor from deciding cases within that agency's jurisdiction.

MEMORANDUM

To: Senate Government and Veteran's Affairs Committee
From: Candie L. Robinson, Executive Director
ND Board of Registration for Engineers and Land Surveyors
Date: January ~~22~~²³, 2015
Re: SB 2185 - Historical Legal Fees

During the Senate Government and Veteran's Affairs Committee hearing on SB 2185 concerns were raised about removing language from the law that requires the Board to pay legal costs to a registrant if the registrant is the prevailing party on an appeal. A request was also made for some of the Board's financial history as it pertains to legal costs and this year's operating budget. That information is attached and I offer the following explanation of the data.

The provision that the Board pay the legal costs of a registrant if the registrant prevails on appeal is **unique to this Board**. Of all the occupations created in Chapter 43 of the ND Century Code and the State Board Association in in NDCC 27-14, the Board is the only entity that has this requirement. The attached table contains the names of the occupations as well as the NDCC location where this information can be found. Furthermore, an inquiry was sent to similar boards in other states and of the boards that responded, the North Dakota Board is **the only Professional Engineering and Land Surveying licensing board in the United States** with this requirement.

During testimony, concerns were raised about registrants of the Board losing "protection" under the law if this language is removed. What is it about the Board of Registration that creates a unique need for this protection? The Board has not imposed onerous burdens upon the regulated community and the attached financial documents support this assertion. It would seem that if regulated professions need protection from their own licensing boards that it should not be unique to the Board of Registration. Rather, this requirement should be placed in a location in the NDCC where it applies to **all regulated professions**.

Financially, the Board of Registration has been very prudent in their legal expenses. The attached document summarizes legal expenses for the past 10 fiscal years. During that time, the Board spent a total of \$240,843 on legal expenses. Complaint related expenses account for less than 1/2 of all legal expenses. For legal costs recovery, the Board recovered slightly more than \$8,000. The remaining complaint related expenses are due to the investigatory and legal review process that resulted in a solution in which legal fees were not assessed or the complaint was dismissed as unfounded or trivial.

As the committee is aware, the Board was recently assessed legal fees by the District Court. The amount of that assessment was staggering and was only slightly less than the Board has spent

on complaint and hearing related costs in the past **10 years**. The requirement exposes the Board to a potential liability that is significantly greater than the registrant will ever be exposed to by the Board.

In summary, based upon the factual information that is attached, the Board has been fiscally responsible in their legal expenditures and has not abused their authority to recover legal costs. The Board has gone so far as to create a proactive enforcement program that **prevents** disciplinary actions. Legal costs and cost recovery assessments are held to the minimum amount that still allows the Board to govern effectively. There are no "protections" that are being removed. SB 2185 removes a requirement that is unique only to this Board and makes licensing laws more uniform amongst all professions and removes a financial liability exposure to the Board.

Chapter	Chapter Name	Required to Pay Legal Fees of Registrant	
		Yes	No
27-14	State Bar Association		XX
43-01	Abstracters		XX
43-02.2	Accountants		XX
43-03	Architects and Landscape Architects		XX
43-04	Barbers		XX
43-05	Podiatrists		XX
43-06	Chiropractors		XX
43-07	Contractors		XX
43-09	Electricians		XX
43-10	Funeral Service Practitioners		XX
43-10.1	Pre-Need Funeral Services		XX
43-11	Cosmetologists		XX
43-12.1	Nurse Practices Act		XX
43-13	Optometrists		XX
43-15	Pharmacists		XX
43-17	Physicians and Surgeons		XX
43-18	Plumbers		XX
43-18.1	Water Conditioning Contractors and Installers		XX
43-18.2	Sewer and Water Installers		XX
43-19.1	Professional Engineers and Land Surveyors	XX	
43-20	Dental Hygienists and Assistants		XX
43-23	State Real Estate Commission		XX
43-23.3	Real Estate Appraisers		XX
43-25	Massage Therapists		XX
43-26.1	Physical Therapists		XX
43-28	Dentists		XX
43-29	Veterinarians		XX
43-30	Investigative and Security Services		XX
43-31	Detection of Deception Examiners		XX
43-32	Psychologists		XX
43-33	Hearing Aid Dealers		XX
43-34	Nursing Home Administrators		XX
43-35	State Board of Water Well Contractors		XX
43-36	Professional Soil Classifiers		XX
43-37	Audiologists and Speech-Language Pathologists		XX
43-38	Electrologists and Electronic Hair Removal Technicians		XX
43-39	Athletic Trainers		XX
43-40	Occupational Therapists		XX
43-41	Social Workers		XX
43-42	Respiratory Care Practitioners		XX
43-43	Environmental Health Practitioners		XX
43-44	Dietitians and Nutritionists		XX
43-45	Addiction Counselors		XX
43-47	Counselors		XX
43-48	Clinical Laboratory Personnel		XX
43-49	Reflexologists		XX
43-53	Marriage and Family Therapy Practice		XX
43-55	Professional Employer Organizations		XX
43-57	Integrative Health Care		XX
43-58	Naturopaths		XX
43-59	Music Therapists		XX
43-60	Genetic Counseling		XX

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North Dakota State Board of Registration for PE/LS

Legal Expenditures Summary
07/01/2005-01/23/2015

Total Expenses	\$240,843.27
Enforcement Program	\$41,390.17
Retainer	\$66,500.00
Meeting Attendance	\$22,931.50
Non-Routine Legal Expenses	\$10,505.14
Complaint & Hearing Related Expenses	\$99,516.46

Legal Costs Recovered by Board

2007	\$1,783.81
	\$1,441.53
2008	\$2,000.00
	\$1,068.86
2009	\$360.00
2012	\$1,085.00
2013	\$324.00
Total Recoverd Legal Fees	\$8,063.20

The Enforcement program began in 2012. It is a proactive effort to bring individuals into compliance with licensure laws. The enforcement program was created with the specific intent to prevent disciplinary actions.

Non-routine legal expenses are related to services not covered by the retainer but are not related to a complaint against a registrant.

**North Dakota State Board of Registration for Professional Engineers and Land Surveyors
FY 2014-2015 Final Budget**

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	Budget 2014-2015	Change	Budget 2013/2014	Actual 7/13-6/14
Revenues				
Endorsement Income	66,750.00	(\$48,300.00)	115,050.00	\$109,250.00
Interest & Misc. Income	66,290.00	(6,910.00)	73,200.00	\$78,073.59
Renewal Income	431,900.00	35,015.00	396,885.00	\$469,115.00
Other Revenues:		0.00	0.00	
Total Revenues:	564,940.00	(\$20,195.00)	\$585,135.00	\$656,438.59
Disbursements:				
Accounting Fees	\$3,850.00	\$0.00	\$3,850.00	\$3,195.00
Education Programs	23,000.00	10,000.00	10,000.00	9,883.93
Equipment & Furniture	9,000.00	(6,000.00)	12,000.00	10,222.51
Legal & Investigations	130,000.00	(2,400.00)	132,400.00	72,540.20
Legislative Action	4,000.00	4,000.00	0.00	0.00
Membership Dues	6,850.00	0.00	6,850.00	6,500.00
Orientation Examination	10,000.00	0.00	10,000.00	1,468.67
Office Operations	35,000.00	(11,625.11)	46,425.11	31,630.61
Office Rent	21,600.00	0.00	21,600.00	21,600.00
On Line Renewal Expenses	20,625.00	19,775.00	350.00	585.00
Printing & Reproduction	5,000.00	(4,000.00)	9,000.00	1,392.00
Rulemaking	0.00	(4,000.00)	4,000.00	2,592.61
Salaries-Fringe Benefits	45,994.02	170.14	45,823.89	44,623.55
Salaries & Wages	186,196.40	6,472.40	179,724.00	160,644.26
Telephone	6,000.00	(1,000.00)	6,000.00	6,187.84
Travel & Meetings	32,250.00	(13,712.00)	53,662.00	33,237.50
Transfer to Reserves		0.00	0.00	0.00
Web Site	16,950.00	(26,500.00)	43,450.00	19,337.50
Total Disbursements	\$556,315.42	(\$28,819.57)	\$585,135.00	\$425,641.18
 Proposed Budget Excess of Revenues Vs. Expenses		\$8,624.58		

1/23 SB 2185 #1 PB4

Revenues
2014-2015

	Budget 2014/2015	Change	Budget 2013/2014	Actual 7/13-6/14
Endorsement Income:				
Certificate of Commercial Practice (180 @ \$100.00)	18,000.00	(12,000.00)	30,000.00	20,000.00
Professional Engineers (300 @ \$150.00)	45,000.00	(32,250.00)	77,250.00	83,700.00
Professional Land Surveyors (25 @ \$150.00)	3,750.00	(4,050.00)	7,800.00	5,550.00
Endorsement Income Total:	66,750.00	(48,300.00)	115,050.00	109,250.00
Interest & Misc. Income:				
Interest Income-estimate	2,100.00	(800.00)	1,300.00	3,443.59
CPC Fees	64,190.00	7,710.00	71,900.00	74,630.00
Misc Income				
Interest & Misc. Income Total:	66,290.00	(6,910.00)	73,200.00	78,073.59

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Revenues
2014-2015

	Budget 2014/2015	Change	Budget 2013/2014	Actual 7/13-6/14
Renewal Income:				
CoCP Renewals (1100 @\$100.00)	110,000.00	25,000.00	85,000.00	142,150.00
LS Renewals (400@\$75.00)	30,000.00	730.00	29,270.00	30,570.00
PE Renewals (3800@\$75.00)	285,000.00	8,910.00	276,090.00	289,840.00
PE/LS Renewals (35@\$140.00)	4,900.00	(1,005.00)	5,905.00	5,905.00
CPC Pre-Approved Provider (2@\$500.00)	1,000.00	1,000.00	0.00	0.00
Retired (100@\$10.00)	1,000.00	380.00	620.00	650.00
Renewal Income Total:	431,900.00	35,015.00	396,885.00	469,115.00
Other Revenues:				
Transfer from Reserves		0.00	0.00	0.00
Other Revenues Total		0.00	0.00	0.00

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Expenses
 2014-2015

	Budget 2014/2015	Change	Budget 2013/2014	Adj. 6/14	Actual 7/13-6/14
Accounting Fees:					
Audit Estimate	\$3,700.00	0.00	3,700.00		3,195.00
State Auditor's Fee	150.00	0.00	150.00		
Accounting Fees Total:	\$3,850.00	0.00	3,850.00		3,195.00
Education Programs:					
Printing	1,000.00	(1,500.00)	2,500.00		938.94
Publication	\$1,000.00	(2,000.00)	3,000.00		
Travel	3,500.00	1,500.00	2,000.00		
Program Development	17,500.00	15,000.00	2,500.00		8,944.99
Education Programs Total:	\$23,000.00	10,000.00	10,000.00	13,000.00	9,883.93
Equipment & Furniture:					
Office Furniture	\$1,000.00	(5,000.00)	6,000.00		
Office Equipment	2,000.00	(1,000.00)	3,000.00		7,500.00
Computer Equipment	6,000.00	3,000.00	3,000.00		2,722.51
Equipment & Furniture Total:	\$9,000.00	(6,000.00)	12,000.00	15,000.00	10,222.51
Legal & Investigations:					
Enforcement	15,000.00	0.00	15,000.00		15,269.40
Hearings	50,000.00	0.00	50,000.00		40,788.38
Investigations, Research & Other Legal	50,000.00	0.00	50,000.00		7,677.42
Legal Counsel Retainer	\$15,000.00	6,600.00	8,400.00		7,700.00
(includes meeting attendance)	\$0.00	(9,000.00)	9,000.00		6,060.00
Auditor Adjusting Entry					(4,955.00)
Legal & Investigations Total:	\$130,000.00	(2,400.00)	132,400.00		72,540.20

Expenses
2014-2015

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	Budget 2014/2015	Change	Budget 2013/2014	Adj. 6/14	Actual 7/13-6/14
Legislative Action					
Legal Services (Estimate)	\$2,500.00	2,500.00	0.00		
Travel & Meetings	1,500.00	1,500.00			
Legislative Action Total:	\$4,000.00	4,000.00	0.00		0.00
Membership Dues					
NCEES	\$6,500.00	0.00	6,500.00		6,500.00
CLEAR	350.00	0.00	350.00		
Membership Dues Total:	\$6,850.00	0.00	6,850.00		6,500.00
Board Exams:					
Workshops and Meetings	10,000.00	0.00	10,000.00		1,468.67
Board Exams Total:	10,000.00	0.00	10,000.00		1,468.67
Office Operations:					
Paper for Copier		3,501.11	3,501.11		
Misc Office Supplies(\$640.00/month)		7,676.00	7,676.00		
Postage Expense		6,000.00	6,000.00		
Postage Meter Lease		1,200.00	1,200.00		
Postage Meter Maint. Agrmt.		150.00	150.00		
PO Box Rental Fee		375.00	375.00		
Safe Deposit Box Rental		75.00	75.00		
Office Insurance Premium		500.00	500.00		
ND Risk Management		998.00	998.00		
Employee Bond Insurance		0.00			
Equipment Maintenance Contract		2,800.00	2,800.00		
Equipment Repair & Service		2,000.00	2,000.00		
Technical Support Service		10,000.00	10,000.00		
Software Upgrades-estimate		4,500.00	4,500.00		
Notary Bond Renewal		150.00	150.00		
Office Maintenance and Repair		6,500.00	6,500.00		
Office Operations Total:	\$35,000.00	(11,625.11)	46,425.11	46,625.11	31,630.61

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Expenses
2014-2015

	Budget 2014/2015	Change	Budget 2013/2014	Adj. 6/14	Actual 7/13-6/14
Office Rent:					
Monthly lease (\$1,800.00 per month)	\$21,600.00	0.00	21,600.00		21,600.00
Office Rent Total:	\$21,600.00	0.00	21,600.00		21,600.00
Online Renewal Fees:					
Account Maintenance	\$525.00	175.00	350.00		585.00
Transaction Fees	20,000.00	20,000.00	0.00		
Direct Deposit Fees	100.00				
Online Renewal Fees Total:	\$20,625.00	19,775.00	350.00	850.00	585.00
Printing & Reproduction:					
General Office Stock	3,000.00	(3,000.00)	6,000.00		1,392.00
Misc. Printing	2,000.00	(1,000.00)	3,000.00		0.00
Printing & Reproduction Total:	\$5,000.00	(4,000.00)	9,000.00		1,392.00
Rulemaking					
Legal Review	\$0.00	(1,500.00)	1,500.00		508.61
Publication		(2,000.00)	2,000.00		2,084.00
Public Hearings		(500.00)	500.00		
Rulemaking Total:	\$0.00	(4,000.00)	4,000.00		2,592.61
Salaries: Fringe Benefits:					
Federal Unemployment	250.00	(25.00)	275.00		155.10
Health Insurance (\$850.00 X 3/monthly)	30,600.00	0.00	30,600.00		31,852.29
Medicare	2,699.85	93.85	2,606.00		2,345.39
ND Unemployment	\$300.00	(300.00)	600.00		242.26
ND Worker's Comp	600.00	0.00	600.00		0.00
Social Security Tax	11,544.18	401.29	11,142.89		10,028.51
Salaries: Fringe Benefits Total:	45,994.02	170.14	45,823.89		44,623.55

**Expenses
2014-2015**

	Budget 2014/2015	Change	Budget 2013/2014	Adj. 6/14	Actual 7/13-6/14
Salaries & Wages:					
Executive Director	\$78,540.00	7,140.00	71,400.00		71,400.00
Administrative Assistant	46,200.00	4,200.00	42,000.00		42,000.00
Administrative Assistant	46,200.00	4,200.00	42,000.00		42,000.00
Roth IRA-Executive Director	4,712.40	428.40	4,284.00		2,267.88
Roth IRA-Administrative Assistant	2,772.00	252.00	2,520.00		1,412.19
Roth IRA-Administrative Assistant	2,772.00	252.00	2,520.00		1,170.19
Temporary Admin	5,000.00	(10,000.00)	15,000.00		0.00
Discretionary Bonus Funds		0.00			1,500.00
Auditor Adj					(1,106.00)
Salaries & Wages Total:	186,196.40	6,472.40	179,724.00		160,644.26
Telephone:					
Service	6,000.00	0.00	6,000.00		6,187.84
Telephone Total:	6,000.00	(1,000.00)	6,000.00	7,000.00	6,187.84
Travel & Meetings					
NCEES Annual Meeting (2 @ \$3,000.00 each)	6,000.00	(3,000.00)	9,000.00		
NCEES Central Zone Meeting (2 @ \$ 2,000.00 each)	4,000.00	(2,000.00)	6,000.00		
Regular Board Meetings (5 @ \$2100.00 EACH)	10,500.00	(6,300.00)	16,800.00		
Teleconference Meetings (5@ \$750.00 EACH)	3,750.00	(4,250.00)	8,000.00		
Miscellaneous Travel	8,000.00	0.00	8,000.00		
Meeting Security	0.00	(5,862.00)	5,862.00		
Travel & Meetings Total:	32,250.00	(13,712.00)	53,662.00	45,962.00	33,237.50
Web Site:					
Registration Fees	750.00	0.00	750.00		
Graphic Design	0.00	(10,000.00)	10,000.00		
Web Site Development	15,000.00	5,000.00	10,000.00		2,898.75
Social Networking Establishment	0.00	(1,500.00)	1,500.00		
Staff Training	1,200.00	0.00	1,200.00		
Intern Exam	0.00	(20,000.00)	20,000.00		16,438.75
Web Site:	16,950.00	(26,500.00)	43,450.00		19,337.50

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MEMORANDUM

To: Attorney Todd D. Kranda
From: Attorney Lyle Kirmis, Special Assistant Attorney General
ND Board of Registration for Engineers and Land Surveyors
Date: January 22, 2015
Re: SB 2185 - Due Process

A concern has been raised during the Senate Government and Veteran's Affairs Committee hearing on SB 2185 as to whether the proposed amendments to NDCC 43-19.1-26 would result in a lack of due process for Registrants as to whom charges have been filed. **It would not.**

All issues as to which a hearing are held must be set forth in a written specification of issues served upon the Registrant at least thirty days before the hearing. The Registrant accordingly knows all of the issues that will be addressed by the Board at the hearing and has an opportunity to present evidence at the hearing on those charges, call witnesses, cross-examine witnesses, and make arguments. The Board only considers the issues set forth in the specification of issues; and decides those issues based solely on the evidence presented at the hearing. The three Board members who make this decision are totally isolated from the investigative process. **This process affords the Registrant full due process rights.**

This has been the process followed for years by the Board, and the amendment does not change this process, rather it supports the Registrant's due process by providing that the hearing can only be on charges that are set forth in the specification of issues. Without the changes in SB 2185 the current law would actually allow the Board to hear anything that was in the charges, without any Specification of Issues. This would actually make it harder for the Registrant to defend himself, or herself, since frequently the charges include matters that the Committee investigating the charges determines should not be in the Specification of Issues.

The changes contained within SB 2185 allows the Specification of Issues to include any matters that arose in connection with the investigation of the original charges. The Board believed it had this power as part of its duty to protect the public, but recently a district court decision held otherwise in a situation where the Registrant had actually admitted a clear violation of statutes. The effect of this is that in order to include these matters in the hearing, the entire process would have to be started over by adding new charges. The proposed changes within SB 2185 avoids this result; but it does not reduce the Registrant's due process rights because the Specification of Issues for the hearing must still include any issues that will be addressed at the hearing.

The proposed changes within SB 2185 do not, in any way, reduce the Registrant's due process rights; it merely allows the Board to avoid the unnecessary costs and delays of restarting the process if additional matters arise in the investigation.

Testimony of
Roger Kluck
In support of SB 2185

#1
2185
3-12-15

Chairman Kasper, and esteemed members of the House Government and Veteran's Affairs Committee:

Thank you for this opportunity to present my testimony to you today. My name is Roger Kluck and I am from Minot. I stand before you today in support of SB 2185 and request your action to be a "do pass" recommendation. I am a licensed Professional Engineer and I currently serve as the Vice-Chairman of the North Dakota Board of Registration for Professional Engineers and Land Surveyors. Please allow me to briefly explain my position on this bill.

The Board is supporting this bill as amended. In N.D.C.C. 43-19.1-25, the Board desires to remove language that requires the Board to pay a registrant's legal fees if the registrant is the prevailing party in an appeal. Language creating this requirement was amended into the law during the 2009 legislative session. The Board did not support the amendment. The Board is the only regulatory agency in the state of North Dakota with this requirement and, to the best of our knowledge, the only engineering and land surveying licensure board in the United States with this requirement.

The amendment made by the Senate Government and Veteran's Affairs committee removes language that requires a registrant to pay the Board's legal fees if the Board disciplines that individual during an administrative hearing process. The Board supports this amendment and finds it equitable to all parties.

The Board reacts to complaints filed by members of the public against registrants. The Board is required to investigate the complaint. During the investigatory phase, the registrant is given the maximum protection afforded her/him by the law, including entering into a stipulated agreement rather than going to hearing. Frequently, the investigation shows that the complaint is trivial or unfounded and is dismissed. This process is sufficiently rigorous and robust to give the Board a high confidence level that, if the issue proceeds to a hearing, the preponderance of the evidence will lead to the Board prevailing on the case.

Currently, the law exposes the Board to potentially large financial risk that could, conceivably, bankrupt the board. The Board's costs in these disciplinary cases are, for the most part, known and limited. We have one attorney, who charges us reasonable fees. We strive to be fiscally prudent, even during these hearings. We believe it would be an unfair penalty to a registrant if we accumulated huge legal costs during the investigation and hearing for disciplining a registrant. Registrants, however, are not motivated the same way. Consequently, while the Board usually has moderate legal costs for a disciplinary proceeding, a registrant might have legal costs in an amount several times that of the Board.

When the Board does discipline a registrant and the registrant appeals, the registrant has an impetus to spend more money to prevail in the appeal. The Board, on the other hand, still has a fiduciary responsibility to all the registrants to be fiscally conservative. Is it fair that the Board, in executing its obligations to hear complaints, be exposed to 7 or 8 times the risk as the registrant?

This requirement, as it exists in the law today, creates a serious hindrance in the Board's abilities to carry out its responsibilities. The decision of whether or not to discipline a registrant must be based upon what is best for the public, not the financial capabilities of the Board.

The second change located in N.D.C.C. 43-19.1-26 is intended to correct procedural errors identified by the District Court. When a complaint is received in the Board office, usually from a member of the public, an investigation is conducted to determine the validity of any documents submitted with the complaint and to give the registrant against whom the complaint is made a chance to respond. Occasionally, during the course of the investigation, new information is discovered that warrants an additional charge. In past disciplinary actions, the Board has amended the complaint to include the new information. The District Court ruled that amending the complaint was not properly done by the Board.

The Board believes that this ruling by the District Court places an unfair burden upon the public as a whole. Following the rationale of the District Court, a member of the public who files a complaint against a registrant must be aware of all rules and regulations and word their complaint precisely to satisfy the requirements of the law, or the Board must swear out new charges and begin the process anew. The desired changes create a process by which the Board can amend a complaint after it has been received in the Board office. Bear in mind that the amended charges are given to the registrant along with all other documentation and a period of time is given to allow the registrant to refute or respond to any additional charges in compliance with the requirement of NDCC 28-32.

Concern regarding a registrant's right to due process was raised in the Senate committee hearing. The Board's Special Assistant Attorney General Lyle Kirmis responded to that concern in writing. Mr. Kirmis prepared written comments for the Senate committee and, with Mr. Kirmis' consent, I am providing the same comments to you today..

The other change to this statute is to remove the requirement that a complaint be sworn and notarized. The use of affidavits is not consistent with current legal standards. Most courts have moved away from affidavits in favor of declarations. The language requiring an affidavit was contained in the original Professional Engineers title act passed in 1943 and was carried forward into the current law when Professional Land Surveyors were combined with the Professional Engineers and a new title act was created in 1967. Again, please recall that all complaints are thoroughly investigated by the Board to ascertain their validity before any administrative proceedings begin.

In summary, this bill seeks to eliminate financial risk exposure to the Board so that they may carry out their duty to protect the public based upon what is right rather than what it will cost. The bill also eliminates a similar financial risk exposure to the regulated community. Additionally, the bill seeks to correct procedural errors in the Board's investigatory process identified by the District Court.

Thank you for this opportunity to present my testimony. Please vote to give SB 2185 a "Do Pass" recommendation.

Sincerely,

Roger Kluck, PE

clr

MEMORANDUM

To: Attorney Todd D. Kranda

From: Attorney Lyle Kirmis, Special Assistant Attorney General
 ND Board of Registration for Engineers and Land Surveyors

Date: January 22, 2015

Re: SB 2185 - Due Process

A concern has been raised during the Senate Government and Veteran's Affairs Committee hearing on SB 2185 as to whether the proposed amendments to NDCC 43-19.1-26 would result in a lack of due process for Registrants as to whom charges have been filed. **It would not.**

All issues as to which a hearing are held must be set forth in a written specification of issues served upon the Registrant at least thirty days before the hearing. The Registrant accordingly knows all of the issues that will be addressed by the Board at the hearing and has an opportunity to present evidence at the hearing on those charges, call witnesses, cross-examine witnesses, and make arguments. The Board only considers the issues set forth in the specification of issues; and decides those issues based solely on the evidence presented at the hearing. The three Board members who make this decision are totally isolated from the investigative process. **This process affords the Registrant full due process rights.**

This has been the process followed for years by the Board, and the amendment does not change this process, rather it supports the Registrant's due process by providing that the hearing can only be on charges that are set forth in the specification of issues. Without the changes in SB 2185 the current law would actually allow the Board to hear anything that was in the charges, without any Specification of Issues. This would actually make it harder for the Registrant to defend himself, or herself, since frequently the charges include matters that the Committee investigating the charges determines should not be in the Specification of Issues.

The changes contained within SB 2185 allows the Specification of Issues to include any matters that arose in connection with the investigation of the original charges. The Board believed it had this power as part of its duty to protect the public, but recently a district court decision held otherwise in a situation where the Registrant had actually admitted a clear violation of statutes. The effect of this is that in order to include these matters in the hearing, the entire process would have to be started over by adding new charges. The proposed changes within SB 2185 avoids this result; but it does not reduce the Registrant's due process rights because the Specification of Issues for the hearing must still include any issues that will be addressed at the hearing.

The proposed changes within SB 2185 do not, in any way, reduce the Registrant's due process rights; it merely allows the Board to avoid the unnecessary costs and delays of restarting the process if additional matters arise in the investigation.

Chapter	Chapter Name	Can Recover Legal Costs from Registrant		Required to Pay Legal Fees of Registrant	
		Yes	NDCC Citation	Yes	No
43-14	State Bar Association				XX
43-01	Abstracters	XX	43-01-16		XX
43-02.2	Accountants	XX	43-02.2-09		XX
43-03	Architects and Landscape Architects	**	See Notes		XX
43-04	Barbers	XX	43-04-48		XX
43-05	Podiatrists	XX	43-05-15		XX
43-06	Chiropractors	XX	43-06-15		XX
43-07	Contractors	XX	43-07-15		XX
43-09	Electricians	XX	43-09-23		XX
43-10	Funeral Service Practitioners	XX	43-10-16		XX
43-10.1	Pre-Need Funeral Services	XX	43-10.1-06.2		XX
43-11	Cosmetologists				XX
43-12.1	Nurse Practices Act	XX	43-12.1-13		XX
43-13	Optometrists	XX	43-13-21.1		XX
43-15	Pharmacists	XX	43-15-45		XX
43-17	Physicians and Surgeons	XX	43-17-31.1		XX
43-18	Plumbers				XX
43-18.1	Water Conditioning Contractors and Installers				XX
43-18.2	Sewer and Water Installers				XX
43-19.1	Professional Engineers and Land Surveyors	XX	43-19.1-25	XX	
43-20	Dental Hygienists and Assistants	XX	43-28-18.2		XX
43-23	State Real Estate Commission	XX	43-23-11		XX
43-23.3	Real Estate Appraisers	XX	43-23.3-22		XX
43-25	Massage Therapists				XX
43-26.1	Physical Therapists				XX
43-28	Dentists	XX	43-28-18.2		XX
43-29	Veterinarians	XX	43-29-16		XX
43-30	Investigative and Security Services	XX	43-30-12		XX
43-31	Detection of Deception Examiners				XX
43-32	Psychologists				XX
43-33	Hearing Aid Dealers				XX
43-34	Nursing Home Administrators				XX
43-35	State Board of Water Well Contractors				XX
43-36	Professional Soil Classifiers				XX
43-37	Audiologists and Speech-Language Pathologists				XX
43-38	Electrologists and Electronic Hair Removal Technicians				XX
43-39	Athletic Trainers				XX
43-40	Occupational Therapists	XX	43-40-16.2		XX
43-41	Social Workers				XX
43-42	Respiratory Care Practitioners	XX	43-42-03		XX
43-43	Environmental Health Practitioners				XX
43-44	Dietitians and Nutritionists				XX
43-45	Addiction Counselors				XX
43-47	Counselors	XX	43-47-07.1		XX
43-48	Clinical Laboratory Personnel				XX
43-49	Reflexologists				XX
43-53	Marriage and Family Therapy Practice	XX	43-53-09		XX
43-55	Professional Employer Organizations	XX	43-55-08		XX
43-57	Integrative Health Care	XX	43-57-10		XX
43-58	Naturopaths	XX	43-57-10		XX
43-59	Music Therapists	XX	43-57-10		XX
43-60	Genetic Counseling	XX	43-17-31.1		XX

**North Dakota State Board of Registration for Professional Engineers and Land Surveyors
FY 2014-2015 Final Budget**

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	Budget 2014-2015	Change	Budget 2013/2014	Actual 7/13-6/14
Revenues				
Endorsement Income	66,750.00	(\$48,300.00)	115,050.00	\$109,250.00
Interest & Misc. Income	66,290.00	(6,910.00)	73,200.00	\$78,073.59
Renewal Income	431,900.00	35,015.00	396,885.00	\$469,115.00
Other Revenues:		0.00	0.00	
Total Revenues:	564,940.00	(\$20,195.00)	\$585,135.00	\$656,438.59
Disbursements:				
Accounting Fees	\$3,850.00	\$0.00	\$3,850.00	\$3,195.00
Education Programs	23,000.00	10,000.00	10,000.00	9,883.93
Equipment & Furniture	9,000.00	(6,000.00)	12,000.00	10,222.51
Legal & Investigations	130,000.00	(2,400.00)	132,400.00	72,540.20
Legislative Action	4,000.00	4,000.00	0.00	0.00
Membership Dues	6,850.00	0.00	6,850.00	6,500.00
Orientation Examination	10,000.00	0.00	10,000.00	1,468.67
Office Operations	35,000.00	(11,625.11)	46,425.11	31,630.61
Office Rent	21,600.00	0.00	21,600.00	21,600.00
On Line Renewal Expenses	20,625.00	19,775.00	350.00	585.00
Printing & Reproduction	5,000.00	(4,000.00)	9,000.00	1,392.00
Rulemaking	0.00	(4,000.00)	4,000.00	2,592.61
Salaries-Fringe Benefits	45,994.02	170.14	45,823.89	44,623.55
Salaries & Wages	186,196.40	6,472.40	179,724.00	160,644.26
Telephone	6,000.00	(1,000.00)	6,000.00	6,187.84
Travel & Meetings	32,250.00	(13,712.00)	53,662.00	33,237.50
Transfer to Reserves		0.00	0.00	0.00
Web Site	16,950.00	(26,500.00)	43,450.00	19,337.50
Total Disbursements	\$556,315.42	(\$28,819.57)	\$585,135.00	\$425,641.18

Proposed Budget Excess of Revenues Vs. Expenses \$8,624.58



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SB 2185 Testimony

March 12, 2015

Chairman Kasper and Committee Members:

My name is Curtis Glasoe. I was born and raised in North Dakota, graduated from NDSU in engineering, the home of the four time NDSU National Championship Football team, spent two years in the US Army during the Viet Nam era. I have practiced engineering and land surveying for over 46 years in North Dakota, South Dakota, Montana, and Idaho. I have resided in North Dakota for over 50 years. I am currently licensed to practice Land Surveying and Engineering in Montana, South Dakota, and the Great State of North Dakota.

I am the National Society of Professional Surveyors (NSPS) Governor for North Dakota and the Legislative Co-Chairman of the North Dakota Society of Professional Land Surveyors (NDSPLS). This State Society is made up of over 300 members. There are approximately 500 Registered Land Surveyors and over 50 dual registrants in Engineering and Land Surveying in North Dakota. Some 185 of these registered people live and practice in the State of North Dakota.

I am here to testify in favor of SB 2185. This Bill will put the proper process and procedure in place to protect the public and to help determine the disciplinary action taken by the Board. Checking with National Council of Examiners of Engineers and Surveyors (NCEES), North Dakota is the only state that has this law where a Board pays legal fees in the case of the registrant being the prevailing party in an appeal. In many civil cases it is not unusual for the losing party to have to pay some of the costs, but this should not apply to the State or any entity created by the State.

The real issue is getting the out-of-state or new professionals licensed in the State of North Dakota to follow the established practices for surveying and platting in our great state. The new surveyor's answer, when they are asked why he/she does not follow the North Dakota laws; they say "this is not the way we do it in Louisiana or Utah or Wyoming". Our answer is this is North Dakota and according to our laws and procedures, we do it a specific way to protect our citizens and landowners from being the victims of shoddy or incomplete work. We need to have a State Board that has the best interest of our North Dakota public in mind and not making decisions from a fear of paying legal fees.

Therefore, I urge this Committee to approve SB 2185.

Thank you.

Curtis W. Glasoe, PE and PLS #2439
NSPS Governor
NDSPLS Legislative Co-Chairman