

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

COMMISSION ON ALTERNATIVES TO INCARCERATION

Wednesday, April 18, 2012
Harvest Room, State Capitol
Bismarck, North Dakota

Senator Stanley W. Lyson, Chairman, called the meeting to order at 10:00 a.m.

Members present: Senators Stanley W. Lyson, Connie Triplett; Representatives Eliot Glassheim, William E. Kretschmar; Citizen Members Leann K. Bertsch, Bradley A. Cruft, Paul D. Laney, Judge Lisa McEvers, Carol K. Olson, Dr. Gary Rabe, Thomas L. Trenbeath, Keith Witt

Members absent: Senator Dave Oehlke; Representative Lawrence R. Klemin; Citizen Members Edward Brownshield, Duane Johnston, Justice Mary Muehlen Maring

Others present: See [Appendix A](#)

It was moved by Mr. Trenbeath, seconded by Representative Glassheim, and carried on a voice vote that the minutes of the previous meetings be approved as distributed.

DEPARTMENT OF CORRECTIONS AND REHABILITATION PERFORMANCE- BASED SENTENCE REDUCTION POLICY

Chairman Lyson called on Ms. Leann K. Bertsch, Director, Department of Corrections and Rehabilitation, for a presentation ([Appendix B](#)) regarding performance-based sentence reduction. Ms. Bertsch said the department generally receives two or three requests per year for sentence reduction due to meritorious conduct. However, she said, there were more requests last year due to volunteer services provided by residents of the Missouri River Correctional Center during the flood emergency.

In response to a question from Representative Kretschmar, Ms. Bertsch said all inmates, except those required to serve 85 percent of a sentence and inmates with sentences of less than six months, are eligible for the performance-based sentence reduction. However, she said, if an inmate is not participating in a required program, the performance-based sentence reduction will be suspended. In addition, she said, sentence reductions may be revoked as a disciplinary measure.

In response to a question from Senator Lyson, Ms. Bertsch said performance-based sentence reduction may begin accruing the day an inmate enters the Penitentiary if the inmate is in compliance with the required conditions.

Mr. Trenbeath said the performance-based sentence reduction policy has been looked at closely and has functioned well. He said there likely is a

problem associated with mandatory minimum sentencing laws which resulted in overcrowding at the Penitentiary due to the incarceration of some individuals who probably should not have been incarcerated. He said minimum mandatory sentencing laws also have probably led to more plea bargain agreements.

Ms. Bertsch said performance-based sentence reduction has worked very well as it is currently structured. She said the policy is a vast improvement over the previous law. She said there are very few inmates who are still covered by the old law, which leads to greater consistency.

DRIVING UNDER SUSPENSION PENALTIES

At the request of Chairman Lyson, commission counsel reviewed a bill draft [[13.0067.01000](#)] relating to driving under suspension penalties. Commission counsel said the bill draft attempts to incorporate suggestions provided by members of a workgroup established by representatives of the Department of Transportation. He said the bill draft provides additional flexibility to the Department of Transportation in providing temporary restricted licenses, expands the potential uses of a temporary restricted license, and requires a court to dismiss a charge for driving under suspension if the defendant provides proof that the defendant has reinstated the operator's license within 20 days after the date of the offense.

At the request of Chairman Lyson, Mr. Glenn Jackson, Department of Transportation, provided comments ([Appendix C](#)) regarding the bill draft. Mr. Jackson said at the last meeting of this commission, he was requested to provide information regarding the potential cost of sending all notices of operator's license suspensions and revocations by certified mail. He said the department determined that providing the notices by certified mail would cost approximately \$1 million per biennium.

In response to a question from Senator Lyson, Mr. Jackson said the cost of each letter sent by certified mail would be approximately \$6.46. He said department sends an average of 220 suspension or revocation letters per day. Thus, he said, the cost of mailing for one year would be approximately \$355,000. He said an analysis of the process of sending and receiving the documents by certified mail

indicates it would take approximately five minutes to prepare the letter and three minutes to enter the receipt into the system. Therefore, he said, the additional time needed to prepare, send, and receive the certified letters and receive the returned notices would require 3.5 full-time equivalent positions. He said the additional positions would cost approximately \$700 per day or \$185,000 per year. He said sending a letter by certified mail would not guarantee the letter has been received.

In response to a question from Mr. Cruff, Mr. Jackson said he is not sure if the better approach would be to eliminate the 12-hour driving restriction for driving to and from work under a temporary restricted license or to adjust the restriction based upon the needs of each individual.

Mr. Trenbeath said it would be ill-advised of the commission to provide the Department of Transportation advice on the policies the department has adopted with respect to the issuance of restricted licenses to individuals who have had a license suspension.

Mr. Witt said law enforcement officers generally are not looking for individuals who are driving with suspended licenses. He said many of the individuals who have frequently been caught driving while under suspension are caught because they violate other traffic laws. He said there may need to be some adjustments in the law or policies to account for one-time offenders who should have an opportunity to get a license reinstated. He said the provision on page 2 of the bill draft relating to requiring a judge to drop a charge probably should be changed to allow a judge to drop a charge rather than require the dropping of a charge. He said the provision on page 4 relating to a substantial deprivation of nutritional, educational, or medical needs could result in substantially different interpretations of what is a substantial deprivation. As a result, he said, law enforcement officers likely will have to spend more time sitting in court waiting to testify regarding driving under suspension charges.

Mr. Laney said he agrees with Mr. Witt that the interpretation of a substantial deprivation is going to be different in the eyes of a law enforcement officer and the individual stopped for driving while under suspension. He said the number of individuals who have license suspensions in Cass County is very high, and some of the individuals who have had a license suspended never get out of the cycle of continuing suspensions. He said he understands the desire to help in some cases, but he does not want to see law enforcement officials having to spend more time sorting out situations and determining if an individual is complying with restrictions and conditions of a temporary restricted license.

Mr. Jackson said the purpose of easing some restrictions should be to address driving under suspension violations that result only due to a person who was driving under suspension and not due to other offenses.

Senator Lyson said a law enforcement officer should not be asked to look the other way when the officer sees an individual driving who the officer knows is under suspension. He said the individual is breaking the law, and the burden should not be placed on the law enforcement officer for the stupid actions of the individual who is breaking the law.

Senator Triplett said the bill draft should attempt to help only those individuals who are stopped simply because law enforcement is aware the individual is under suspension or due to minor noncriminal offenses. She said the intent should not be to give a break to those people who continue to drive poorly. She said the purpose of the bill draft is not to try to hinder law enforcement from protecting the safety of the public.

In response to a question from Judge McEvers, Mr. Jackson said the 20 days provided under Section 2 of the bill draft to have a license reinstated may not be a sufficient amount of time in some cases.

In response to a question from Mr. Cruff, Mr. Jackson said the language in Section 2 of the bill draft may need to be clarified, and the 20-day requirement may need to be reconsidered.

Mr. Trenbeath said the 20-day reinstatement provision creates a somewhat arbitrary standard and would not seem to allow a judge to dismiss a charge if an individual reinstated a license on day 22 and appeared in court on day 30 after the offense.

In response to a question from Mr. Laney, Mr. Jackson said if an individual has been ordered to attend a treatment facility or program and the individual was issued a temporary restricted license, the department will likely place restrictions and conditions on the license to allow for attendance at the treatment program.

In response to a question from Mr. Witt, Mr. Jackson said the various driving under suspension provisions in North Dakota Century Code Title 39 sometimes provide interesting ways in which the laws combine to create circumstances that allow individuals to do things that probably were not intended.

In response to a question from Senator Triplett, Mr. Jackson said the 20-day reinstatement provision of the bill draft is good-intentioned but may need to be changed to provide additional time and to be based upon the notification of the conviction rather than the date of the offense.

Judge McEvers said it may be possible for prosecutors or judges to help educate individuals on the process of getting a license reinstated. She said the 20-day reinstatement time in Section 2 is insufficient.

Senator Triplett requested the bill draft be revised to incorporate the changes suggested by Judge McEvers and Mr. Jackson as well as change "shall" to "may" on line 16 of page 2.

Representative Glassheim said the provisions on page 4 of the bill draft relating to a temporary restricted license being used to prevent the substantial deprivation of the educational, medical, or

nutritional needs of the offender or an immediate family member of the offender may not be necessary. He said the educational or nutritional needs of the offender or a family member could be addressed within the normal restrictions of the license and be planned in advance. He said the commission may consider changing the paragraph to limit the language to the medical or emergency needs of the offender.

Senator Triplett said the language provides that the use of the temporary license would be as necessary to prevent substantial deprivation. She said going to the grocery store at midnight to buy Kool-Aid to satisfy a crying child is not likely to be seen as a substantial deprivation of the nutritional needs as provided under that paragraph. She said she prefers to leave the language of that paragraph as drafted.

Senator Lyson said he agrees with Senator Triplett and that paragraph should be left as is.

BISMARCK TRANSITION CENTER

Chairman Lyson called on Mr. Kevin Arthaud, Bismarck Transition Center, for a presentation ([Appendix D](#)) regarding the center. Mr. Arthaud said the center is operated by Community, Counseling, and Correctional Services, Inc., which is headquartered in Butte, Montana. He said the company operates 11 facilities for adults and youth. He said the center provides services for adult males and has eight female beds that are used mostly for city and county offenders or federal pretrial offenders. He said the facility received a 98 percent rating in its last audit by the American Correctional Association. He said the company has grown since 1983 to have over 600 employees and is governed by a noncompensated board. He said the company provides services to state and local governments and federal agencies.

In response to a question from Senator Lyson, Mr. Arthaud said the center receives referrals from the Department of Corrections and Rehabilitation to house individuals who are in the last few months of their sentences. He said the center does not accept violent offenders or registered sexual offenders. He said the offenders at the center are required to work to pay for a portion of their room and board, pay fines and fees, and save money to be used upon release. He said the offenders must receive approval from case managers with respect to their weekly spending. He said many of the offenders working in Bismarck are employed in construction or in restaurants. He said the goal is to allow the offenders to save money in preparation for discharge and to get started in a job they may retain upon discharge. He said the center does not track the offenders after release, but the Department of Corrections and Rehabilitation tracks recidivism. In addition, he said, the department may provide reports on offenders after release.

Ms. Amy Ruff, Bismarck Transition Center, said the center provides programming in evidence-based practices to reduce recidivism. She said the

Department of Corrections and Rehabilitation is progressive in its rehabilitation program, and the evidence-based practices to reduce recidivism are a contract goal for the center. She said the center also acts as a diversion and assessment center for the department. She said the center is used to help divert probationers and parolees from the Penitentiary. She said an individual may be placed at the center for a 60-day stay, with the initial three weeks to four weeks used to gather information on services that may be required and to observe the behavior of the individual. After that point, she said, counselors and probation and parole officers or representatives of the department may become involved in meeting with representatives of the center to develop recommendations in an attempt to help the individual stay out of trouble.

Mr. Warren Emmer, Bismarck Transition Center, provided information ([Appendix E](#)) relating to a proposed program of the center to work with tribal governments in the state to provide transition programs for tribally committed correctional residence and relating to the Bismarck Transition Center Advisory Board.

In response to a question from Mr. Trenbeath, Mr. Emmer said the tribal program is a new idea and has not been tried in Montana. He said the objective would be to get North Dakota tribes to join a cooperative to help deliver tribal residents who have committed offenses to the center. He said the proposed program would include working with the Community Enterprise Development Corporation to facilitate the establishment of a cooperative. He said the Community Enterprise Development Corporation is skilled at establishing cooperatives and generating funds. He said the proposal for the program does not include requesting state funds for the program. However, he said, the proposal envisions tribal governments working through a cooperative to seek funds that are available to tribal governments. He said the Bureau of Indian Affairs is seeing decreases in funding, and tribal jails are filled. Therefore, he said, tribal judges and law enforcement, including the United States Attorney, are looking for alternative solutions. He said the program could help divert offenders from the state and federal criminal justice systems.

In response to a question from Ms. Olson, Mr. Emmer said tribal leaders would prefer to have posttransition facilities available on the reservations through which individuals could have a safe environment and opportunity to transition to employment and life on the reservation. However, he said, because jobs are limited on the reservations, there is a likelihood tribal members going through the center would stay in Bismarck to retain jobs. He said the program would look at ideas to develop the skills of offenders which could transfer to jobs available on the reservation, such as renovation of housing. He said the long-range goal is to transition tribal members to jobs on the reservation.

Mr. Emmer said after the center went through some difficult times a few years ago, it became clear that a strong local advisory board would be important to help improve the center. He said the center has established the Bismarck Transition Center Advisory Board, which includes representatives from the center, law enforcement, corrections, and the educational community.

In response to a question from Ms. Bertsch, Mr. Emmer said the proposed tribal transition program would operate under the jurisdiction of the participating tribes, and a plan would be developed to provide for sustainable funding so that the state would not be asked to fund the program after initial funding ended.

COLLECTION OF RESTITUTION BY CLERKS OF COURT

Chairman Lyson called on Ms. Lois Scharnhorst, Clerk of District Court, Morton County, for comments relating to the collection of restitution. Ms. Scharnhorst said most of the clerks of court in the state are responsible for collecting restitution. She said collecting restitution and distributing the funds appropriately may be a burden to some clerks of court, because some of the smaller counties do not have full-time state's attorneys who are available to help with the distribution. She said a new computer program has been implemented to help track payments. She said the system is used to assist in the collection of fines, fees, and administrative costs and makes it easier to monitor a file. If an individual is not paying the required fine, fee, or other cost, she said, the clerk of court may transfer the file to the court for appropriate action. Although the amount of restitution collected varies greatly by the size of the county, she said, collection of restitution under the new program has not proved to be a significant burden for her office.

In response to a question from Senator Lyson, Ms. Scharnhorst said although the clerks of court try to keep up to date on collection matters, there have been some glitches in the system with respect to the tracking of collection. She said the system administrators are working on getting the system to track all costs and fees assessed against a defendant. She said if a defendant is in arrears in paying, the defendant may be brought into the court on a show cause order. She said the regional system of monitoring child support collections has worked well, and a similar system may work for other fees and costs assessed against a defendant. She said a central agency for the collection of traffic tickets, such as the Highway Patrol, may be a potential solution to improve monitoring and collection. In addition, she said, providing additional information regarding the availability of paying online may be helpful. Although many defendants are in arrears on payments, she said, she does not have information regarding the exact percentage. However, she said, many

defendants make regular monthly payments in a diligent manner.

MONETARY THRESHOLDS FOR FELONY OFFENSES

Chairman Lyson called on Mr. Al Austad, North Dakota Association for Justice, for comments regarding the appropriateness of the monetary thresholds for determining whether an offense is a felony. Mr. Austad said the amounts in statute should be adjusted to account for inflation over the last 30 years to 40 years when most of those amounts were established. He said the state's attorneys in the western portion of the state are seeing up to 400 percent increases in caseloads and the 40-year-old monetary thresholds determining whether an offense is charged as a felony have a significant impact on the use of limited resources. He said adjusting the thresholds may allow state's attorneys to devote more time to cases that cause bodily injury rather than property offenses.

In response to a question from Mr. Laney, Mr. Austad said the review of the monetary threshold should look at all monetary limits that move a crime from a misdemeanor to a felony. He said all monetary limits, including the amount of traffic fines, could be examined.

Judge McEvers said this issue arose because Justice Maring had expressed concern with the \$500 threshold for a Class C felony theft offense. She said the \$500 threshold appears to be low, particularly in light of the amount of time and resources used in addressing the crime.

Senator Lyson said regardless of the amount of resources invested, \$500 is a significant amount of money to most people.

Ms. Bertsch said thefts should be prosecuted, but there has been inflation over the last 40 years. She said the monetary threshold should be compared with the federal monetary levels for similar crimes. She said an offender will not go unpunished for a crime if the crime is reduced to a misdemeanor. She said whether the crime is charged as a misdemeanor or a felony, the likelihood of the offender receiving a suspended sentence is probably similar. However, she said, fewer resources will be used to deal with the misdemeanor offense, and the offender will not be subject to felony probation under the supervision of the Department of Corrections and Rehabilitation.

Mr. Travis Finck, Bismarck Public Defenders Office, said the monetary levels should be examined. He said public defense resources allocated to a felony offense are significantly different from those allocated to misdemeanors. He said there are a significant number of technology-related thefts that result in felonies because of the \$500 threshold. He said an individual who is prosecuted for stealing his buddy's video game system probably does not need to be subject to probation administered by the Department of Corrections and Rehabilitation. He said caseloads

are increasing significantly in the western and central portions of the state due to increased population and energy development. Because of the additional costs a defendant may be required to pay for a felony offense, he said, restitution for a misdemeanor is more likely to be repaid in a shorter amount of time. He said the \$45 supervision fee that a felony offender would be required to pay could be used to pay restitution. Although he is unsure of the appropriate levels for various crimes, he said, there would be benefits for all parties involved if the lower amounts were prosecuted as misdemeanors rather than felonies.

In response to a question from Representative Glassheim, Mr. Finck said public defenders and criminal defense attorneys are looking at this issue and may be able to provide the commission with recommendations at the commission's next meeting.

Ms. Bertsch requested commission counsel to provide the members of the commission with a copy of the bill draft that was considered by the Judiciary Committee during the 2009-10 interim.

Senator Triplett requested commission counsel to provide the commission with information regarding the rate of inflation over the last 40 years.

Judge McEvers requested commission counsel to invite state's attorneys to provide comments on the appropriateness of the monetary thresholds.

No further business appearing, Chairman Lyson adjourned the meeting at 11:55 a.m.

John Bjornson
Commission Counsel

ATTACH:5