

2009 SENATE POLITICAL SUBDIVISIONS

SB 2143

2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 2143

Senate Political Subdivisions Committee

Check here for Conference Committee

Hearing Date: 01/09/09

Recorder Job Number: 6735

Committee Clerk Signature



Minutes:

Chairman Andrist: Called the meeting to order to discuss SB 2143. Reminded people to not use acronyms to help the Clerk and public understand what is being discussed.

Tag Anderson: Director of Risk Management Division of the Office of Management and

Budget. His testimony was given to provide information regarding SB 2143. See attachment #1.

Chairman Andrist: Are there any questions for Mr. Anderson?

Senator Anderson: Your testimony uses the word exhaustion a lot. Is that to ensure that all other options are tried before these things take effect?

Anderson: That is correct. The idea of the doctrine of exhaustion is that the claimant must exhaust all options before seeking regress in the courts. Basically, try and resolve the problem at the lowest, earliest level possible.

Senator Anderson: It states that if there is no statutory appeal there is 90 days allowed, is that pretty standard?

Anderson: That would not be consistent with all of the various causes of action that could be brought to district court. The 90 days was actually put in at the suggestion of the department of labor to keep consistent with other parts of the human rights policy.

Senator Anderson: So pretty much it is.

Anderson: If there is no internal mechanism the person would, I believe, have 300 days to bring an action.

Senator Lee: How does this process compare not to discrimination law but if a teacher were having a problem with the school board?

Anderson: I believe that it would be substantially similar to the extent that a teacher had a provided forum to deal with disputes generally and that forum allows discrimination claims to be heard. This legislation would essentially require that to happen.

Senator Lee: If it were not a discrimination case. If a teacher had been dismissed by a school board or by an administrator, how does that process compare?

Anderson: The process may be the same but this would have no impact on the extent to which teachers have those forms, it simply recognizes that if it does you have to try and resolve it.

Senator Lee: But if it does, the process will be fairly similar to what we have here.

Anderson: I believe so, yes.

Senator Dotzenrod: Is there a specific case or situation that came up that prompted you to bring up this bill or was it two agencies communicating with each other and they found a need to clarify?

Anderson: Essentially the reason this bill is being brought is because it codifies existing law but it is the uncertainty that Risk Management is concerned about. It also affects the actuarial folks, the insurance people and the underwriters. It is designed to decrease uncertainties.

Senator Dotzenrod: So there was not a specific case that created a conflict leading to this bill.

I did not realize that you hired the attorneys, I always thought it was the attorney general who hired. I was surprised to hear that OMB is in that role.

Anderson: We pay the bill. You are correct that no attorney can represent the state of North Dakota unless the attorney general approves that person. My point is that many claims that come through the state are unable to be processed by the attorney general so we have to hire out which can be very expensive. We recommend who the outside people should be and pay the bills.

Senator Dotzenrod: Is this a busy area? Is there a lot of stuff going on?

Anderson: It happens infrequently but when it does and we cannot use the attorney generals services, it gets to be very expensive.

Chairman Andrist: Further questions? Any for, against or neutral about SB 2143?

There was no opposition.

Chairman Andrist: Closed the hearing.

Senator Lee: I recommend we move forward with a **Do Pass** recommendation.

Vice Chairman Olafson: I second.

Chairman Andrist: Is there any further discussion? I think my read on it is it clarifying procedure without changing a whole lot.

Senator Dotzenrod: It seems a little abstract and unclear and we already have the language and process but this appears to make the steps along the way a little clearer. I am just having a little trouble understanding how this will happen in real life.

Chairman Andrist: I agree with **Senator Dotzenrod** in this case but I trust that the agency is trying to clarify on paper so an unhappy employee will know what they can do.

Vice Chairman Olafson: It seems to bring clarity, I do not see any red flags. It is a little abstract but I think it is ok.

Chairman Andrist: Any further comments? Ok, we'll have the Clerk call the role on a motion to **Do Pass**.

Roll Call was taken. **Yes: 6, No: 0, Absent: 0.**

Senator Bakke will carry the bill.

Chairman Andrist: Adjourned the meeting.

Date: 1/9/0
Roll Call Vote #: 1

2009 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 2143

Senate Political Subdivisions Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Do pass Do not pass Amendment

Motion Made By Senator Lee Seconded By Senator Olafson

Senators	Yes	No	Senators	Yes	No
Chairman John M. Andrist	/		Senator Arden C. Anderson	/	
Vice Chairman Curtis Olafson	/		Senator JoNell A. Bakke	/	
Senator Judy Lee	/		Senator Jim Dotzenrod	/	

Total (Yes) 6 No 0

Absent _____

Floor Assignment Senator Bakke

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

REPORT OF STANDING COMMITTEE

SB 2143: Political Subdivisions Committee (Sen. Andrist, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2143 was placed on the Eleventh order on the calendar.

2009 HOUSE POLITICAL SUBDIVISIONS

SB 2143

2009 HOUSE STANDING COMMITTEE MINUTES

Bill No. SB 2143


House Political Subdivisions Committee

Check here for Conference Committee

Hearing Date: February 26, 2009

Recorder Job Number: 9752

Committee Clerk Signature



Minutes:

Chairman Wrangham opened the hearing on SB 2143.

Tag Anderson, Director OMB Risk Management Division: (see testimony #1).

Rep. Zaiser: I think this is a very good idea.

Tag Anderson: This is just clarification on the process.

Rep. Kretschmar: Under the bill on page 2 Subsection 4, can you choose on the outset you could go to administrative or district court?

Tag Anderson: What the administrative remedy requires is a grieved party first goes through internal processes that are made available. They have to utilize the statewide mechanism to go through the HR division or personnel division. That is their administrative remedy.

Because there is a mechanism for statutory appeals of those decisions they have to forgo that particular part of the bill. Should they succeed then they have to go through HR then they could request a hearing from the hearing office in district court and that is what this is.

Rep. Kretschmar: I was referring to subsection 4.

Tag Anderson: It would only apply in most cases; first goes to the Department of Labor.

They have no internal representation at all. If they go to the Department of Labor; then they

decide to go to the district court, the department of labor says we have done this. It can only be one point.

Rep. Koppelman: Essentially what this does is it creates a two stage process; and in affect bars the individual from seeking regress in the courts immediately. Is that right?

It says they must exhaust these other options first.

Tag Anderson: Yes that is correct. It reinforces the state law that already exists in ND which is that you have to exhaust your internal HR. When it comes to state or political subdivisions that has created that administrative form the Supreme Court has indicated this is the process.

Rep. Koppelman: So you are talking about case law based on the Supreme Court decisions that are now in the statue.

Tag Anderson: Yes.

Opposition: None

Neutral: None

Hearing closed.

Chairman Wrangham reopened the hearing on SB 2143.

Do Pass Motion Made By Rep. Jerry Kelsh: Seconded By Rep. Zaiser

Vote: 12 Yes 0 No 1 Absent Carrier: Rep. Zaiser

Hearing closed.

Date: 2/26/09
Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2143

HOUSE POLITICAL SUBS COMMITTEE

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DP DNP DP AS AMEND DNP AS AMEND

Motion Made By Rep Kelsh Seconded By Rep Zaiser

Representatives	Yes	No	Representatives	Yes	No
Ch. Wrangham	✓		Rep. Conrad	✓	
Vice Chair Rep. Headland	✓		Rep. Kelsh	✓	
Rep. Hatlestad	✓		Rep. Kilichowski	✓	
Rep. N. Johnson	✓		Rep. Mock	✓	
Rep. Klemin	0		Rep. Zaiser	✓	
Rep. Koppelman	✓				
Rep. Kretschmar	✓				
Rep. Pietsch	✓				

Total (Yes) 12 No 0

Absent 1

Floor Carrier: Rep. Zaiser

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

REPORT OF STANDING COMMITTEE

SB 2143: Political Subdivisions Committee (Rep. Wrangham, Chairman) recommends DO PASS (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). SB 2143 was placed on the Fourteenth order on the calendar.

2009 TESTIMONY

SB 2143

Testimony on SB 2143
Tag Anderson, Director
OMB Risk Management Division
January 9, 2009

#1
Same given
to House
2-26-09.

Mr. Chairman, and members of the Senate Political Subdivisions Committee, my name is Tag Anderson. I am the Director of the Risk Management Division of OMB. I appear today to provide information on Senate Bill 2143.

Senate Bill 2143 adds a new subsection to N.D.C.C. § 14-02.4-19, which governs actions for discrimination under the North Dakota Human Rights Act. This Bill addresses and clarifies three related issues. These issues are application of the exhaustion of administrative remedies doctrine, the question of primary jurisdiction when a governmental entity creates an administrative remedy for which there is a process for judicial review, and the issue of the availability of costs and attorneys fees when a claimant is successful in proving discrimination in an administrative forum. Because these issues are not unique to state employees, the language has been drafted broadly for your consideration.

The first part of the newly added subsection 5 addresses the exhaustion of administrative remedies doctrine which is a firmly established principle of North Dakota law. The exhaustion of administrative remedies doctrine requires an aggrieved party to seek redress at the lowest level before seeking redress in court. The exhaustion requirement has been applied prudentially to private employee/employer disputes by the North Dakota Supreme Court in some cases. Where a state or political subdivision has established an administrative remedy, the Supreme Court has indicated that the doctrine impacts a court's subject matter jurisdiction with the exhaustion of administrative remedies rooted in separation of powers principles. This amendment reinforces and codifies the exhaustion requirement for both private employees with established forums for resolving employment disputes and public employees that are subject to civil service systems with established administrative remedies.

In addition, this amendment addresses the question of primary jurisdiction when a governmental entity has created an administrative remedy for which there is a process for judicial review. The provisions of the Human Rights Act are drafted in general terms

and these provisions provide an administrative remedy through the Department of Labor as well. In order to avoid having inconsistent administrative or judicial decisions, one adjudicative forum must have primary jurisdiction to resolve the dispute. The potential of having two conflicting administrative adjudications, or the potential that a district court would be asked to affirm two conflicting administrative decisions with identical facts simply leads to diminished confidence in administrative and judicial processes. Recognizing that one administrative forum has primary jurisdiction to resolve a dispute avoids this potential problem. For example, for classified state employees, the Human Resource Management Services Division is charged with adopting rules including rules that ensure compliance with nondiscrimination laws that are binding and apply to employees in the classified service and that are enforceable through the statewide appeals mechanism created by N.D.C.C. Ch. 54-44.3.

The language of the first sentence in subsection 5 was patterned after and is substantially similar to language contained in N.D.C.C. § 34-01-20(3), which codified these principles when this statute was amended in 1997 to create a cause of action for employer retaliation.

The second sentence of this new subsection addresses how long a party with no statutorily provided process for judicial review would have to bring an action in district court after exhausting administrative remedies. This provision would give the employee ninety days from the date the internal process was complete or ninety days from the date the Department of Labor issues a determination in those cases in which a charge of discrimination is filed with the Department.

The third sentence addresses how long a party with no statutorily provided process for judicial review would have to request an administrative hearing through the Department of Labor. Consistent with current Department of Labor practice, that request would ordinarily have to be made within twenty days of the Department issuing a determination. The hearing itself could not be held until the internal process was completed.

The fourth sentence provides that a party that is successful in demonstrating discrimination in an administrative forum may apply to the district court for an award of costs and attorneys fees. The ability to apply for an award has been assumed in the

past and this clarifies that a successful claimant, having properly exhausted administrative remedies, should be made whole.

Finally, the last sentence recognizes that the Department of Labor's primary role of seeking voluntary compliance with nondiscrimination laws through the conciliation process remains unchanged. The Department's ability to accept and investigate charges of discrimination and attempt to resolve the matter through the negotiation and settlement is not changed by this amendment.

This concludes my prepared remarks and I would be happy to answer any questions you may have.

Thank you.