

2013 HOUSE GOVERNMENT AND VETERANS AFFAIRS

HB 1118

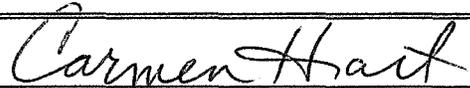
2013 HOUSE STANDING COMMITTEE MINUTES

House Government and Veterans Affairs Committee
Fort Union Room, State Capitol

HB 1118
January 17, 2013
17357

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to officers and employees of the penitentiary and division directors and personnel of the department of corrections and rehabilitation.

Minutes:

You may make reference to "attached testimony."

Chairman Jim Kasper opened the hearing on HB 1118.

Leann Bertsch, Director of the North Dakota Department of Corrections and Rehabilitation, appeared and presented the attached testimony. **Attachment 1.** (Ending 5:20)

Rep. Ben Koppelman In this higher case and under this new statute, in the investigation process what the warden was intending to do, would that be reviewed then by the director before the punishment was given? It seemed like the Supreme Court had a problem with punishing them once and punishing them again. Under this, wouldn't we have to find a way to find a proper punishment and punish them once? Isn't that kind of what they were saying?

Leann Bertsch In a large agency of 800 employees, you have to have some trust. This was a misplaced trust in a renegade warden. You have to have some trust in your supervisors but still have a mechanism to review. I am very confident in my present employees that their disciplinary actions would be good, but in the future you may get someone that is going to violate departmental policy and not give the appropriate discipline. What these changes in this bill allow is for the director of that major division and the director of the department to review that and make sure that the appropriate disciplinary sanction was awarded.

Rep. Ben Koppelman I understand the review process. In this case, the warden said you are going one day without pay. That guy comes back to work two days later, and if this review doesn't happen until sometime later and then the decision that the punishment wasn't consistent with policy and severity and the person should be on leave without pay for six months and you impose that, wouldn't you be doing a double jeopardy type of thing like the court was saying was wrong? Wouldn't you be creating that situation again?

Leann Bertsch This bill actually addresses that. Previous law had allowed state agencies to be the final authority. They need that final authority, because by this very decision if he had actually come back to work and he is no longer our employee, the employee who was sexually harassed would have rights under Title 7 for sexual harassment. The agency is subject to liability for allowing a sexual harassing employee to remain within that department and actually has supervisory authority over her. Yes, if he came back to work, fine. When it was brought to my attention, I would have that full review authority to make sure the appropriate disciplinary action was taken. That is what the court had a problem with, him coming back and then being fully disciplined appropriately. I believe that an agency director and agency head needs that discretion to protect the liability of the state and also the employees that work within that department from this type of conduct.

Rep. Gail Mooney Right now you really have no mechanism in place to completely take care of a situation like this within your own department without it going into the court systems?

Leann Bertsch Internally, yes we can do that because I have a good set of supervisors. If you get a supervisor that is trying to protect an employee and tries to keep that information away from the director of that division or the director of the department, you could have a disciplinary action that is not in compliance with departmental policy and procedure. If I do become aware of, by this very decision I would be foreclosed from reviewing and then imposing the adequate disciplinary action that should have been administered in the first place.

Rep. Marie Strinden I share Rep. Koppelman's concerns that this bill wouldn't protect you if you had to go to the Supreme Court again. I am wondering if there are other state divisions that have a similar review process like this?

Leann Bertsch The changes in the statute would protect the Department of Corrections with the language that is being proposed. Previously it did not because we did not have those protections. This was actually a new holding by the Supreme Court that other states had but North Dakota had never held before is that you could not have two bites at the apple. North Dakota had never taken that position before. I agree with you. This protects the North Dakota Department of Corrections with the changes proposed in this bill. However, other state agencies may very well want to review their authorizing legislation, their authorizing statutory authority. In small agencies this is probably not a big issue. In a large agency it definitely is an issue.

Rep. Marie Strinden To your knowledge this is the first change to statute of this kind of all the state departments?

Leann Bertsch Yes.

Rep. Gail Mooney Has this gone through Legislative Council or some form of counsel to insure that it actually does protect you as you intended it to?

Leann Bertsch We have reviewed this with the attorneys at the Attorney General's Office.

Chairman Jim Kasper Is there a policy or a timeline where the warden, in this case, takes disciplinary action that they notify you so that you are aware of the disciplinary action that is being taken and is it required of all disciplinary action so you are kept in the light? Is there just certain levels of severity where you have to be notified, and if so, what is their timeline?

Leann Bertsch There have been a lot of changes in the department since I became director, but particularly after this incident, the chain of all adverse personnel actions going on in the entire Department of Corrections, I am notified of them all. I follow those closely and so do my HR officers. We have made adequate improvements within the department to assure knowledge of all of those going on.

Chairman Jim Kasper You have new written policy guidelines in the department that spells it out specifically?

Leann Bertsch Yes.

Rep. Gary Paur I cannot see any reference in here to a timeline. Would it be possible for this case to be reviewed five years down the road?

Leann Bertsch Obviously, it would depend on the severity of the action. For example, if a supervisor decided to sweep a theft of property from the agency under the rug and try to hide the disciplinary action from the higher supervisory authority, the agency director, and five years later it was discovered that he wasn't disciplined appropriately for stealing for which he probably should have been fired, I would say, yes, he could still be fired for that theft. In a theft case obviously I am not so concerned about the safety of other employees like sexual harassment. In a case where you have misconduct toward another employee, it is not going to take very long for the disgruntled or the victim of the misconduct to bring it to a higher authority for their review. You are correct there is no time frame within this other than our agency policies and procedures that have those times set forth as far as a grievance by an employee to bring.

Rep. Gary Paur It seems all inclusive. Even robbing a bank has a statute of limitations and this doesn't.

Chairman Jim Kasper You indicated that you think your department is the first department to address this issue in state government. Have you had discussions with any of the other state government department heads about what may be they ought to be looking at?

Leann Bertsch After this decision came out, I know other state agency heads were discussing the ramifications of this. There has been discussion with Human Resource Management Services about perhaps reviewing the administrative rules with regard to employee disciplinary actions in light of this.

Tag Anderson, Director of Risk Management Division of OMB, appeared in support of this bill. Human Resource Management Services Division is specifically looking at addressing the liability ramifications of the higher decision through their administrative rules. That is, in fact, happening. There are some unique attributes that are in the statutes relative to the Department of Corrections where their divisions, the warden, etc. actually

have their authority spelled out in statute. That is why addressing it through statute and not just relying on HRMS rules is appropriate. As Director of Risk Management, we obviously do have significant concerns about the potential liability ramifications of the higher decision and the inability of the agency head to correct inappropriate prior discipline that had been delegated.

Opposition:

Stuart Sovelkoul, Executive Director of the North Dakota Public Employees Association, appeared in opposition. We did not represent Mr. Heier in this situation. This law, while it pertains solely to the Department of Corrections, we represent very few public employees in the Department of Corrections. We fear this is a step down a path that we don't necessarily want to go. I think this legislation really spits in the face of the concept of double jeopardy. It sounds to me that Ms. Bertsch has a plan in place that would stop a similar situation like this from happening in the future. Instead of putting Mr. Heier on administrative leave and investigating the situation, his supervisor suspended him for a day. That is really uncommon. Normally, you get put on administrative leave and there is a fairly thorough investigation that goes into this. It seems to me that in most cases, HR professionals and supervisors in general are very careful when it comes to their discipline. This situation was handled poorly by a supervisor. It seems to me that by passing this legislation, you are setting up an opportunity to basically abolish double jeopardy altogether. It seems that this situation has been remedied already by internal process. I don't think necessarily that we should alter Century Code because of one instance where a supervisor didn't handle an employee properly.

Rep. Marie Strinden Chairman Kasper, is it possible to get the administrative policies that involve this from the Department of Corrections?

Chairman Jim Kasper Sure. Would you be able to provide a copy to us?

Leann Bertsch Absolutely.

Rep. Gail Mooney Is the fear of the NDPEA a sort of overkill situation?

Stuart Sovelkoul The fear of precedent. I would say as an employee under our state policies and procedures that if you are punished or disciplined for whatever reason, once it is done with, it should be done with. In Mr. Heier's case he was punished three times for the same incident. First, he was put on leave without pay for one day. Then he was told we are going to withhold your salary increase for the next year. Then he was told he was going to be terminated all for the same incident. What usually happens in state government is when allegations are made, you are put on administrative leave and they start doing an investigation into what happened. Then you are given a notice to come back to work and maybe you are put on probation, or you are given a letter of pre termination that says we looked into this situation. It looks like we have cause to terminate and that is what we are going to do. All I am saying is that process seems to work. Let's keep that process in place, because what I wouldn't want as an employee is to think that a matter was behind me only to find out that it is not. You have all heard stories that it is impossible to fire public employees. I assure you state employees are fired in North Dakota every

week. If you aren't a good employee, they have really clear ways to get rid of employees who aren't doing their job. I think this is a solution in search of a problem.

Rep. Gail Mooney I am not disagreeing that there isn't protocol in place that insures that employees can or should be dealt with in appropriate ways. Part of what I am seeing here is that it was the direct supervisory capacity that maybe fell short. What keeps them in place?

Stuart Sovelkoul As Ms. Bertsch alluded to she said no, all disciplinary actions. I would assume disciplinary actions of a certain nature. If any kind of allegation of sexual harassment comes through, it needs to cross my desk before we act on it. That seems like a reasonable and prudent approach to this. It sounds like that is what they have already enacted. What we are trying to say is once you have been punished for something, what the Supreme Court of North Dakota said, once you have been punished or disciplined for something, you ought not to be punished for it again.

Rep. Gary Paur In reading the bill, can you see any provision where the review process can't happen two, three, four times?

Stuart Sovelkoul Are you specifically saying could the warden herself or the director herself review it over and over?

Rep. Gary Paur Yes.

Stuart Sovelkoul I wouldn't be able to respond to that. I think Mr. Anderson would be in a better position to explain the intent of what that language specifies.

Rep. Karen Rohr This might be a question for Mr. Anderson. Do you need to be reviewing the chain of command for reporting incidents from a risk management point of view per policy?

Tag Anderson Our concern from Risk Management's perspective is the same concern that Leann expressed which was there are situations where you as an employing agency have an obligation both under state and federal law to take certain types of corrective action. Otherwise, liability will be imposed under Title 7, for example. What do you do when you delegated authority to someone and they have imposed discipline that is not appropriate? If you look at the language that has been drafted here, the authority of Leann to correct that prior discipline is not open ended. It is limited to those situations where it is inconsistent with established agency policies.

Chairman Jim Kasper What lines are you on?

Tag Anderson Lines 18-19. It has to be inconsistent with the expectations of the agency under their policy standards and practice, and there is an obligation to take corrective action. I certainly agree with what Stuart indicated that most agencies do a wonderful job of making sure that when they deal with an employee, they get all the information and they take appropriate corrective action. What this bill is attempting to do is what do we do when that doesn't happen?

Rep. Ben Koppelman Do you believe this language that Stuart had offered us in terms of his concern that there is any threshold of severity? One side of the coin might be tardiness and the other extreme might be sexual harassment. Is there any limitation in this law to say anything in between can't be reevaluated if it is not consistency with policy? Are we only talking about the most severe offenses?

Tag Anderson I will let Leann speak specifically to the legislation. I think the intent here is where we you have and there is an obligation to take corrective action. The authority that the agency head themselves will utilize to correct inappropriate prior discipline is limited to those situations where they have an obligation to that.

Chairman Jim Kasper The term obligation is an open ended term as well. Your obligation is not my obligation in terms of looking at a situation. Could not this issue be addressed in administrative rules and define the level of severity of an offense or a complaint that would have to be reviewed by the head of the agency or in this case, the highest possible level of look at before a final decision is made? Before a decision is made, the employee and the charger has a responsibility and obligation to be in front of someone who is going to be reviewing the situation and then a decision is made. You don't ever get to the first level of decision until all the facts are on the table, all the players have been a part of the process and the highest level in the agency is involved in the decision. Could you not write administrative rule that would do that?

Tag Anderson If I understood your question, there are two points. One, it may be in the eye of the beholder if you will as to whether or not there is an obligation.

Chairman Jim Kasper Forget that point. You could define the level of severity. Say if you have 10 items of inappropriate behavior, you could say Item 6 and above, you must go through a process of getting to the top of the level of the agency with a system in place where the complainer and the complainees are both involved in hearing their side of the story and then a decision is made at the highest level possible in the agency. It is made one time as opposed to a decision is made now and you have a review after the fact. Why do we want to ever to get to after the fact is what I am trying to get to?

Tag Anderson I don't disagree with that. Certainly from my perspective as Director of Risk Management, anytime an agency is dealing with sexual harassment misconduct, for example, we would want the agency head to be involved without question. That didn't happen in the higher decision.

Chairman Jim Kasper I understand. Could you write an administrative rule that all the agencies of state government would have to follow that would implement that type of policy for certain higher level offenses so you are not faced with double or triple jeopardy?

Tag Anderson As the Director of the Risk Management Division, I really don't have authority to tell Laurie Hammeren at HRMS what to do. Whether they could draft a rule that would accomplish that, I don't know.

Chairman Jim Kasper You are telling me that there are certain agencies of state government that OMB would not be able to impose a rule on and the prison system is one of them?

Tag Anderson No. The DOCR does have classified employees who are subject to the HRMS rules. What I am indicating is I haven't thought of that line of reasoning. As I understand what you are saying is instead of allowing the head of the agency to sort of undo the prior discipline and take appropriate discipline by rule simply require that for certain offenses, the agency head has to be involved at the outset. That is something that could certainly be discussed with Ms. Hammeren at HRMS as a possible alternative to this approach. I can't speak for her as to whether or not that would be a good idea or a bad idea. Typically what they do is they solicit the input from all the HRMS professionals that have to live with those rules and try to get their input. I expect that there would be some resistance to that rule based upon certain large agencies having to delegate authority. Certainly DOT will have misconduct issues that arise that are dealt with by their district engineers. I suspect that the director of the agency just really wouldn't have the time to be constantly involved in those types of things. The other issue is that often through the internal policies that are required by the HRMS rules you are supposed to have an internal appeals mechanism to the agency head, and often what will happen is you design your internal policies to sort of insulate the agency head to some extent so they can be an objective person on their internal review.

Rep. Karen Rohr Are you the risk manager for the entire state government system? Are you made aware of instances such as this that could increase the liability to the state?

Tag Anderson We urge agencies to provide us notice when there are incidents that could potentially give rise to liability and we certainly urge them to report any sexual misconduct type claims. We don't get to tell them what to do. We simply try to help facilitate them doing what they should.

Rep. Karen Rohr As a risk manager, I would think that you would have the ability to make a recommendation to HR based on the situations that happen such as this in your role.

Tag Anderson I don't disagree with that. As it relates to the higher case in particular, I would have to go look at our internal records as to whether we had notification or not. I certainly wasn't aware of the severity at least at the initial outset.

Rep. Marie Strinden I have a question for Stuart. I am going to make a statement and you tell me if I am correct or not. As the law stands and assuming that the Department of Corrections has put in good personnel policies, which it seems like they have, if the same situation happened again and the warden did not punish the sexual harasser appropriately, then the sexual harasser would have been punished once, kind of left out for not getting a very hard sentence, but it would be the warden that the director could then punish for not following policy.

Stuart Sovelkoul I am not the right person to answer that question. My guess would be that under the policy that Ms. Bertsch described, it sounded like she said that all serious

disciplinary allegations are crossing her desk now. It would sound to me, according to her testimony, that the process you described couldn't happen without her first signing off on it.

Leann Bertsch The fact of the matter is when I indicated that I am made aware by the HR directors of personnel actions going on, I am still the final appeal authority for certain adverse disciplinary actions. I cannot be making a decision on that because I have to allow in an agency of over 800 people your supervisors to make some of those decisions. The appeal process is by the employee who is receiving the adverse action up to me. I have to insulate in that direction. Even with all the best policies in place, and we have good policies. In fact we had good policies in place before that and required exactly what Mr. Sovelkoul said is that serious misconduct would require an employee to be put on administrative leave and a thorough investigation to take place. When you have a supervisor at fault as we had in this case and said I am doing an investigation and didn't put the person on administrative leave, didn't do the investigation that we typically do, called what he did an investigation, and then quickly administered a one day, it was basically to protect the deputy warden. When it did come to my attention via the victim who was sexually harassed and continues to work in that environment, that foreclosed me from acting. I had an obligation because under the Human Rights Act of North Dakota, she could have easily gone through the Human Rights Act and accused the Department of Corrections for not taking a harsh view of sexual harassment in a hostile work environment. That is what the proposed change allows us to do. We can write all the wonderful policies but if you have a supervisor that decides to violate that, then that would foreclose me if we don't have these changes from actually going out the appropriate punishment from the offending employee. Certainly I would have authority to discipline the offending supervisor but that doesn't allow the agency to now right the wrong and properly discipline the one who actually sexually harassed the employee.

Rep. Vernon Laning Would you say some sort of time limitation would be acceptable to you? Say you were given a month. If you had not reviewed or changed any discipline within that one month, then the employee was essentially scott free. It didn't matter if you murdered your brother or anything else. If you did not take additional disciplinary action within that one month, that is the end of it. From an employee point of view, he doesn't have to be concerned that the next five years he is going to drag this up and hammer him with it. Is that something you could live with?

Leann Bertsch I don't think you would want to put a definitive time thing. I think you could probably put a word within a reasonable time. Depending on the misconduct it would determine on what time frame for that type of review would be reasonable. One month wouldn't be reasonable in this case. This whole process took three years to play out at the Supreme Court. Certainly the whole process for disciplinary actions with the ALJ, reasonable can be based on the circumstances of the situation.

Rep. Gail Mooney What type of disciplinary action happened in this instance?

Leann Bertsch This was a very complex case. The supervisor didn't believe he did anything wrong. He chose to insulate himself by saying he actually believed that the deputy warden and made ___ specifically that he was drunk and all of that. Obviously he was verbally reprimanded and he had letters of reprimand. That does not still help the

agency as far as liability. The action needed to be towards the sexually harassing employee, not the supervisor.

Rep. Gail Mooney As a supervisor, is he still in that role?

Leann Bertsch No.

Rep. Ben Koppelman I have worked with agencies that have approximately over 800 employees and most of their ways of doing things, certain sorts of violations require the sign off of a higher up. I would sure hope that sexual harassment isn't the brand name offense of the day widespread. In these other organizations that do that, they might want to allow their supervisors to be the ones who conduct the investigation and have a finding, yes, but it still requires a stamp from higher up's office to sign off on certain things. Under the proposed legislation I personally think a better oversight and sign off process seems much more equitable to everybody involved including the supervisor who may not want to have his stuff dug up five or seven years later either. Give them some peace of mind that they are supported in their decision rather than having the potential for a double jeopardy type of situation.

Leann Bertsch Your points are well taken and that is exactly how we have it in place. We had it in place before, but when you have a supervisor that totally ignores what the protocol is, you still leave the state agency head without a remedy. The other difference with that is maybe you want to do away with the statute that gives the warden specific authority. Most agencies aren't set up like the Department of Corrections. There are very specific statutory authority delegated to the warden and the statute that is referenced in the bill specifically says the warden has authority to hire and fire. That is why the Department of Corrections specifically needs the statutory change, because the authority of the warden is statutory.

Rep. Ben Koppelman There might be another way. It would be interesting to see if there are any other options we might have as a remedy.

Leann Bertsch This has been well thought out. This thing has started in 2009. Frankly, I think this is the best way to do it within the statutory structure our agency has to operate under. As a taxpayer of North Dakota, I certainly don't want to see a sexual harasser come into a windfall because you had a supervisor that was trying to sweep misconduct under the rug. That could easily happen again no matter how stringent your policies and procedures are if you decide to have a supervisor who is in cahoots with the offending employee.

Rep. Scott Louser Are there any levels of authority between the warden and director?

Leann Bertsch At the time this occurred, there was one level between myself and the warden. That level no longer exists. I wear both hats. I am the director of the Division of Adult Services as well as the director of the Department of Corrections. I didn't choose to fill that position so the wardens report directly to me.

Rep. Marie Strinden I really appreciate that this came out of the Attorney General's Office. Did you have discussion about the double jeopardy problem? Did you bring this idea to

them and they tweaked it or did you bring the problem to them and had a bunch of solutions?

Leann Bertsch When the Attorney General's Office decision came out, they came up with this immediately. The decision that came out was totally unsuspecting. If you would read the ALJ's decision and the District Court affirming that, we should have been on firm ground. This was basically a new decision affecting a lot of HR decisions going forward. I think it is good legislation. I think it would protect the taxpayers of North Dakota. It would protect the workplace for state employees that expect a hostile free, sexual harassment free environment. I think it is probably the best piece of legislation that addresses this from happening again.

Vice Chair Randy Boehning What is the hierarchy? There is you. There is the warden. Who is between?

Leann Bertsch No one is in between me and the warden now. On a structure you would see one layer. That is still me, because I don't have a FTE filling that position. It is me and the wardens of the different facilities.

Vice Chair Randy Boehning There is no deputy director?

Leann Bertsch No.

Chairman Jim Kasper Below the warden, how many people in the Department of Corrections system have the authority to make disciplinary decisions without going to a higher level?

Leann Bertsch In an agency of 800 we have two major divisions--adult and juvenile. We have supervisors throughout. I would think we probably have at least 300 that have supervisory authority.

Chairman Jim Kasper Those 300 have the ability to make a decision on a sexual harassment charge?

Leann Bertsch They would.

Chairman Jim Kasper Are you made aware of those?

Leann Bertsch Yes, I am made aware that there is an ongoing investigation. I would not be involved in the details because I would want an unbiased opinion of the case if the employee chooses to appeal an adverse action. When it gets to my desk, I would have the synopsis of the investigation and then the employee's side of the facts. Then I would determine whether the disposition was fair or not.

Chairman Jim Kasper Under the current system it appears that the serious charges are still potentially coming to you?

Leann Bertsch Not for initial disposition. I would know about them. Certainly the policy is there. People can fire an employee without my input. That has to be able to be allowed to happen in an agency of this size. I could not do my job and be looking at every disciplinary action that is going on within the department.

Chairman Jim Kasper Is the warden involved in being notified of levels below him where serious action is being taken or considered?

Leann Bertsch Within the State Penitentiary Warden Schmalenberger would be apprised of personnel actions happening within that facility. I believe the wardens of any facility would be apprised, but it is up to each warden. Obviously, we have different facilities. The small facility, they probably withhold that up to their level. In a large facility, you probably are going to have a deputy warden or even a captain being able to terminate someone on their shift. I believe the warden actually withholds the termination decisions at her level.

Chairman Jim Kasper Has there been any other incident anywhere like this in your department since 2009?

Leann Bertsch I am not aware of a sexual harassment incident going on within my department since 2009.

Chairman Jim Kasper Has there been any other type of an incident where it was determined after looking at it that it was improperly handled and you had to get involved to make a final decision?

Leann Bertsch After this happened I made it very clear that I need to be apprised and before any action is taken that it would have to come through me before the final disciplinary action is doled out. However, that is because I have a different set of employees. I no longer have Tim Schultze working for me. I have a good warden working for me. That doesn't mean to say in the future that you get someone that decides they are not going to follow the policy of the department and do exactly what happened in the Heier case and then foreclose the director of the department from taking appropriate action to fix the problem that was created.

Rep. Scott Louser Now I am confused. If you have to be involved in that decision, then how can you be insulated and handle the appeal?

Leann Bertsch I am not involved in that decision. I am going to be apprised of it and it would be my review. I have to allow the supervisors to take whatever action they have. The review that comes to me that I have to be insulated is on behalf of the employee that is receiving the adverse disciplinary action which would have been Rob Heier in this case. Of course, he wasn't going to appeal it up to me because he was very happy to get away with a one day suspension.

Rep. Scott Louser Why is the warden no longer the warden?

Leann Bertsch He retired.

There was no other opposition.

Rep. Gary Paur I would like to keep the hearing open if you wouldn't mind.

Chairman Jim Kasper What I am going to do is appoint a subcommittee. There are a lot of pros and cons on this bill, and there is a lot of information that we need to gather. I am going to appoint Vice Chair Randy Boehning to head the subcommittee. Rep. Gail Mooney is going to carry the bill. Rep. Ben Koppelman is the third one. If any of the other committee members want to be involved, you are free to sit in on the hearings that they have, but they will be the final three that will come back with a recommendation after they hear all sides.

The hearing was closed on HB 1118.

2013 HOUSE STANDING COMMITTEE MINUTES

House Government and Veterans Affairs Committee
Fort Union Room, State Capitol

HB 1118
January 24, 2013
17718

Conference Committee

Committee Clerk Signature

Carmen Hart

Explanation or reason for introduction of bill/resolution:

Relating to officers and employees of the penitentiary and division directors and personnel of the Department of Corrections and Rehabilitation

Minutes:

You may make reference to "attached testimony."

Attachments 2, 3, and 4 were handed out to the committee. This information was requested at the hearing.

Chairman Jim Kasper opened the session on HB 1118 giving a quick review of what happened that brought this bill forward.

Vice Chair Randy Boehning handed out an amendment. **Attachment 1**. This would take away the hiring and firing away from the warden and give it to the Department of Corrections director.

Tag Anderson, Director, Risk Management Division of OMB, appeared. Obviously this is a DOCR bill, not an OMB bill. Employment related bills are important to risk management because liability is a tremendous risk to the state of North Dakota. Leann of DOCR was unable to attend, but she was comfortable with what I had come up with and shared with Rep. Boehning as far as the approach. This amendment simply clarifies that it is in fact the director of DOCR that is the appointing authority over all the employees within the institutions that are under her control.

Vice Chair Randy Boehning When we have an issue come up like the Heier case, how would it be handled now versus the way it was handled before?

Tag Anderson Right now the state of the law is that under the current administrative rule structure for classified employees and the supreme court decision in the Heier case, if we had another unfortunate Heier situation, the same thing would happen.

Vice Chair Randy Boehning Walk us through the process.

Tag Anderson There is a chapter in the Century Code that the legislative assembly established many years ago to create what is called the classified service of state

government. Most employees in state government are classified employees and they are subject to the statutes that are contained in that chapter as well as the administrative rules that have been promulgated pursuant to that delegated authority. Instead of a contract of employment that you might see in the private sector, the contract between classified employees and the state is defined by administrative code. Those provisions in administrative code provide that you cannot discipline except for cause. You have to have progressive discipline before you ultimately can terminate an employee except for serious infractions. An employee that is dismissed or demoted for cause has an ability to first internally grieve it within the agency. Once they get past the internal grievance process, an employee that was facing discipline for reasons that the employee didn't feel was for cause would have the ability to have an independent hearing in front of an alj, who would make a decision.

Vice Chair Randy Boehning Now with the classified employee underneath DOCR, that would go through HRMS and they would review the findings and the punishment or dismissal would be levied by the warden, the director, or by HRMS?

Tag Anderson The disciplinary decision is imposed by the agency head. The alj, on behalf of HRMS, simply conducts a contested administrative proceeding to determine whether there was cause for the discipline and whether the other administrative rule provisions were followed. If the alj determines there was not cause or that progressive discipline was not properly followed, they would remand it back to the agency for further disposition.

Rep. Ben Koppelman Assuming this amendment is accepted, is there in administrative rule any procedures that would create a like process that was asked for in the original language creating the ability to reopen hearings and discipline at two or more different instances for the same offense?

Tag Anderson Currently the administrative code contains no provision that would indicate that once a disciplinary decision has been imposed that the agency can essentially reopen and reconsider and impose a more severe disciplinary sanction. The Supreme Court's decision came as a shock. It certainly is my hope as director of risk management that HRMS will pursue an administrative rule change that does address the ability to reopen previously imposed disciplinary matter in narrow circumstances providing all of the due process rights that the employee is entitled to, most importantly, that they have to demonstrate for cause again that there was good cause to reopen it.

Chairman Jim Kasper I am a little bit concerned with what you said. I was under the impression that the Supreme Court said once a ruling is done on a discipline, it is a done deal. Now I hear you say there may be an attempt to rewrite the rules to circumvent that result. In almost all cases when you are in a severe situation, every effort would be made to uncover all the facts before a decision is made. What I heard you say is we still might be in a position of double jeopardy if the rules are changed. Is that what you are implying?

Tag Anderson Double jeopardy is a principle that applies to criminal proceedings, not civil proceedings.

Chairman Jim Kasper In this case it appears there was double jeopardy unless you can come up with a better term that describes the same thing.

Tag Anderson The Supreme Court decision is not one that is a matter of constitutional principle that you cannot reopen a disciplinary action against an employee. The Supreme Court's decision was based upon looking at the law and other jurisdictions without, in my judgment, any textual support in 54-44.3 or administrative code provisions which define the relationship between the state and its employee and held what is called the merger doctrine--the discipline and the misconduct merged in the discipline in that you cannot then reopen the misconduct. Take a sexual harassment investigation, for example. The decision maker initially gets information that indicates the sexual harassment maybe didn't occur or only occurred in a minor fashion. They subsequently get information that it was something that was mild but rather was severe. That decision maker has to have the ability to, in those narrow circumstances, say we have to reopen and reconsider this. Otherwise, the state affectively has the right to check.

Chairman Jim Kasper I understand it is narrow. How many pages are the rules regarding this area we are talking about?

Tag Anderson Dealing with the issue that we are just talking about, there isn't anything right now. The administrative code provisions that sort of define the relationship between the state employees and classified service are in Article 4-07. Getting back to the amendments to HB 1118, the focus of HB 1118 was to deal with the Heier decision, but it really led to the problem with the statues that DOCR has. The statue says the warden is the appointing authority. That creates a problem.

Chairman Jim Kasper Does this make this department sort of like all the other agencies?

Tag Anderson I think it does.

Rep. Bill Amerman The bill was brought forth basically because of the Heier decision. Under this couldn't this still happen, like having the one-day suspension?

Tag Anderson You are exactly right. This bill in its present form does not address the Heier decision. That is the context in which the broader issue of who is the appointing authority arose. When DOCR had their assistant attorney general draft the original HB 1118, he was very much aware that all agencies are aware of the Heier decision and aware that HRMS is looking at whether or not we should address it and if so, how, but he felt there is another problem. Given the history of how DOCR came to be, who is the appointing authority? The statue says it is the warden. The primary issue here was to address that the head of the agency needs to be the appointing authority.

Rep. Scott Louser You had mentioned the first step would be an internal grievance. If this would pass, would the director now be hearing the internal grievance?

Tag Anderson Typically the answer is yes.

Rep. Scott Louser I recall the director telling us that she had to be insulated from an internal grievance in the event there was an appeal and she couldn't possibly be involved in all of those because she had approximately 800 employees. Now we are saying she would be?

Tag Anderson No. The frustration that Leann expressed to you about the Heier decision isn't being addressed in HB 1118 as amended. The frustration she felt with that may be addressed through administrative code changes to address those narrow circumstances in which an agency head needs the ability to reopen a prior disciplinary action. This addresses the other issue which is by statute, she is not the appointing authority and she should be.

Rep. Ben Koppelman According to the Supreme Court document, she was made aware of the circumstance. In August she sends a memo to department supervisors and managers directing staff to review the department sexual harassment policy. Rep. Ben Koppelman read a statement written by her. What this tells me she was aware of the circumstance at the beginning and she didn't press and pry and try to dig further at that point. Later she decides to rewrite the policy. The person who was offended against doesn't go to her superiors. She says nothing until the director fishes for information from her employees some three or four months later about this specific issue. Then she comes forward and the director reopens it and offers more severe punishment. I have no problem with this amendment but we had other amendments that would have dealt with this issue so that this sort of reopening a case couldn't occur.

Tag Anderson I am not going to dispute that there probably are some valid concerns, and those current concerns will be addressed fully through the administrative rules process if they do decide to pursue it.

Rep. Gail Mooney Essentially what this would do is provide to let Leann or the director the necessary authority to be able to oversee the situation and then if there is an issue that arises at any point in time, administrative rules will have been drafted following this that would allow her the ability to pursue proper channels?

Tag Anderson I think so if I understand you. The assistant attorney general for DOCR knew that HRMS was revisiting the issue of whether we want to address the Heier decision through administrative code. They were of the belief, given these unique statutes that still say the warden is the appointing authority, that the administrative rule wouldn't solve the Heier issue in their context.

Rep. Gail Mooney That moves that up to her level which then allows her to be able to have the authority through administrative rules that will be devised to be able to manage any future occurrences.

Tag Anderson That is exactly right. Again, the rules may not happen.

Rep. Gary Paur Basically it would be in her best interest to pursue those rule changes?

Tag Anderson I think it is in every agency head's interest to pursue administrative rules that would allow them to do what they have to do under federal and state law to avoid liability and to avoid putting someone back into the workplace that causes discomfort if not other problems with their victim.

Rep. Gary Paur Why didn't she pursue administrative rule changes instead of changing the Century Code?

Tag Anderson DOCR and other agencies express concern about the Heier decision and the director of HRMS is aware of them and is considering that they may undertake some administrative rule changes that would allow for an agency to reopen and re impose discipline in very narrow, structured circumstances. What Leann and the assistant attorney general were addressing is that they did not feel necessarily that that rule would work for them because the statue says the warden is still the appointing authority and if the warden is the one that made the bad decision to begin with, reopening isn't going to do anything.

Chairman Jim Kasper The light is starting to come on.

Vice Chair Randy Boehning How many states have this administrative rule or statue about this reopening that you are talking about?

Tag Anderson I don't have numbers. When I was the assistant attorney general representing agencies in employee matters including employee dismissals, I certainly did advise them that if there was likely a potential that either an alj or a court would indicate that there is some type of merger doctrine that would be implicit in our rules. Lots of states do have principles that are similar to that. What Leann was expressing is in those narrow circumstances, you are faced with having to reinstate someone that makes the state liable potentially for sexual harassment because under federal law, you have not taken adequate remedial action and forces you to put someone back into a position that is taking another valued employee and making them suffer.

Rep. Vernon Laning Under the amendment that you are proposing, you make appointment and removal of all officers. That authority is given to the director of DOCR. Does that mean she is responsible for all of the hiring? If so, there are 800 employees. She can't be tied up that much.

Tag Anderson No. The statue is not designed or intended to make her responsible for making every hiring decision directly or necessarily making her responsible for every termination decision directly. She has what is called appointing power.

Rep. Vernon Laning She can delegate that to someone?

Tag Anderson Yes.

Chairman Jim Kasper It is your intent to encourage all agency heads to adopt rules or a rule be adopted that all the department heads must abide by in the executive branch that address an issue that may not be addressed quite the way it should right now. Do you have the power to require that to be adopted?

Tag Anderson I don't have that authority as director of risk management. HRMS does have statutory authority to again promulgate administrative rules that affectively define the relationship between the state and its employees. I have urged Laurie Hammeren, director of HRMS, to consider a rule change.

Chairman Jim Kasper This is a hoghouse amendment, 13.8057.01003.

Rep. Ben Koppelman moved to adopt the amendment.

Rep. Gail Mooney seconded the motion.

A roll call vote was taken to adopt the amendment. **ADOPTED, 14-0.**

Rep. Marie Strinden moved a **Do Pass as amended.**

Rep. Vicky Steiner seconded the motion.

A roll call vote was taken and resulted in a **DO PASS AS AMENDED, 14-0.** **Rep. Gail Mooney** is the carrier.

The session was adjourned.

12/1/13
CJ/16

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1118

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 12-47-06 and 54-23.3-05 of the North Dakota Century Code, relating to the appointing authority of the director of the department of corrections and rehabilitation.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 12-47-06 of the North Dakota Century Code is amended and reenacted as follows:

12-47-06. Appointment of officers.

~~The director of the division of adult services with the concurrence of the director of the department of corrections and rehabilitation shall appoint the warden. The warden may be removed by the director of the division of adult services with the approval of the director of the department of corrections and rehabilitation for misconduct, neglect of duty, incompetency, or other proper cause showing an inability or refusal to properly perform the duties of the office. All other officers and employees must be appointed by the warden, subject to the approval of the director of the division of adult services. The warden shall show in the record of any officer or employee who is discharged by the warden the reason therefor~~director of the department of corrections and rehabilitation.

SECTION 2. AMENDMENT. Section 54-23.3-05 of the North Dakota Century Code is amended and reenacted as follows:

54-23.3-05. Appointment and removal of officers.

The director of the department of corrections and rehabilitation with the approval of the governor may appoint a director of the division of juvenile services, a director of the division of adult services, and other division directors and personnel as deemed necessary for the effective and efficient operation of the department. The director of the division of juvenile services, the director of the division of adult services, and other division directors who may be appointed shall meet qualifications as established for the classified service. ~~The division directors may be removed by the director of the department, with the approval of the governor, for misconduct, neglect of duty, incompetency, or other cause showing an inability or refusal to properly perform the duties of their office. All other officers and employees of each division must be appointed and removed by the director of the division, subject to the approval of the director of the department of corrections and rehabilitation. All officers and employees of the department of corrections and rehabilitation are subject to the provisions of the state personnel policies.~~

Renumber accordingly

Date: 1-24-13
 Roll Call Vote #: 1

**2013 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 1118**

House Government and Veterans Affairs Committee

Check here for Conference Committee

Legislative Council Amendment Number 13-8057.01003

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Koppelman Seconded By Mooney

Representatives	Yes	No	Representatives	Yes	No
Chairman Jim Kasper	X		Rep. Bill Amerman	X	
Vice Chairman Randy Boehning	X		Rep. Gail Mooney	X	
Rep. Jason Dockter	X		Rep. Marie Strinden	X	
Rep. Karen Karls	X		Rep. Steven Zaiser	X	
Rep. Ben Koppelman	X				
Rep. Vernon Laning	X				
Rep. Scott Louser	X				
Rep. Gary Paur	X				
Rep. Karen Rohr	X				
Rep. Vicky Steiner	X				

Total (Yes) 17 No 0

Absent _____

Floor Assignment _____

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

Date: 1-24-13
 Roll Call Vote #: 2

**2013 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 1118**

House Government and Veterans Affairs Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Strinden Seconded By Steiner

Representatives	Yes	No	Representatives	Yes	No
Chairman Jim Kasper	X		Rep. Bill Amerman	X	
Vice Chairman Randy Boehning	X		Rep. Gail Mooney	X	
Rep. Jason Dockter	X		Rep. Marie Strinden	X	
Rep. Karen Karls	X		Rep. Steven Zaiser	X	
Rep. Ben Koppelman	X				
Rep. Vernon Laning	X				
Rep. Scott Louser	X				
Rep. Gary Paur	X				
Rep. Karen Rohr	X				
Rep. Vicky Steiner	X				

Total (Yes) 14 No 0

Absent _____

Floor Assignment Mooney

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

REPORT OF STANDING COMMITTEE

HB 1118: Government and Veterans Affairs Committee (Rep. Kasper, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1118 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 12-47-06 and 54-23.3-05 of the North Dakota Century Code, relating to the appointing authority of the director of the department of corrections and rehabilitation.

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SECTION 2. AMENDMENT. Section 54-23.3-05 of the North Dakota Century Code is amended and reenacted as follows:

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Re-number accordingly

2013 SENATE GOVERNMENT AND VETERANS AFFAIRS

HB 1118

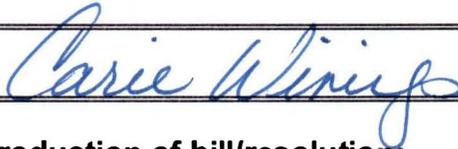
2013 SENATE STANDING COMMITTEE MINUTES

Senate Government and Veterans Affairs Committee
Missouri River Room, State Capitol

HB 1118
03/28/2013
Job Number 20595

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

A BILL for an Act to amend and reenact sections 12-47-06 and 54-23.3-05 of the North Dakota Century Code, relating to the appointing authority of the director of the department of corrections and rehabilitation.

Minutes:

Chairman Dever: Opened the hearing on HB 1118.

Tracy Stein, Human Resources Director, North Dakota Department of Corrections:

See Attachment #1 for testimony in support of the bill.

(2:02)Chairman Dever: How does the Governor feel about this change?

Tracy Stein: No comment.

Chairman Dever: So this transfers authority from the warden to the director of DOCR. Are we going to hear testimony from the DOCR on both sides of this?

Tracy Stein: No Comment.

Senator Nelson: Does this date back to when we had only one warden?

Tracy Stein: We now have 3 wardens.

Senator Nelson: That is what causes the conflicts here?

Tracy Stein: I think a lot of the cause of the conflicts is because she is the ultimate authority for the Department of Corrections so she has the authority to give us direction. So I guess she allows digression with other wardens but she is aware of things going on related to actions with personnel.

Chairman Dever: So we are deleting language that says the division directors may be removed by the director of the department with the approval of the Governor and that is where the Governor's reference is?

Tracy Stein: No Comment.

Chairman Dever: The Governor appoints the director. Now it is called the Department of Corrections, but at one point, wasn't it called the Department of Institutions and there has been a complete restructuring of all of that?

Tracy Stein: Correct.

Vice Chairman Berry: It was mentioned that the director of the Department of Corrections used to be the warden?

Senator Nelson: At one point. I think LeAnn can give us information on the history of that.

Leann Birch, Department of Corrections: The Department of Corrections only came into being in 1989. So that old language was basically before there used to be just the penitentiary as a stand-alone and that reported to the Director of Institutions. Some of that is outdated language. All this bill does it brings it in line with other state agencies where the agency head has the ultimate authority for hiring and firing and disciplinary issues over employees.

Senator Cook: Ron Carlson is in charge at YCC and who does he answer to?

Leann Birch: Yes, his title is the Director of the YCC and he answers to Lisa Bjergaard and she answers to me. We have two main divisions; juvenile and adult. I also wear the title of Director of Division of Adult Services as well.

Chairman Dever: Closed the public hearing on HB 1118.

Senator Nelson: Moved a Do Pass.

Senator Poolman: Seconded.

Senate Government and Veterans Affairs Committee

HB 1118

03/28/2013

Page 3

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

Vice Chairman Berry: Carrier.

Date: 3/28

Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. 1118

Senate Government and Veterans Affairs Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Senator Nelson Seconded By Senator Poolman

Senators	Yes	No	Senator	Yes	No
Chariman Dick Dever	✓		Senator Carolyn Nelson	✓	
Vice Chairman Spencer Berry	✓		Senator Richard Marcellais	✓	
Senator Dwight Cook	✓				
Senator Donald Schaible	✓				
Senator Nicole Poolman	✓				

Total (Yes) 5 No 0

Absent 0

Floor Assignment Berry

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

REPORT OF STANDING COMMITTEE

HB 1118, as engrossed: Government and Veterans Affairs Committee (Sen. Dever, Chairman) recommends DO PASS (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1118 was placed on the Fourteenth order on the calendar.

2013 TESTIMONY

HB 1118

**HOUSE GOVERNMENT AND VETERAN AFFAIRS COMMITTEE
Representative Kasper, Chairman**

**North Dakota Department of Corrections and Rehabilitation
Presenting Testimony in Support of House Bill 1118
Thursday, January 17, 2013**

Good morning Chairman Kasper and members of the Committee. I am Leann Bertsch, Director of the North Dakota Department of Corrections and Rehabilitation ("DOCR"). I am here today to provide testimony and information in support of House Bill 1118 and the proposed amendments to North Dakota Century Code Sections 12-47-06 and 54-23.3-05. The proposed amendments give the Director of the DOCR's Division of Adult Services, and the Director of the DOCR, oversight over disciplinary proceedings conducted by DOCR employees who are acting in a supervisory capacity.

The proposed amendments to these statutes are in response to the North Dakota Supreme Court's decision in August of 2012 in Heier v. ND Department of Corrections and Rehabilitation, 2012 ND 171, 820 N.W.2d 394. In its decision the Supreme Court concluded that Robert Heier, an employee and deputy warden with the Department of Corrections and Rehabilitation, could not be subject to more stringent discipline by the Director for sexual misconduct after receiving lenient discipline from a warden for the same misconduct.

In May 2009 Warden Tim Schuetzle administered a personnel disciplinary disposition on Deputy Warden Robert Heier for conduct committed on April 18, 2009, namely Deputy Warden Heier grabbed the buttocks of a female DOCR employee at a concert held at the Bismarck Civic Center. Deputy Warden Heier then told the female employee that if she told anyone about the incident, she would lose her job. Heier did not initially admit he made that statement when first questioned about the incident by his supervisor, Warden Tim Schuetzle. Shortly after the incident at the concert, the female employee filed a written complaint with her supervisor and after a very limited and superficially conducted internal

investigation the disciplinary action imposed on Deputy Warden Rob Heier was only a one day suspension without pay for his misconduct and threat.

Later, in August 2009 the disciplinary action on Heier was brought to my attention by the employee. She was dissatisfied with the outcome of the investigation and disciplinary action because the disciplinary action granted did not match the severity of Deputy Warden Heier's conduct and threat to her job, especially under the DOCR's "zero tolerance" hostile or threatening work environment policy. I was unaware of Deputy Warden Heier's threat to the employee. Warden Schuetzle had not advised me or the Director of Adult Services of the full details of the employee having been threatened about being fired from her job. At that point, I ordered further investigation into the matter based on the additional information about the threat. After several witnesses, including Deputy Warden Heier, had been interviewed, Deputy Warden Heier admitted making the threat, which he had initially denied making when questioned by Warden Schuetzle in late April 2009. Based on the additional information obtained in the second investigation in late August 2009, the Director of Adult Services initiated the disciplinary process and Deputy Warden Heier was terminated from employment in September 2009.

Deputy Warden Heier appealed his case through the various legal and judicial steps including an administrative hearing before an administrative law judge, who upheld the Deputy Warden's termination from employment, and the Burleigh County District Court, which affirmed the administrative law judge's decision. The case was eventually heard by the Supreme Court, which concluded Heier could not be disciplined again for the same misconduct. The Supreme Court further concluded I delegated my authority to discipline department employees to Warden Schuetzle and Schuetzle was aware of all threats Heier had made when the initial investigation and action was taken by Warden Schuetzle. The Supreme Court reversed the district court's judgment affirming the Administrative Law Judge's decision and held Deputy Warden Heier's employment was improperly terminated and required the DOCR pay Deputy Warden Heier for back wages. His back pay amounted to approximately \$213,000.00. In effect, the DOCR had to pay six figures worth of salary for services the state never received.

The DOCR requests the amendments proposed in HB 1118 because the amendments authorize the Adult Services Director and the Director of the DOCR the necessary latitude to review and reconsider previously imposed personnel disciplinary actions if previous disciplinary action was inconsistent with DOCR policy. Any agency has the responsibility to thoroughly investigate allegations of threats, sexual harassment, or workplace violence and impose the appropriate punishment when the employee's misconduct has been substantiated. In the Heier case the initial investigation was superficial and incomplete and the punishment was imposed was inadequate in relation to the severity of the employee misconduct. The policy of the DOCR is zero tolerance when it comes to sexual harassment and a hostile or threatening work environment. Unfortunately, the Supreme Court did not agree with the DOCR's policy and actions. While this Legislative Assembly cannot overrule the court's decision in Deputy Warden Heier's case, HB 1118 provides a remedy if a similar situation arises in the future.

13.8057.01003
Title.

Prepared by the Legislative Council staff for
Representative Boehning
January 24, 2013

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1118

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact sections 12-47-06 and 54-23.3-05 of the North Dakota Century Code, relating to the appointing authority of the director of the department of corrections and rehabilitation.

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12-47-06. Appointment of officers.

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SECTION 2. AMENDMENT. Section 54-23.3-05 of the North Dakota Century Code is amended and reenacted as follows:

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The director of the department of corrections and rehabilitation with the approval of the governor may appoint a director of the division of juvenile services, a director of the division of adult services, and other division directors and personnel as deemed necessary for the effective and efficient operation of the department. The director of the division of juvenile services, the director of the division of adult services, and other division directors who may be appointed shall meet qualifications as established for the classified service. ~~The division directors may be removed by the director of the department, with the approval of the governor, for misconduct, neglect of duty, incompetency, or other cause showing an inability or refusal to properly perform the duties of their office.~~ All other officers and employees of each division must be appointed and removed by the director of the division, subject to the approval of the director of the department of corrections and rehabilitation. All officers and employees of the department of corrections and rehabilitation are subject to the provisions of the state personnel policies."

Renumber accordingly

<p style="text-align: center;">NORTH DAKOTA</p>  <p style="text-align: center;">DEPARTMENT OF CORRECTIONS AND REHABILITATION</p> <p style="text-align: center;">POLICY AND PROCEDURES</p>		POLICY NUMBER: 3A-1	
		APPENDICES:	
		ACA/PbS RELATED STANDARDS: 2-CO-1C-01	
CHAPTER TITLE: 3. Human Resources	SECTION: A. Personnel	SUBJECT: Employee Handbook	
DATE ISSUED: March 13, 2010	DATE(s) REVISED: May 17, 2011, March 12, 2012		

1. **AUTHORITY:** Authority for these policy and procedures is found in chapter 54-23.3 of the North Dakota Century Code.
2. **DEFINITIONS AND ACRONYMS:**
 - A. DOCR: Department of Corrections and Rehabilitation
 - B. HRMS: Human Resource Management Services
3. **POLICY:** A DOCR Employee Handbook is available to each employee. It shall provide an in-depth description of procedures and practices for all DOCR employees, in accordance with the North Dakota Human Resources Department.
4. **PROCEDURES:**
 - A. At a minimum, the Employee Handbook covers the following:
 1. Organization
 2. Recruitment and promotion
 3. Benefits, holidays, leave, and work hours
 4. Employee evaluation
 5. Resignation, termination, and retirement
 6. Equal employment opportunity provisions
 7. Personnel records
 8. In-service training and staff development
 9. Grievance and appeals procedures
 10. Statutes relating to political activities
 11. Insurance and professional liability requirements

12. Disciplinary procedures
 13. Job descriptions and responsibilities (Refer to HRMS.)
(<http://www.nd.gov/hrms/comp/adddelete.html>)
(<http://www.nd.gov/hrms/comp/index/classes.asp>)
 14. Basis for determining salaries (Refer to HRMS.)
(<http://www.nd.gov/hrms/managers/comp.html>)
 - a. Human resources staff will review the Employee Handbook annually and submit recommend changes to the Director of DOCR.
 - b. The contents of the Employee Handbook must be included in the staff orientation program. New employees shall sign a document acknowledging that they have received the Employee Handbook. The signed acknowledgement will be placed in the employee's personnel files. Revisions to the Employee Handbook will be communicated by e-mail and will be made available through the DOCR intranet.
5. **SIGNATURE:** These policy and procedures become effective when signed by the Director of the Department of Corrections and Rehabilitation.

This copy has been approved by the Director with the original signature on file.

1113
Attachment 3

 <p>NORTH DAKOTA</p> <p>DEPARTMENT OF CORRECTIONS AND REHABILITATION</p> <p>POLICY AND PROCEDURES</p>		POLICY NUMBER: 3A-13
		APPENDICES:
		ACA/PBS RELATED STANDARDS: 2-CO-1C-11 4-ACRS-7E-04
CHAPTER TITLE: 3. Human Resources	SECTION: A. Personnel	SUBJECT: Harassment-Hostile Work Environment-Work Place Threats and Violence
DATE ISSUED: July 16, 2010	DATE(s) REVISED: December 22, 2010, May 10, 2012	

1. **AUTHORITY:** Authority for these policy and procedures is found in chapters 54-23.3, 14-02.4 and 12-47-12 of the North Dakota Century Code.

2. **DEFINITIONS AND ACRONYMS:**

- A. **Employee:** Any person who occupies a position in the classified service, unclassified service or temporary service.
- B. **Harassment:** Improper conduct directed at someone that the person finds offensive and harmful, and that a reasonable person would view as unwelcome or offensive. Types of harassment may include, but is not limited to race, national or ethnic origin, color, religion, age, marital status, family status, or disability.
- C. **Inmate:** An offender housed in a Department of Corrections and Rehabilitation facility or the Dakota Women's Correctional and Rehabilitation Center.
- D. **Juvenile (Definition for Juvenile Community):** A juvenile who is supervised by an officer of the juvenile court or has been adjudicated unruly or delinquent by the juvenile court and placed in the custody of the Division of Juvenile Services.
- E. **Juvenile (Definition for Juvenile Corrections):** A juvenile who is supervised by an officer of the juvenile court or has been adjudicated delinquent and placed in the custody of the Division of Juvenile Services and placed at the North Dakota Youth Correctional Center.
- F. **Offender:** An individual sentenced to the custody of the Department of Corrections and Rehabilitation, individuals transferred to the physical custody of the Department of Corrections and Rehabilitation by another state or the federal government, or persons under the supervision and management of the Department of Corrections and Rehabilitation.
- G. **Person:** An individual, partnership, association, or legal representative.

- H. Sexual Contact: Shall include, but shall not be limited to, the intentional touching either directly or through clothing of the genitalia, anus, groin, breast, inner thighs, or buttocks of any person with the intent to abuse, humiliate, harass, degrade, arouse or gratify the sexual desire of any person.
 - I. Sexual Harassment: May include a range of behaviors and may involve employees or persons of the same or different gender. These behaviors may include, but shall not be limited to, advances or requests for sexual favors, sexual jokes and innuendos, verbal abuse of a sexual nature, leering, massaging, touching, comments about a person's body, sexual prowess, or sexual deficiencies, degrading email, displaying or showing inappropriate sexually suggestive or offensive pictures or objects anywhere in the workplace and other verbal or physical conduct of a sexual nature.
 - J. Sexual Misconduct: Shall include, but not limited to, subjecting another person to sexual contact by persuasion, inducement, enticement or forcible compulsion, subjecting to sexual contact another person who is incapable of giving consent by reason of custodial status; subjecting another person to sexual contact who is incapable of consenting by reason of being physically helpless, physically restrained or mentally incapacitated; and raping, molesting, prostituting or otherwise sexually exploiting another person.
 - K. Work Place Threats and Violence: Any activity by an employee or other person that would cause an employee to feel unsafe due to the threat of physical harm.
 - L. DOCR: Department of Corrections and Rehabilitation
3. **POLICY:** The DOCR will provide an environment free of gender, race, ethnicity, religion, sexual, disability harassment, work place threats and violence. Such harassment may include any activity that creates fear, intimidates, ostracizes, psychologically or physically threatens, embarrasses, ridicules, or in some other way unreasonably over burdens or precludes an employee from reasonably performing their work.
4. **PROCEDURES:**
- A. Harassment:
 - 1. Employees experiencing harassment shall make it clear to the harasser that such behavior is offensive and unwanted. If the employee does not feel comfortable addressing the harassment, they shall contact their human resource representative, or the Director of Professional Standards.
 - a. Harassment will not be tolerated and disciplinary action up to and including discharge from employment can and will be taken against any employee who is found to have engaged in such harassment. An employee found to have made a false accusation may also be subject to disciplinary action.
 - B. Sexual Harassment:
 - 1. Instances of sexual misconduct, contact, or harassment between employees, inmates, offenders and juveniles are prohibited. Sexual

harassment consists of unwelcome sexual advances, requests for favors, and other verbal, non-verbal, or physical conduct or communication of a sexual nature when:

- a. Submission to such conduct is made either explicitly or implicitly as a term or condition of an employee or potential employees' employment.
 - b. Submission to or rejection of such conduct by an employee is used as the basis for employment decisions affecting an employee or potential employee.
 - c. Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile or offensive working environment.
- C. Allegations of sexual contact, sexual harassment, and sexual misconduct will be reported, fully investigated and otherwise be treated in a confidential and serious manner.
1. Employee conduct and attitude toward such allegations will be professional and unbiased. Employees will cooperate with the investigation into all allegations. Investigations are conducted in such a manner to avoid threats, intimidation, or future misconduct.
 2. To minimize the risk of allegations, inmates, offenders and juveniles are prohibited from intentionally making physical contact with employees. Employees are also prohibited from touching inmates, offenders and juveniles except during the performance of job tasks.
 3. Any inmate, offender or juvenile who has knowledge of any incident of sexual contact, sexual harassment, or sexual abuse involving employees, inmates, offenders or juveniles is encouraged to bring it to the attention of their case manager or the supervisor on duty.
 4. As soon as an incident of sexual contact, sexual harassment, or sexual misconduct comes to the attention of an employee, the employee who receives the information shall immediately inform the warden or division director. Failure to do so may result in disciplinary action up to and including dismissal. This notification is to be done in a way to ensure maximum confidentiality.
 5. Upon completion of this notice, the notified supervisor must begin an investigation within 24 hours of receiving notification of the incident.
 6. The accused employee may be placed on administrative leave pending the outcome of the investigation.
 7. Once the initial investigating officer deems there is some evidence to support the allegations, the investigation will be transferred to an investigator.
 8. Upon conclusion of the investigation, the investigating officer will forward the findings and recommendation to the DOCR Director of

Human Resource, division director or warden for the division in which the inappropriate conduct was alleged to have taken place.

9. Upon receipt of the investigative report, the DOCR Director of Human Resource, division director or warden will take appropriate disciplinary action if necessary.

D. Work Place Threats and Violence:

1. The DOCR has a zero tolerance policy against work place threats and violence. Work place threats and violence not only degrades the efficiency of an organization but reduces the quality of life for employees. Zero tolerance empowers potential victims and fosters an environment that allows maximum production.
 - a. Violent acts or threats of violence include any activity by an employee or other person that would cause another employee to feel unsafe due to the threat of physical harm. The violent behavior may take the form of verbal threats or harm to another employee, damage to property, physical aggression, or harassment. Threats of violence include possession or display of a weapon of any type or exhibiting an object in such a manner that it appears to be a weapon or could be used as a weapon.
 - b. Employees who are subject to or become aware of any violent acts or threats of violence shall immediately report the matter to their supervisor or any higher level authority.
 - c. Supervisors who receive a report of violent activity or a threat of violence shall immediately assess the situation to determine the nature of the threat and take the following action.
 - d. When it is apparent that one or more employees may be in immediate physical danger, notify the nearest available security or law enforcement.
 - e. When a report is received, the supervisor will gather all available information and provide a full report of the circumstances to the division director or warden through the chain of command in a timely manner.
 - f. When a report has been investigated and the violator is an employee of the DOCR, the division director or warden shall take appropriate actions which may include participation in the Employee Assistance Program, disciplinary action up to and including termination of employment, and reporting the incident to law enforcement authorities. When the violator is not an employee of the DOCR, the division director or warden shall take appropriate action which may include termination of business relationships, reporting the incident to law enforcement authorities, or other appropriate sanctions.

g. Employees of the DOCR who violate this policy will be subject to disciplinary action, which will include termination of employment (zero tolerance).

h. Division directors will incorporate a work place threats and violence program into their Workforce Safety Risk Management Program.

5. **SIGNATURE:** These policy and procedures become effective when signed by the Director of the Department of Corrections and Rehabilitation.

This copy has been approved by the Director with the original signature on file.

11/15-
Attachment 4

<p style="text-align: center;">NORTH DAKOTA</p>  <p style="text-align: center;">DEPARTMENT OF CORRECTIONS AND REHABILITATION</p> <p style="text-align: center;">POLICY AND PROCEDURES</p>		POLICY NUMBER:
		1A-9
		APPENDICES:
		A. Professional Standards Interview Form B. Witness Acknowledgment Form C. Immunity Grant Advertisement Form "Garrity Warning" D. Request for Professional Standards Investigation
		AGA/PbS RELATED STANDARDS:
		2-CO-1A-05
CHAPTER TITLE:	SECTION:	SUBJECT:
1. Administration and Management	A. General Administration	Professional Standards Investigations
DATE ISSUED:	DATE(s) REVISED:	
August 5, 2010	February 24, 2011, February 1, 2012, August 13, 2012	

1. **AUTHORITY:** Authority for these policy and procedures is found in chapter 54-23.3 of the North Dakota Century Code.

2. **DEFINITIONS AND ACRONYMS:**

- A. **Complaint:** Synonymous with grievance. An allegation of misconduct, violation of law or agency rules, directives, or policies made against any employee of the department.
- B. **Conclusion of Fact:** The final determination about allegations based on investigative activities. Classifications of investigative findings are exonerated, sustained, not sustained, unfounded, and policy failure.
- C. **Confidential Informant:** A person who, under the guidance of the Director of Professional Standards, without the expectation of compensation or other valuable consideration, furnishes information on an occasional basis to assist with investigations.
- D. **Department:** Department of Corrections and Rehabilitation.
- E. **Director of Professional Standards:** A staff member designated by the Director of the Department of Corrections and Rehabilitation and at the direction of the Director conducts and directs a variety of investigations that may involve violations of institutional or departmental rules, regulations, policies, or violations of law on the part of inmates, staff, visitors, contractors and volunteers.
- F. **Director:** The Director of the Department of Corrections and Rehabilitation.
- G. **Dissemination:** The process of spreading the document throughout the organization.

- H. Exonerated: Alleged actions did occur, but were justified, lawful and proper.
 - I. Garrity vs. New Jersey: The United States Supreme Court held that information provided to an employer under the threat of dismissal for non-cooperation with an investigation was not admissible in criminal court to be used against the employee. This legal doctrine may be relevant to a circumstance in which the state is investigating potentially criminal conduct by a member.
 - J. Not Sustained: Insufficient evidence available to prove or dispute allegations.
 - K. Offender: An individual sentenced to the custody of the Department of Corrections and Rehabilitation, individuals transferred to the physical custody of the Department of Corrections and Rehabilitation by another state or the federal government, or persons under the supervision and management of the Department of Corrections and Rehabilitation.
 - L. Policy Failure: Alleged actions occurred and caused harm; however, the actions taken were not inconsistent with department policy.
 - M. Procedures: Series of interrelated steps taken to help implement the policies.
 - N. Professional Standards Investigation: A formal investigation (authorized by the Director of Department of Corrections and Rehabilitation) of alleged inappropriate behavior by a Department of Corrections and Rehabilitation employee, which may be a violation of department rules and regulations concerning misconduct, criminal laws, or moral character standards. Such violations, if sustained in whole or part, could lead to disciplinary action including dismissal, along with possible criminal charges where applicable.
 - O. Special Duty: Any duty assigned by the Director of the Department of Corrections and Rehabilitation to the Director of Professional Standards or other Department of Corrections and Rehabilitation employee, which is outside the normal daily duty requirements.
 - P. Supervisory Inquiry: An informal investigation of an alleged inappropriate behavior of a less-serious nature by any employee, which may be a violation of department rules and regulations. This includes one time or isolated incidents of a member committing misconduct or being rude or discourteous. Such behavior, if sustained, may only result in the employee receiving counseling or remedial training.
 - Q. Sustained: Allegations supported by sufficient evidence to justify a reasonable conclusion that the actions occurred and were violations.
 - R. Unfounded: Allegations are false, did not occur, or not supported by facts.
 - S. DOCR: Department of Corrections and Rehabilitation
3. **POLICY:** The DOCR will have a system in place for the receipt, investigation and determination of complaints received by the agency from any person or employee.
 4. **PROCEDURES:** The supervisor or reporting party shall notify the respective human resource officer, warden, and division director upon knowledge of alleged serious misconduct, inappropriate behavior or policy violations by a DOCR employee. The

human resource officer will collect the information and advise the Director of Human Resources of the circumstances. The Director of Human Resources will advise the Director of the DOCR and a decision will be made by the Director of DOCR on any investigative action that needs to be taken by the Director of Professional Standards.

- A. No outside agencies shall be contacted regarding possible employee misconduct prior to approval by the Director of DOCR.
- B. The Director of Professional Standards shall receive the completed Request for Professional Standards Investigation form prior to conducting the investigation.
- C. The Director of Professional Standards may conduct investigations of department employee, volunteer and contractor misconduct only as instructed by the Director of DOCR.
- D. The office of the Director of Professional Standards will provide for professional standards investigative data gathering and dissemination and special assignments, as determined by the Director of DOCR. When acting in an official capacity processing or investigating complaints, the Director of Professional Standards will be considered a direct representative of the Director of DOCR, acting upon the Director's authority.
- E. When an investigation is conducted by office of the Director of Professional Standards, a Risk Management Online Incident Reporting Form <http://www.nd.gov/risk/>, will be completed on line by the Director of Professional Standards within 24 hours of receiving the completed Request for Professional Standards Investigation form.
- F. The purpose of the office of Professional Standards is to establish a mechanism for the investigation and resolution of complaints of employee misconduct. The office of Professional Standards will ensure the integrity of the department is maintained through a system of internal discipline, where fairness and justice are assured by an objective and impartial investigation and review.
- G. The Director of Professional Standards may assign, collect and disseminate investigative data gathered through telephone monitoring, mail monitoring, confidential informants, surveillance via audio, video and visual, communication with criminal justice agencies, use of associated computer programs, and property and facility searches.
- H. The investigator should take recorded statements from witnesses and complainants, whenever possible. Material witnesses, or witnesses expected to be hostile, should be interviewed in person when possible. Supplemental or corroborative witnesses may be interviewed over the phone.
- I. Special Assignments May Include:
 - 1. Central office security, investigations for other criminal justice agencies and special duty assignments.
- J. Receiving a Complaint:

1. Complaints should be made, in writing, by the complainant. The employee receiving the complaint must document the complaint in detail, including the name, address and phone number of the complainant. If the complainant wishes to remain anonymous, this may be granted during the investigation. Upon completion of the investigation, the investigative report is subject to open records as authorized by North Dakota Century Code 44-04-18. <http://www.legis.nd.gov/cencode/t44c04.pdf> Anonymous complaints are to be given objective consideration as is given any other complaint, based upon the availability of independent or identifying information that could corroborate the allegation. All complaints of employee misconduct shall be accepted from all persons who wish to file a complaint, regardless of the hour or day of the week. At no time should a complainant be told to return at a later time to file his or her report.
2. Any supervisor may receive complaints. If the complainant reveals information, which indicates immediate action is required to prevent danger to life, property or evidence, the supervisor shall contact the division director or warden immediately. The division director or warden will then contact the respective human resource officer as soon as possible. The human resource officer will explain the department's disciplinary procedures to the person making the complaint and should advise the complainant that he or she will be kept informed of the status of the complaint and its ultimate disposition.
3. If the complaint is of such a nature that it is going to be handled as a supervisory inquiry, the following shall take place:
 - a. The supervisor conducting the inquiry shall interview any witnesses and gather other documents relating to the complaint. When the investigation is completed, it shall be written in the professional format as cited in section J of this document, and forwarded to the respective human resource officer.
 - b. During a supervisory inquiry, if more serious employee misconduct is revealed, the supervisor shall stop the inquiry and immediately contact the Director of Human Resources.
 - c. Investigations that disclose alleged criminal activity will be provided by the Director of Human Resources or the Director of Professional Standards to the appropriate prosecutorial authority for their review and assistance.
 - d. Complaints that conclude with a finding of unfounded, exonerated, or not sustained, will be maintained in the office of Professional Standards. The data contained in these files may be used for statistical information, management purposes or training reports.
 - e. Complaints that conclude with a finding of sustained, in total or in part, will become part of the employee's permanent personnel file in addition to being maintained in the office of Professional Standards. The data contained in these files may

be used for statistical information, management purposes or training reports.

- f. Final discipline as a result of professional standards investigations may be at the direction of the Director, which may include consultation with the department's legal and personnel staff.
 - g. The complainant and the affected employee will receive notification of the conclusion of fact and disposition concerning an allegation of misconduct.
- K. The professional standards report format.
- 1. When the investigation is complete, it shall be typed in the professional standards investigation report format. The investigative report usually contains three parts, listed in the following order:
 - a. The background section describes how the complaint was received and the allegations.
 - b. The investigative details are a written synopsis of who was interviewed and what was done to investigate the case.
 - c. The conclusion of the report is what the investigator has determined based on all the witness statements and evidence gathered during the investigation. Conclusions are sustained, not sustained, exonerated, exonerated due to policy failure, exonerated due to training failure, and unfounded.
- L. The findings of fact will be discussed with the Director of DOCR, warden or other appropriate director verbally, during a face to face discussion.
- M. The investigator must verify that the contents of the report are true and accurate based on the investigator's personal knowledge, information, and belief. This may be done by including the following statement at the conclusion of the report and above the signature line. "I declare that I have written and read the foregoing document and that the facts stated in it are true to the best of my knowledge, information, and belief".
- N. Information regarding professional standards investigations is confidential while the investigation is active, and any release of investigative information or materials will only be made at the conclusion of the investigation and in accordance with public records laws.
- O. Due to the confidentiality of ongoing professional standards investigations, DOCR employees interviewed or involved with an investigation will be instructed to refrain from discussing such matters with any person other than the investigator assigned to the case.
- P. Filing the Professional Standards Report:
- 1. Once the professional standards report is completed, the Director of Professional Standards will file and secure the report. This includes the investigation report, all statements, all audio or visual recordings, and

other attachments gathered during the investigation. All professional standards investigations will be secured and stored in a locked cabinet.

Q. Immediate Suspension Pending Investigation and Disposition:

1. The department may suspend the subject employee, pending the outcome of the investigation and subsequent administrative or criminal charges in serious cases of employee misconduct. At least one of the following conditions must be met in order to affect an immediate suspension, pending the investigation.
 - a. The employee is unfit for duty.
 - b. The employee is a hazard to any person, if permitted to remain on the job.
 - c. An immediate suspension is necessary to maintain safety, health, order or effective direction of public services.
 - d. The employee has been formally charged with a crime.
5. **SIGNATURE:** These policy and procedures become effective when signed by the Director of the Department of Corrections and Rehabilitation.

This copy has been approved by the Director with the original signature on file.



NORTH DAKOTA
Department of Corrections
& Rehabilitation

Attachment #1

Central Office

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Bismarck, ND 58502-1898

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Jack Dalrymple, Governor
Leann K. Bertsch, Director

Senate Government Veterans Affairs Committee
Chairman: Dick Dever
House Bill 1118

Mr. Chairman and members of the Committee, I am Tracy Stein, the Human Resources Director for the North Dakota Department of Corrections and Rehabilitation ("DOCR"). I am here today to provide testimony in support of HB 1118 and proposed amendments to North Dakota Century Code Sections 12-47-06 and 54-23.3-05. The proposed amendments would change the appointing authority of personnel from the Warden's and give the Director of the Department of Corrections and Rehabilitation a clear and direct line of authority over the Adult Services Director, Wardens, officers and employees of the department. In addition the Director of the DOCR would have the appointing and removal authority over all officers and employees within the DOCR. That removal process would be subject to the state personnel policy provisions that are in place for positions in classified service.

These changes to the code would bring in line the DOCR Director authority similar to what other state agencies have in place. As 12-47-06 is currently written it is somewhat confusing on the line of authority whereby it gives the Warden appointing authority for officers and employees. Based on that language the Director of the DOCR is not even mentioned as the appointing authority over those personnel.