



PO BOX 201706
Helena, MT 59620-1706
(406) 444-3064
FAX (406) 444-3036

State Administration and Veterans' Affairs Interim Committee

59th Montana Legislature

SENATE MEMBERS

JOSEPH TROPILA--Vice Chair
BILL TASH--Chair
KEITH BALES
CAROLYN SQUIRES

HOUSE MEMBERS

RALPH HEINERT
VERDELL JACKSON
RALPH LENHART
VERONICA SMALL-EASTMAN

COMMITTEE STAFF

DAVE BOHYER, Lead Staff
JOHN MACMASTER, Staff Attorney
FONG HOM, Secretary

MINUTES

Please note: These minutes provide abbreviated information about committee discussion, public testimony, action taken, and other activities. The minutes are accompanied by an audio recording. For each action listed, the minutes indicate the approximate amount of time in hours, minutes, and seconds that has elapsed since the start of the meeting. This time may be used to locate the activity on the audio recording.

An electronic copy of these minutes and the audio recording may be accessed from the Legislative Branch home page at <http://leg.mt.gov>. On the left-side column of the home page, select *Committees*, then *Interim*, and then the appropriate committee.

To view the minutes, locate the meeting date and click on minutes. To hear the audio recording, click on the Real Player icon. (Note: You must have Real Player to listen to the audio recording.)

March 6, 2006

Capitol Building, Room 102
Helena, Montana 59601

COMMITTEE MEMBERS PRESENT

SEN. BILL TASH, Chair
SEN. JOSEPH TROPILA, Vice Chair

SEN. KEITH BALES
SEN. CAROLYN SQUIRES

REP. RALPH HEINERT
REP. VERDELL JACKSON
REP. RALPH LENHART

COMMITTEE MEMBERS ABSENT

REP. VERONICA SMALL-EASTMAN

STAFF PRESENT

DAVE BOHYER, Lead Staff
JOHN MACMASTER, Staff Attorney
FONG HOM, Secretary

Visitors

Visitors' list, [Attachment #1](#)

COMMITTEE ACTION

- Minutes of November 4, 2005; and November 30, 2005 were approved and adopted

PART 1 TAPE 1A

00:00:02 CALL TO ORDER AND ROLL CALL

SEN. TASH called the meeting to order at 8:30 a.m. Secretary took roll visually.

SEN. SQUIRES moved to adopt the minutes of the November 4, 2005, and the November 30, 2005, meetings. MOTION CARRIED UNANIMOUSLY.

00:02:16 COMMISSIONER OF POLITICAL PRACTICES - Gordon Higgins

MR. HIGGINS gave a presentation on electronic filing of campaign finance information and a demonstration of the Commissioner of Political Practices' Campaign Finance Online Filing System (**EXHIBIT 1**).

TAPE 1B

00:48:56 DEPARTMENT OF MILIARY AFFAIRS

ADJ. GENERAL RANDY MOSLEY gave a video and slide presentation on Montana National Guard (**EXHIBIT 2**), discussed the current issues of the National Guard, discussed the budget cuts that are affecting the National Guard, and gave an update on emergency management. He introduced Brigadier General Campbell, Commander of the Air National Guard, Brigadier General Putnam, Commander of the Army National Guard, Command Chief Yurich, and Lt. Swanson.

DAN MCGOWAN, Disaster and Emergency Services Administrator, DMA, gave a report on emergency management in Montana, including:

- distribution of Homeland Security Funds to 63 jurisdictions, including counties and reservations.
- distributing and disseminating the 2005 grant funds of \$11.5M,
- finished a requirement by federal government on enhanced justifications and initiative development of an application for '06 funds.
- the Governor's Emergency Preparedness Summit, May 22 and 23, 2006.
- Disaster and Emergency Services helped the Katrina victims; approximately 500 individuals came to Montana; worked with the Federal Emergency Management Agency to act as a subcontractor for them and made sure Katrina evacuees received housing and assistance from the federal government. In process of closing that program down and transferring that back to the federal government.

QUESTIONS

SEN. SQUIRES asked if those Katrina victims in Montana were better off in receiving benefits than those victims who are in New Orleans. ADJ. GENERAL MOSLEY said yes.

SEN. TROPILA thanked Adj. General Mosley for a job well done.

TAPE 2A

01:30:46

OFFICE OF BUDGET PROGRAM AND PLANNING

DAVID EWER, Director of Office of Budget and Program Planning

- Congratulated the Committee for supporting efforts to re-establish that an interim committee needs to review retirement matters.
- Discussed the dispute of whether the rules adequately or reasonably reflected the intention of the sponsor and her legislation. Administration agreed that the rules then drafted did not meet the intention of the bill. Felt that the rules process used does work.
- Discussed Governor's letter (**EXHIBIT 3**) to Carole Carey, President of the Public Employees' Retirement Board, providing a directive as a result of the investigation in the hiring of a new Executive Director of PERS.
- Discussed his views of the issues dealing with pensions: fiscal issue and ministerial issue. The fiscal issue is the unfunded liability that is large and does not amortize satisfactorily within a 30-year window; the ministerial issue is progress on getting proposed legislation before the SAVA committee for review prior to a legislative session.
- Discussed devising fiscal notes with respect to pensions, put on the front page whether the fiscal note on the proposed legislation has been considered by the SAVA committee.
- Felt that among the agencies in the Executive Branch who deal with retirement, the level of communication and cooperation was unsatisfactory. All committees and boards have agreed to a joint issues meeting, two board members from each board, on April 3, 2006.

SEN. SQUIRES said that there are several issues in the Governor's report that is alarming: 1) the open meeting law, several meetings were held and minutes of those meetings were not produced; 2) time limits created because of non-existence of minutes; and 3) the hiring process used for the Executive Director of PERS. Sen. Squires asked Mr. Ewer if he did not see a positive in placing into statute some road map in the functioning manner of the Board.

SEN. SQUIRES said that she is concerned about state agencies that promulgate

rules that conflict with statute. Sometimes, such as the incident with SB 370 and the Sheriffs and Peace Officers Association, an entity has to place itself in a financial hole to retain legal counsel. Such an entity is forced to commit resources to deal with a public employee who works eight hours a day, and that individual doesn't lose money or benefits. She feels that money is taken away from such an entity to cover legal fees when there is no corresponding cost to the public agency.

SEN. TASH said that he would like the record to show Sen. Squires' concerns and asked that she attend the April 3rd Joint Board Meeting and report back to the Committee on the meeting.

02:13:36

DRAFT LEGISLATION

DAVID NISS, Legal Counsel, LSD, gave an overview on draft legislation.

- LC 9990 (**EXHIBIT 4**) arose from the polling of the Legislators as a result of rules proposed by PERB to implement SB 370.
- LC9991 (**EXHIBIT 5**) deals with issue of what happens if an agency decides not to notify the sponsor of the bill that it is beginning drafting the rules implementing that bill.

REP. LENHART asked if notice sent to the prime sponsor by mail should require a certified signature required or not. MR. NISS said that that is the choice of the Committee to add that type of amendment or that exact amendment.

- LC 9992 (**EXHIBIT 6**) provides that an agency may not enforce, implement, or otherwise treat as effective, an administrative rule until after the effective date of the rule.
- LC 9993 (**EXHIBIT 7**), LC 9994 (**EXHIBIT 8**) and LC 9995 (**EXHIBIT 9**) speaks to situations, such as the situation that arose with SB 370 involving the Sheriffs and Peace Officers Association.
- Discussed 25-10-701, Payment of Costs by Governmental Entities (**EXHIBIT 10**). Mr. Niss discussed the federal precedent for LC 9993, 9994, and 9995, i.e., the federal Equal Access to Justice Law.

TAPE 2B

SEN. TASH asked if and when there is any recovery, where would it come from. MR. NISS said that in bill draft 9995, payment would be out of the agency's

budget. In 9993 and 9994, it would come from other appropriations from the state. Bill drafts 9993 and 9994 are intended to make the party whole, whereas 9995 is intended to make the party whole, and to penalize the offending agency.

REP. JACKSON asked Mr. Niss to explain "knowing or willful" that is found in all bill drafts. MR. NISS said those two words are various degrees of the word "intentional" and written for the purposes of criminal law. REP. JACKSON asked if they would have to prove that they knew that they were breaking the law. MR. NISS said that under one of them you would but not the other. He said that you would have to prove that they knew what they were doing at the time and that it was not a negligent act.

MR. NISS said that under all three drafts, the purpose is to reimburse the contesting party after an expense has been made. It is not the intent of the drafts to give a grant to a party, and it is not to grant unlimited sums of money. In two of the bills, there is a cap of \$10,000 on the amount that could be paid pursuant to the settlement procedure by the Department of Administration. There will be a fiscal note on all three bills.

Under the Administrative Procedure Act, a state agency cannot adopt any rule it wants. A rule has to be authorized by law; it has to correctly implement the law; and it has to be reasonably necessary to implement the provisions of the statute. That reasonable necessity has to be shown in the notice of proposed rulemaking, in the comments before the agency, written or oral, and in the notice of adoption.

Secondly, Mr. Niss would add a statement to the effect that a payment by the Department of Administration is not any kind of admission of guilt for the purposes of subsequent court proceedings.

Thirdly, he would probably require and not allow rules to be adopted by the Department of Administration. As the three bills are drafted, the adoption of rules to implement any of these three bills is discretionary with D of A and he would make it mandatory.

Four, there are differences in how the draft bills use the terms that Rep. Jackson mentioned, willfully or knowingly, that needs to be fine tuned in all three drafts.

DISCUSSION

JOHN MACMASTER said that he agrees with fine tuning the use of the language. He said that if you look at the definition of knowingly or purposely in

criminal law, purposely includes knowingly. If you did something purposely, you did it knowingly. If you did knowingly, you didn't necessarily do it purposely. He would substitute in all three bills the word "intentionally".

MR. NISS said the reason why that came up is because John and he did not talk about the bills. As John knows, there is a definition for the purposes of civil law, section 1-1-204, of knowingly and willfully and that is why you don't see a definition taken from Title 45 in the criminal code. For the purposes of civil law, the definition in Title 1 applies to all of the Montana Code Annotated.

REP. JACKSON asked Mr. Niss: If one uses the word "intentional", what would you use as the test for intentional? Would it be the tort negligence test? MR. NISS said definitely not, it is not negligence standards. REP. JACKSON asked how would one determine whether it is intentional. MR. NISS said that knowingly denotes only a knowledge that facts exists which bring the act or omission within the provisions of this code, it does not require any knowledge of the unlawfulness of the act or the admission.

PUBLIC COMMENT

REP. LARRY JENT, sponsor of HJR 42, suggested that the Committee look at 2-4-303, MCA, that has to do with emergency rules. He said that emergency rules are supposed to be adopted very sparingly because of the constitutionally required notice and so forth. There is a need for the making of emergency rules and a need to define reasonable necessity for a rule. He talked about fee-shifting bills, which switch attorneys fees over to the person that lost. He doesn't think you need an "intention" sentence. Instead, you need to say that they were "substantially unjustified" and then you need to define reasonable and necessity. He said that the bills get more complex when you start going into Title 17 about the appropriation. He said you may want a fee cap on an hourly rate rather than a flat fee cap. You can also cap the total amount but you should cap the hourly rate so you are not getting a bill that charges a high hourly rate.

SEN. BALES said that he agrees with Rep. Jent's suggestion for "substantially unjustified". His question has to deal with an agency that proposes a rule and there are several entities that have said that they disagreed with what an agency is doing. He asked if each and every one of those entities receive compensation going before that board and telling them that their proposed rules are against current law and how will that work. REP. JENT said that a quick answer is no. The person that receives compensation is the one who actually files the action and has to pay the lawyer. That is to keep citizens from having to file court actions and pay lawyers when the government does something it shouldn't do to

begin with. That's the rationale behind this particular and all fee shifting statutes.

DICK MOTTA, Philipsburg, said that what he has to say parallels the rules for open meetings. He discussed a recent decision by Justice Cotter on the open meeting laws regarding the school board in Darby, Montana, not giving Mrs. Fleemore the opportunity to meet and participate in the meeting. Mr. Motta distributed a document defining sections 2-3-213 and 2-3-221, MCA.

(EXHIBIT 11).

TAPE 3A

Mr. Motta said that under the Constitution, we have the right to bring cases before the court, know and participate in what these committees and local governments are doing. He said that he would like his proposed legislation to be heard.

JIM CASHELL, Sheriff of Gallatin County, said that he thinks the process worked. In regards to 9990, 9991 and 9992, they look at those as housekeeping bills and as an attempt by Sen. Squires to clean the process up and make it work better. In regards to 9993, 9994, and 9995, the Sheriffs Association spent \$7,600 on legal bills. They were the lead on the effort to correct the administrative rules implementing SB 370.

MARK CADWALDER, speaking for himself, said that there may be a few problems in some of the proposed bills. In 9993 and 9994, providing for fee shifting upon application to the Department of Administration, there may be a due process problem in that once the Department of Administration makes the decision, it reports to say there is no appeal of that decision, it cannot go to court. Regarding LC9991, which requires the date, time and manner of the notification, he said that he understands the date, understands the manner, but is not sure about time. Did we put this out in the morning mail to go out in the afternoon mail? Was it at 3:34 that it was delivered to the post office? Is that the level of detail that the Committee is looking for?

KATHY MCGOWAN, Smith and McGowan, said that they represent a number of associations that are "long on problems and short on money." She said that she agrees with Mr. Ewer that the process did work but it worked at great expense, not only the monetary expense, but the expense of a lot of individuals' time and

energy over a period of months. She said that we need to have a balance and to do things so that we can make sure that the process works a little bit better.

SEN. SQUIRES moved to take under consideration to postpone 9993, 9994,

9995 to the next meeting and take action on 9991 and 9992.

SEN. SQUIRES moved to postpone LC 9993, LC 9994 and LC 9995, and with the information that Mr. Niss has, that he compile one bill draft.

MR. NISS said that he would like clarification on what is the source of funding for the reimbursement of fees.

SEN. SQUIRES asked Mr. Niss if there is a group in place in the Department of Administration that has an amount of money to pay civil penalties, and if there is, can we tie it to that and have it come out right. MR. NISS said that under all three bills, the Department of Administration adjudicates the claim. SEN. SQUIRES asked if there was not an agency after that that pays money for errs of the state. MR. NISS said that under all three bills, the claim is adjudicated by the Department of Administration. The difference is the source of the money, so the distinction can't be made on the basis of which agency adjudicates the claim.

SEN. BALES asked Mr. Niss what the legalities are looking at all the different departments, as to how you implement it if we take it out of a department's budget. MR. NISS said that that depends on the question if the limitations on the funds as they were appropriated to the agency, under state law; i.e., general fund appropriations, we don't have a problem with that because any language in an appropriation bill that conflicts with statute, such as 93, 94, 95 would be void; the statute supersedes and the Attorney General has been clear on that. As to other money, we may well have a problem because federal funds are often paid pursuant to a plan of some kind, if not federal statute. The money is appropriated by the United States pursuant to a plan approved and adopted by the agency. There would be difficulty in taking federal money for this purpose because of the limitations contained either in the federal statute or plan adopted by the agency, but as to general fund money, at this point, I do not see any difficulty with that and 9995 reflects that.

SEN. TASH said that the Committee needs to consider the motion which is to postpone action on 9993, 9994 and 9995. **MOTION CARRIED UNANIMOUSLY.**

SEN. SQUIRES moved for a do pass on 9990. SEN. BALES asked Rep. Jent what bills he saw in conflict with the emergency rules, without objection. SEN. SQUIRES said that she objected in that this has nothing to do with emergency rules. This bill has to do with polling process. **MOTION FAILED. Rep. Jackson, Rep. Heinert, Sen. Bales, Sen. Tash voted no.**

LC 9991

SEN. SQUIRES proposed a do pass on LC 9991 and then have discussion regarding certified mail. She said she would then bring up the issue about the agencies talking about it being cost prohibitive.

MR. NISS discussed LC 9991. He said that the existing law, with or without the language proposed in subsection 2(d), applies only to initial rules implementing legislation. Discussion on type of mailing, return receipt requested and email. He said it is possible to put in bill in detail or substitute certified return receipt requested as the only type of hard copy paper notification that would be accepted.

REP. JACKSON asked why you would need the time of day. It is getting complicated. Could say by certified letter or email but to record the day, time and manner gets involved. If you take it to post office and it is stuck in the box, chances are it's going to be postmarked the next day and I don't think the agency would know what the postmark was going to be.

SEN. BALES asked if there had been a bill passed in 2001 that had effective date on part of it and an effective date on the other that required rulemaking was not until July of last year. Under a situation like that there were no rules required upon initial part of it but there were rules on the second part, would that also fall underneath this in that the initial rules were not in that first year but that they were in subsequent year. MR. NISS said that his question is whether the time at which rules are proposed or begun to be written by an agency following the passage of the legislation makes any difference, and the answer to that is no.

REP. LENHART said he is concerned that people living in rural areas may not get to the post office and get that certified mail signed. MR. NISS said that the reason for the bill is to make sure that that notice is given. In discussing this issue with the Committee at the November 4 meeting, this was the only way that we came up with to ensure that that notice would be given. REP. LENHART said that Mr. Niss threw email into the mix and that takes away his concern on whether or not it should be certified mail.

SEN. BALES moved to strike time of notice out in amended language. MR. NISS said that takes out time in 6th line, takes out "and time" in 8th line, time in the 9th line, and we still have Rep. Jackson's point about whether you will know the postmark date.

REP. JACKSON said to amend to say "Notify primary sponsor by mail and/or email if the Legislative bill that enacted this section" and skip everything and say "if the primary sponsor wasn't notified of filing of notice so on and so on" and put emphasis on second part because it's going to be easy to notify and the important thing is they know the consequence of goofing up on that step and the consequence is that nothing is going to happen to that rule.

SEN. BALES said there is a motion on the floor and a motion to amend the motion and delete "time" out of it. SEN. TASH said the motion before us is to eliminate the reference to time in the bill. MOTION CARRIED UNANIMOUSLY.

SEN. SQUIRES MOVED TO PASS LC 9991 AS AMENDED. MOTION CARRIED UNANIMOUSLY.

00:31:34

LC 9992

SEN. SQUIRES moved for a do pass on LC 9992. REP. JACKSON asked if a rule could be used prior to the time it is adopted. JOHN MACMASTERS said that the rule does not become law until it is adopted and that law, once it's adopted, can't be imposed on the people until the adopted rule takes effect. **MOTION CARRIED with Sen. Bales, Rep. Jackson, and Sen. Tash opposing.**

00:40:18

LC 9990

SEN. SQUIRES asked Sen. Bales that if she lets Rep. Jent talk, would he reconsider LC9990. SEN. TASH said that if there is no objection, we will hear continued presentation. SEN. BALES said that we have other issues to discuss, let's see how we get along on them and then look at it again.

TAPE 4A

00:41:49

STATUS REPORT FROM MONTANA PUBLIC EMPLOYEES RETIREMENT BOARD

Melanie Symons, Legal Counsel, Public Employees Retirement Board, discussed the lawsuit brought by the governor against the PERB. She passed out a summary of the lawsuit (**EXHIBIT 12**), the screening process (**EXHIBIT 13**), the Job Profile (**EXHIBIT 14**), and the timeline for the interview process (**EXHIBIT 15**).

00:59:08

QUESTIONS

SEN. SQUIRES asked if any of these new pieces of paper are within statutes or will these be a method that the PERB uses for each new executive director. MS.

SYMONS said that this process is a process that is being used throughout state government and is very consistent with rules that exist and are being created right now by the Department of Administration. She said that the PERB does have a policy regarding hiring of the Executive Director and both legal counsel and that policy has been followed on both instances of this process. SEN. SQUIRES asked if the policy included the new material. MS. SYMONS said that she would hesitate to put that type of detail in formal policy because you don't know in the future what is going to come about, that you might want to change something, and then if you change your rules in order to do a new process, that doesn't look good. SEN. SQUIRES asked why they are not putting this in and that she is sure the Executive Director is not going to be in a bargaining unit and that MPERA staff are in a bargaining union. MS. SYMONS said that some of their staff is in a bargaining union, but the management staff is not in a union, nor is the Executive Director. She said that they have policy manuals and job profiles.

SEN. TASH said that he did not know if these comments are relevant to the charge of this committee. It is something that they have explained; to most of the committee's satisfaction that they are attempting to do whatever needs done to rectify whatever wasn't done before that should have been done. In the meantime, it is probably in everybody's best interest to be constructive about what we discuss in this committee.

01:06:14

RECAP OF ISSUES PERTAINING TO SIX BILLS REGARDING THE IMPROVEMENT OF RESPONSIVENESS OF PERB PROCESS AND ACTIONS

DAVID NISS said that each of the next six drafts has a preamble explaining the basis for the bill. He said that he will comment on additional basis. He said that some bill drafts are responsive to the discussion made by Mr. Ewer. The six bills are prospective and will have no effect on the advertising or the hiring of the Executive Director of the Public Employees Retirement Administration in the process that is now going on. They apply only to persons hired after the effective date of the legislation.

01:10:45

LC 9997, qualifications of the public employees retirement board executive director (**EXHIBIT 16**). MR. NISS asked to pass on discussing LC 9997 while copies are being made.

01:15:50

LC 9998, the executive director and other staff of the public employees' retirement board must be hired by the Department of Administration (**EXHIBIT 17**).

SEN. BALES asked if the board of TRS hire their executive director or are they hired by the Department of Administration. MR. NISS said that he didn't look at that specifically but his recollection is that they are one of the 12 exceptions. SEN. BALES asked if before the 1997 Session, was the director of PERS at a cabinet level position or was it something less. MR. BOHYER said that it was a division within the Department of Administration.

01:23:33

MR. BOHYER said that the discussion on LC 9997 can proceed, but the Committee should not take action on it because a different bill was posted and the Committee has not had time to look it over.

MR. NISS said that the language from section 1 amending 19-2404(2) is taken from the PERB advertisement for their executive director position, which they are now filling, with two exceptions. At the bottom of 2(a), you see an "or" there. In the Board's advertisement, it requires an "and" and the meaning is that they require both education and experience, rather than one or the other. In the first line of 2(b), the advertisement used by the Board requires 7 years and not 2 or more years of administrative experience. With those two differences, this bill would put into statute the requirements that the Board is using in its advertisement.

SEN. TASH asked if this bill draft parallels what the PERB now has as its criteria for credentials. MR. NISS said yes, except for the two exceptions.

SEN. BALES asked if the qualifications for various positions, how often are they specifically spelled out in statute like this. MR. NISS said that he is not aware of another executive branch agency for which this is done. He does know that in local government position requirements in statute particularly for county attorney positions, law enforcement positions, have quite a bit of detail prescribed in statute. But he is not aware of another executive branch agency that does. If committee members wanted to compare this language to the advertisement being used by the Board, they should turn to the report that was done by Mr. Ewer and the Governor's chief legal counsel. Those requirements are on the last page, Exhibit A. But it looks like to him that those are not exactly what is prescribed for the applicants on the PERB's website.

SEN. SQUIRES said that Ms. Symons told her that this was the job profile. It has comments which she referred to on the back that they set up for the executive director, but on the website, there is another criteria for becoming executive director? MR. NISS said that it seemed to him, for example, that the number of years of job related work experience is phrased differently than what is on the

website. The website uses the language actually copied in the bill which was college degree or equivalent educational background or training, business public administration, etc., and it seemed to him that on the website, it requires 7 or more years job related experience, and yet the document handed out, it appears to require 5 or more, not 7 or more.

TAPE 4B

SEN. SQUIRES asked Ms. Symons which ones are they abiding by, the one on the internet or the one we have a copy of. MS. SYMONS said that the job announcement passed out today is the job announcement that is on their website as far as the executive hiring process goes. She said that the job announcement on the internet says the ideal candidate will have a minimum of 7 years of progressively responsible experience and personnel management, fiscal management, program planning evaluation and budgeting.

MS. SYMONS discovered that the copy which Sen. Squires had is an old version. MR. NISS said that the change he made in the proposed legislation was at the end of 2(a) in the board stated requirements is an "and" and in (b), the number he used was two or more years, and their current requirement is 7 or more years. SEN. TASH said that decisions will be made later in regards to 9997 and the committee will have all the information that is relevant.

01:35:23 LC 9999, require senate confirmation of members of PERB (**EXHIBIT 18**). Applicability provision at the end of the bill would make this change to require senate confirmation of the gubernatorial appointments to that board that is prospective only and would not affect any of the incumbents in their current term.

01:44:22 LC 10001, extend time of filing petition with district court to set aside an agency decision made in violation of the public participation in government statutes in Title 2, chapter 3, parts 1 and 2 (**EXHIBIT 19**). There are two sets of statutes, one dealing with open meetings and the other dealing with notice and opportunity to be heard. Each of those different parts have their own enforcement provision. That enforcement provision says that a civil action to enforce those requirements must be brought within 30 days of the violation by an agency.

02:07:19 LC 10002, deleting language qualifying the right of an individual to bring a civil action to enforce the requirements of public participation in government statutes in Title 2, chapter 3, part 1 (**EXHIBIT 20**). MR. NISS passed out a copy of Chapter 2-3-101, MCA, (**EXHIBIT 21**) to better explain LC 10002. He talked about Rule of Civil Procedure 17 (**EXHIBIT 22**).

SEN. BALES said that what Mr. Niss is talking about in 10002, is that the striking

of any person's whose rights have been prejudiced that will go back to a default of 17(a). Sen. Bales said that he thought that the courts can change this rule at any time and we as legislative body can put into law what we expect courts to enforce and that by taking that off, we are to some extent abdicating our responsibility to say that it is a person with an interest and we are leaving the court to decide who has standing or who our party in interest is. He asked if is it defined somewhere other than in statute what a party in interest is? MR. NISS said not any other place that he knows of. SEN. BALES said that maybe we should look at putting something in statute that defines it (party in interest).

02:18:26 LC 10003, allowing a district court to award costs and reasonable attorney fees to a plaintiff who prevails in a civil action brought to enforce the plaintiffs' rights under the public participation in government statutes (**EXHIBIT 23**). MR. NISS said that the intention is to clear up an anomaly in the statutes. When a previous legislature enacted one of the enforcement statutes, 2-3-221, MCA, that is contained within (**EXHIBIT 21**), they said that a citizen bringing suit to enforce Article II, section 9, fees and costs could be awarded. Since then, the Supreme Court has held that the Legislature didn't need to do that, that Article II, section 9 is self-implementing.

02:26:20 **PUBLIC COMMENT ON DRAFT LEGISLATION**

REP. LARRY JENT said that regarding LC 9998, the governor is ultimately the chief financial and executive officer of the state of Montana, and the governor is the appropriate person, both to be responsible and accountable for retirement actions. He supported the next bill because it is appropriate that the governor appoint those people, but that it be done with the advice and consent of the senate. With regard to LC 10001, it says the clock starts running when a person has to do something in court and says that if the day you should have known something about what you are complaining about and is consistent with Mr. Niss' explanation with all the other tolling statutes.

With regard to 10002, this bill's purpose is to have a legislature pronouncing who has standing to gripe about an administrative decision, but they really didn't find out about in time. He asked if Rule 17(a) is the rule on real party in interest. He suggested that the concept of real party in interest is related to but equal to standing. The real question here is who has the right to complain about an agency action that is not taken in accordance with the law?

TAPE 5A

02:33:12 BETTY LOU KASTAN, Brockway, Vice Chair of PERB and Chair of the PERB Hiring Subcommittee for the director, and a member of Legislative Subcommittee, commented on the hiring process of the Executive Director of MPERA and what the Board should have been allowed to do. She also spoke on

the proposed legislation. She said that she did not support this type of legislation.

02:47:23 KELLY JENKINS, Legal Counsel, PERB, passed out the a document regarding the Retirement Board hiring authority (**EXHIBIT 24**). He said that on the second page of 9997, the second whereas is a complete misstatement of the law or any factual reality. He said that it is not the legislature's responsibility to oversee the fiduciary operations of PERB on the retirement administration staff to insure that those fiduciary obligations are fulfilled.

02:50:29 MELANIE SYMONS, Attorney for PERB and the attorney who speaks to Ms. Kastan's employment bills, commented on 10002 and 10003 and open meetings, Rule 17(a).

02:53:53 FRANK COLE commented on his case.

03:02:32 SEN. BALES said that the Committee should take action on items brought up.

SEN. TASH said this Committee will vote by roll call vote. MR. BOHYER said that if the committee takes action as a do pass motion and the motion carries, the draft bill will go forward as an LC, put it into the system, and come out by request of the State Administration and Veterans' Affairs Interim Committee. If a motion to do pass fails, then the bill sits there just as it would in committee with no action taken on it, and wouldn't move anywhere until there is a positive motion taken on it. These are not bills, they are discussion items. Nothing dies in interim committees until there are no more meetings.

VOTE BY THE COMMITTEE ON PROPOSED DRAFT LEGISLATION

03:09:52 LC 9998, the executive director and other staff of the public employees' retirement board must be hired by the department of administration
SEN. SQUIRES moved for a do pass on LC 9998. SEN. BALES speaks in opposition to bill. Roll call vote: Sen. Squires and Rep. Lenhart voted yes; Sen. Bales, Sen. Tropila, Sen. Tash, Rep. Heinert, and Rep. Jackson voted no. Motion failed.

TAPE 5B

03:16:10 LC 9999, require senate confirmation of members of PERB
SEN. SQUIRES moved for a do pass. Roll call vote: Sen. Bales, Sen. Squires, Sen. Tropila, Sen. Tash and Rep. Lenhart voted yes; Rep. Heinert and Rep. Jackson voted no. Motion carried.

- 03:22:30 LC 10001, extend time of filing petition with district court to set aside an agency decision made in violation of the public participation in government statutes in Title 2, chapter 3, parts 1 and 2
SEN. SQUIRES moved for a do pass. SEN. TASH asked if Sen. Squires would move to change and strike reasonably. SEN. SQUIRES said that she would not change reasonably. Roll call vote: Sen. Squires, Sen. Tash, Sen. Tropila, and Rep. Lenhart voted yes; Sen. Bales, Rep. Heinert and Rep. Jackson voted no. Motion carried.
- 03:30:58 LC 10002, deleting language qualifying the right of an individual to bring a civil action to enforce the requirements of public participation in government statutes in Title 2, chapter 3, part 1
SEN. SQUIRES moved for a do pass. Sen. Squires said that she was willing to postpone this until the next meeting and discuss Rule 17(a). SEN. SQUIRES withdrew her motion and requested that LC 10002 be placed on the agenda for the next meeting.
- 03:36:08 DAVE BOHYER, regarding HJR 42, said that in interest of time, if it was the decision of the Committee, members can talk to him about HJR 42 individually or at a future committee meeting, and didn't see a need to present his report on HJR 42 at this time.
- PUBLIC COMMENT**
- 03:37:42 REP. LARRY JENT said that as the sponsor of HJR 42 and one who chaired the proceedings, there were directions to the study committee and those directions were uniform among the members of the committee to take a closer look at the investment of the Montana Public Retirement System's assets. He said that the committee is here to ask, is existing public policy appropriate?
- SEN. TASH asked what Rep. Jent's feelings are about the state having its own actuary. REP. JENT said that is something that needs to be studied and looked into, study the costs of our own actuary.
- 03:42:17 REP. GARY MCLAREN, House District 89, said the he seconds what Rep. Jent said. He was on the standing committee and one of their major concerns is found on page 14, items 2 through 5 of Mr. Bohyer's report. He asked that the Committee look at those items.
- 03:42:30 TOM SCHNEIDER, Montana Public Employees Association, said that many organizations such as his do not consider potential legislation by April 14. He

said that they represent people who are in the Highway Patrol system, the Fish and Game system, the Sheriff system, the Police Officer system, and PERS, and there is no way that they can say by April 14 whether there was going to be any legislation on any retirement systems proposed by our organization. That is done at the conventions.

OTHER COMMITTEE BUSINESS

03:44:48

MR. BOHYER discussed the memo regarding solicitation for proposals affecting public employee retirement plans (**EXHIBIT 25**).

MR. BOHYER discussed dates of when to review proposed legislation. The attorneys start drafting after Labor Day; Research staff finishes up interim committee work, including drafting final reports, around mid-October and starts drafting around Election Day.

MR. SCHNEIDER said that most organizations have developed a legislative program by June 15. In their case, they would have available by May 15.

MR. BOHYER had a discussion regarding the timeline for discussion of proposed legislation after this meeting: May 12 is scheduled for next meeting; June 22 and 23 are scheduled as a two-day meeting to review agency legislation that comes through executive planning process; September 11 is reserved but no agenda. Couple options: try to combine stakeholder legislation and agency legislation at the June meeting; if carryover from June meeting have that at September meeting; jam another meeting in sometime during the summer.

03:56:03

REP. HEINERT moved to authorize Dave Bohyer to send out a letter with questions attached after March 23 to all current legislators and candidates who are not current legislators so that current stakeholders have as much notice as possible. MOTION carried unanimously.

MR. BOHYER discussed the adoption of HB 2 in the Special Session and that this Committee needs criteria upon which they are going to be able to rely when they weigh the relative benefits and detractions of any of the retirement proposals. He suggested another meeting between now and May 12 meeting to look at and adopt some principles and guidelines for the state retirement plans.

TAPE 6A

REP HEINERT moved for an April 21 meeting date. Motion carried unanimously.

MR. BOHYER talked fiscal notes. Legislative Council created a working group

consisting of two members from the Legislative Council and two members from the Legislative Finance Committee to look at the form and content of fiscal notes. Mr. Bohyer handed out a copy of the results of the Fiscal Note Survey (**EXHIBIT 26**) for the Committee's information.

04:03:43 SEN. TROPILA discussed that Mr. Cole has been pursuing his issue for the last six years. He said that he had requested that Mr. O'Connor look into his case, Mr. O'Connor retired, and now he would like Ms. Symons to continue looking into his case. Sen. Tropila asked Melanie Symons to report on Mr. Cole's case. Ms. Symons said she would be happy to do so if Mr. Cole waived his right to privacy so that she could share Mr. Cole's information with the Committee. After some discussion, Mr. Cole said it was okay for Ms. Symons to discuss his case and information with the Committee.

4:08:08 SEN. BALES asked when this Committee was going to address addition items on HJR 42 which Rep. Jent had brought up. MR. BOHYER said that was the purpose of the 4:00 agenda item.

SEN. BALES said that he would like to go back and readdress those things, that he was not comfortable with the final solutions that the Committee came up with. He said that he would like to find some other way other than increasing employer's contribution and need to look at other things, other alternatives changing where we are at and where we are going in the future. He said he would like it be a further agenda item. MR. BOHYER said it will be an agenda item for the May 12 meeting.

ADJOURNMENT

04:10:33 SEN. TASH adjourned the meeting at 5:22 p.m.

CI0425 6100fhxa.