

**HOUSE COMMITTEE ON JUDICIARY**

**SUBCOMMITTEE ON CIVIL LAW**

**March 19, 1997 Hearing Room 357**

**1:00 P.M. Tapes 42 - 44**

**MEMBERS PRESENT:**

**Rep. Lane Shetterly, Chair**

**Rep. Judith Uherbelau, Vice-Chair**

**Rep. Roger Beyer**

**Rep. Jo Ann Bowman**

**Rep. George Eighmey**

**Rep. Floyd Prozanski**

**Rep. Charles Starr**

**Rep. Larry Wells**

**STAFF PRESENT:**

**Bill Taylor, Counsel**

**Lisa Fritz, Administrative Support**

**MEASURE/ISSUES HEARD:**

**HB 2948 - Public Hearing**

**These minutes are in compliance with Senate and House Rules. Only text enclosed in quotation marks reports a speaker's exact words. For complete contents, please refer to the tapes.**

<b>Tape/#</b>	<b>Speaker</b>	<b>Comments</b>
<b>Tape 42, A</b>		
005	Chair Shetterly	Calls the meeting to order at 1:13 p.m.

**OPENS  
PUBLIC  
HEARING  
ON HB  
2948**

023	Rep. Shetterly	District 34 Discusses HB 2948 section by section. Submits written testimony in favor of HB 2948 ( <b>EXHIBIT A</b> ).
073	Rep. Shetterly	Continues testimony.
123	Rep. Shetterly	Continues testimony.
156	W. Michael Gillette	Associate Justice, Oregon Supreme Court (appearing as a citizen) Discusses background and his experiences, relating to topics of HB 2948. Explains administrative hearings and the processes involved with them.
206	Gillette	Continues testimony. Describes two functions of administrative proceedings and why they need to be separated.
256	Gillette	Continues testimony.
306	Gillette	Makes some suggestions for improving the bill. The ex parte communications, in section 19, need to be more carefully tailored, and the language on page five, lines 8-10, section nine, is broad and needs to be clarified.
356	Gillette	Continues testimony.
374	Rep. Uherbelau	I'm still not clear on the perceived need of this bill.
380	Gillette	This has to deal with one's own political perceptions, and I am not going to offer political perceptions to this committee. If one believes that the appearance of fairness, in administrative hearings, would be enhanced by "facts" found by someone who is not tied by affiliation or employment, then one would say this bill is needed by definition. If one is not persuaded by that arrangement, then one's enthusiasm would diminish accordingly.
392	Rep. Uherbelau	It seems to me that it would be better, especially if we are trying to save money, to set it up like workers' compensation, where you have a hearings officer that decides both the facts and the law, which many triers do and are very capable, so you don't have these two different layers.
<b>TAPE 43, A</b>		
		It is contemplated that will happen under this bill as well. That is, a hearings officer holds a hearing, under legal standards that have been established ahead of time, to decide certain factual issues. The hearings officer will decide what the facts are and suggest how the law ought to be

009	Gillette	applied to those facts. The normal course of things is such that the hearings officer not only decides what happens, but they offer an initial take, which is a full-scale opinion, which would be satisfactory to end the case, if the agency is satisfied with it. The parallel that you've suggested is actually what is contemplated. This is a different layer of bureaucracy, but not a separate one, because even if a hearings officer works for the agency, with the very same process and very same fact finding as the law, etc., that all goes on now. It's only a question of "where" it happens, not "if" it happens, or if the same number of people are involved, because the same number of people are.
036	Bryan Johnston	District 31 Testifies in favor of HB 2948. Discusses background, intent, and topics of the bill. Explains his interest in the concepts of the bill. There are two motivations for this bill: perception of fairness and efficiency.
086	Rep. Johnston	Continues testimony.
113	John DiLorenzo, Jr.	Oregon Litigation Reform Coalition Submits written testimony in support of HB 2948 ( <b>EXHIBIT B</b> ). Discusses -4 amendments to the bill ( <b>EXHIBIT C</b> ).
163	DiLorenzo	Continues testimony.
215	Rep. Wells	What is the economic impact, of changing this system, on these agencies?
217	DiLorenzo	I believe the fiscal group is currently working on that. I can tell you it is anticipated that, first of all, the fiscal statement will be minimized by virtue of our picking and choosing of agencies to incorporate, initially, into what is becoming a trial program. Depending on the number of agencies you bring in, of course, the fiscal will change. However, it's the intention, I think, of the bill to not replace hearings officers who are already hired within certain agencies, but to transfer their functions over to the department. There will be some cost involved in the rule-making process, which the Office of Administrative Hearings will, itself, undertake, so that everyone will proceed by the same rule-book. I think much of this bill is designed to be as revenue neutral as possible.
241	Chair Shetterly	For the information of the committee, this bill has a subsequent referral to Ways and Means anyway, so I think we'll deal with it more in terms of policy.
243	Rep. Wells	I was wondering if we will hear testimony regarding the economic impact on affected agencies' budgets.
248	DiLorenzo	I imagine some agencies will say that this bill is way too expensive. I would take issue with that; some things that improve government cost a little bit of money. Sometimes it's worth our while to spend money to correct what, I believe, is a crisis in confidence, regarding the ability of agencies to fairly decide cases.
259	Rep. Prozanski	By moving the date up to January from July (-4 amendments), we could actually be rushing the transformation of a very large change for all the agencies we have. It seems to me that, by giving this safety net, under subsection three (opportunity for a second hearing), you are going to drive

		the cost up or have rushed decisions that may not be as thought through.
272	DiLorenzo	First of all, it has been my observation that agencies and members of the executive branch will do their very best to respond to legislative directives. I don't see anything that would stand in the way of agencies implementing this bill a little quicker than the printed version provides. I believe that the executive branch will do the very best job it can to comply with whatever legislative directive you give them, with respect to a time frame. I do believe that, in practice, with respect to the -4 amendments, what will happen is agencies will decide whether they do want to have two hearings. I think agencies will be encouraged to not run people through the old system, in order to avoid the new, under the -4 amendments. I think agencies will be encouraged to participate in alternative dispute resolution, which Rep. Johnston champions. To avoid cost, all an agency needs to do is defer the hearing, until such time a hearings officer is appointed and can take over the case. This does not prevent the agency from entering into any number of interim orders. I think there is a lot of flexibility already built into the bill, and it's really up to the agency to decide how much money they want to devote to the process.
303	Rep. Prozanski	I think it's important to know whether you have anything pending before an agency.
310	DiLorenzo	I have several matters pending before agencies.
313	Rep. Bowman	A concern I have is loss of expertise. How do you see that process working, with people (now) working in one particular area and then moving to several other different areas?
324	DiLorenzo	I think there are safeguards built into this bill because if a hearings officer makes a decision that does not purport to the state of the facts, the agency can change that, provided there is substantial evidence to back that up. I believe variety can lead to keener decision-making. I think there are many hearings officers who would like the opportunity to expand their horizons. There are also many cost savings that can result because one hearings officer can take more than one case (or one type of case) a day.
368	Rep. Bowman	If the agency ultimately has the authority, why have a hearings officer in the first place?
383	DiLorenzo	The agency may only change the finding of fact, if there is no substantial evidence in the record as a whole. Explains the process now and how it would be changed by the bill.
<b>TAPE 42, B</b>		
023	Rep. Uherbelau	I want to go back to this crisis of confidence that has been eluded to because, in all the years I've been practicing, I've never heard this before. Is this anecdotal? Has a survey been done? Where did this "crisis," we are talking about, come from?
		All I can testify to is my personal experience, and I can tell you that I will routinely be faced with the question, "Do you mean to tell me that the

034	DiLorenzo	people who are going to decide this issue are the same people who are prosecuting me in this case?" I almost have to laugh, as I say, "Yes." Then they ask, "Well, what's fair about that?" I have not done any type of public poll or survey.
041	Rep. Uherbelau	I think that's an important point. I don't care who you are in the justice system; we have to believe it works for us. However, I'm not convinced there is a problem, but if there is, I'm not sure this bill would solve it. The agency is still involved, and they do have the final say. Are we really dealing with crisis of confidence when the agency still has the final say?
052	DiLorenzo	Absolutely, because under the current system, the agency is going to determine the facts. There will almost always be some evidence in the record to support the decision the agency makes. Explains that the bill gives them some meaningful review and why it would give them a "fighting chance."
067	Chair Shetterly	I think there is a balance here that has to be reserved -- the autonomy of the agencies to implement their own policies and law. I think it was intentional, in the drafting of this bill, to leave that final implementation to the agency because they have that function. This addresses more how you get there, and then, if the agency is going to reinterpret or approach the result differently than the hearings officer, it's simply a matter of them needing to "show their work," so everyone knows how it got to where it did.
069	Rep. Prozanski	Do you know how many states have gone to this type of system?
070	Janice Krem	Attorney at Law Portland, Oregon 21 states have gone to this type of system. Submits written testimony in support of HB 2948 ( <b>EXHIBIT D</b> ).
110	Krem	Continues testimony.
156	Rep. Uherbelau	Has anybody done any study or investigation, on other states, to see what their experience has been with costs?
175	Krem	Most of the people you talk to from other states will say that, in the long run, you will save money because of the consolidation efforts.
196	Rep. Uherbelau	Could you make the study available to the committee?
197	Krem	I quote it in my written testimony.
198	Rep. Uherbelau	I'd like to see the complete study.
200	Krem	That's possible.
201	Rep. Uherbelau	I still think that if there is this "crisis of confidence," when you leave the agency with the last say, that's not going to change anything. If you thought there needed to be a change, why didn't you think in terms of something, like workers' compensation, where you do have hearings officers and a "neutral" appeal board? I'm not saying that's the way it should be; I'm just trying to address the issue you raised about a "crisis in confidence."
		I think it would be difficult to have something be cost neutral, if you had to

215	Krem	set up new review boards. That would be an issue for me.
220	DiLorenzo	The only alternative would be to change the scope of review of the Court of Appeals, allowing the Court of Appeals to review the case de novo. The problem is that, with the sheer number of cases, it would backlog the Court of Appeals. We felt that since we could not change the scope of review sufficiently, the only way, to give the perception of really giving someone their "day in court," was to make changes that established basic fairness at the hearings level.
233	Chair Shetterly	Ms. Krem, would you address, for members of the committee, what your experience has been with ex parte contact.
236	Krem	There are several varieties, depending on the agency. Describes current system and why she believes it to be frustrating to practitioners. This bill does not say that parties cannot communicate; it just says communications cannot be done in secret.
279	Rep. Bowman	Government is growing at a rapid pace, and we are not taking into account that people want smaller government.
304	Krem	The point of a consolidation is not to create new bureaucracy, it is to eliminate duplicative bureaucracy.
324	DiLorenzo	I don't think this is creating a new bureaucracy; I think this is part of a government reform.
359	Henry "Chip" Lazenby	Governor Kitzhaber's legal counsel Submits written testimony in opposition to HB 2948 ( <b>EXHIBIT E</b> ).
	<b>TAPE 43, B</b>	
001	Rep. Prozanski	Many hearings officers have been forced into changing. If that's what we need to address, how else do we do it?
005	Lazenby	I would suggest to you that proponents can't have it both ways. You can't say that the hearings officers are dedicated, talented, professional people who care a lot about their work, and that they are wholesale, being threatened and extorted by every state agency. You will hear a lot of stories today -- most of them being exceptions, not the rule.
010	Rep. Prozanski	Is there something you can suggest -- a way for us to address these exceptions? Is there some way that we can hold the heads of these agencies responsible for getting their employees, who are under their direction, to change what they believe is right. I'm not criticizing the hearings officers at all. I'm criticizing those individuals who pressure these employees to fit the mold that the heads of these agencies want.
		I'm intrigued by Rep. Uherbelau's idea of going to a workers' compensation situation to review those. We've talked about the possibility of the hearings officer coming up with the findings of fact, the agency talking about why they are varying from the proposed finding, and making that part of the record, so people have something they can look at. I understand the

014	Lazenby	perception that Mr. DiLorenzo talked about, but I think there is also a misperception about the role of the hearings officer, which allows that misperception to be cast. In many of these instances, the hearings officer is supposed to find facts and present them to the agency, so the agency can make that decision. What this bill does is transform the hearings officer into the actual decision maker and demotes or removes the agency head from making that decision.
040	Chair Shetterly	How is the consolidation, Ms. Krem spoke about, adding cost and bureaucracy? It sounds to me like her testimony clearly indicates otherwise.
044	Lazenby	Explains why the bill would costs departments more money. I think before you act on this, you should quantify cost. I think you should not press on thinking something is revenue neutral; I think you need to know. I also think you could look at some options that are less extravagant than creating a new bureaucracy.
085	David Schuman	Deputy Attorney General I think this legislation has been brought about by perception and not what really happens in the overwhelming majority of cases. I think this works an extremely sweeping and fundamental change in the very nature of administrative law.
120	Rep. Bowman	Would one of you give me an example of a contested case that would fall under this particular bill?
127	Don Arnold	Chief Counsel of the General Counsel Division of the Department of Justice Submits written testimony (with Schuman) in opposition to HB 2948 ( <b>EXHIBIT F</b> ). Gives examples, in response to Rep. Bowman's request.
177	Arnold	Continues testimony.
185	Chair Shetterly	Mr. Schuman, you said that the contested case hearings process is an aspect of the application of agency policy. That's true, but it's different than in a case, such as rule-making or another process in the agency, in that you are dealing in this contested case process, with facts that are in dispute, and people on both sides of the dispute. It seems the objection is that we want agencies to retain or have control over the facts, where the final determination is made. That gets to the very reason this bill is here, as it limits the agency in their ability to pick and choose facts to enter into a final order, and it assures the participants that the facts, on which an agency order is based, are fairly determined, on the record, and open. It says that the agency doesn't have the free reign to pick and choose facts they want to use.
210	Lazenby	I don't think the agencies have free reign, without some respect to evidence that is within the record. The standard of review is: Is there anything on the record to support the agency's finding? Another step might be, and it isn't in the bill, to have the agency describe, on the record, why they're varying from the proposed order of the hearings officer, and what they're basing that on, within the record. Let the court decide on that. It's a quasi-judicial proceeding.
		Attorney at Law Submits written testimony on and proposed amendments

240	Gary P. Harrell	to HB 2948 ( <b>EXHIBIT G</b> ). Discusses -3 amendments ( <b>EXHIBIT H</b> ) and -4 amendments.
283	Thomas Barkin	Administrator of the Administrative Hearings Division, Public Utility Commission Submits written testimony on HB 2948 ( <b>EXHIBIT I</b> ).
313	Barkin	Continues testimony.
373	Rep. Prozanski	Is there something we can do, within the existing system, to give a safeguard to those being pressured?
385	Barkin	Gives background, relating to concepts of Rep. Prozanski's concerns.
013	Chair Shetterly	Do you know if any of those proposals have been implemented?
015	Barkin	I don't think any were.
017	Genoa Ingram-Read	Oregon Association of Realtors Submits testimony in opposition to HB 2948 ( <b>EXHIBIT J</b> ).
063	Chair Shetterly	Notes that the hearing for HB 2948 will be carried over to Friday, 3/21/97, 1:00 p.m. Adjourns at 3:05 p.m.
	David Marcus	Oregon Association of Administrative Law Judges Written testimony submitted, for the record, in support of HB 2948 ( <b>EXHIBIT K</b> ).

Submitted by, Reviewed by,

Lisa Fritz, Sarah Watson,

Administrative Support Office Manager

**EXHIBIT SUMMARY**

**A - HB 2948, written testimony, Rep. Lane Shetterly, District 34, 3 pages.**

**B - HB 2948, written testimony, John DiLorenzo, Jr., 5 pages.**

**C - HB 2948, proposed amendments (-4), Legislative Counsel, 1 page.**

**D - HB 2948, written testimony, Janice Krem, Attorney at Law (Portland, Oregon), 4 pages.**

**E - HB 2948, written testimony, Henry Lazenby, Governor Kitzhaber's legal counsel, 2 pages.**

**F - HB 2948, written testimony, Gary P. Harrell, Attorney at Law, 2 pages.**

**G - HB 2948, proposed amendments (-3), Legislative Counsel, 4 pages.**



**I - HB 2948, written testimony, Thomas G. Barkin, Administrator of the Administrative Hearings Division, Public Utility Commission.**

**J - HB 2948, written testimony, Genoa Ingram-Read, Oregon Association of Realtors, 1 page.**

**K - HB 2948, written testimony, David Marcus, Oregon Association of Administrative Law Judges, 1 page.**