

HOUSE COMMITTEE ON JUDICIARY

SUBCOMMITTEE ON CIVIL LAW

March 21, 1997 Hearing Room 357

1:00 P.M. Tapes 45 - 46

MEMBERS PRESENT:

Rep. Lane Shetterly, Chair

Rep. Roger Beyer

Rep. Jo Ann Bowman

Rep. George Eighmey

Rep. Floyd Prozanski

Rep. Charles Starr

Rep. Larry Wells

MEMBER EXCUSED: Rep. Judith Uherbelau, Vice-Chair

STAFF PRESENT:

Bill Taylor, Counsel

Lisa Fritz, Administrative Support

MEASURE/ISSUES HEARD:

HB 2948 - Public Hearing and Possible Work Session

HB 2793 - Work Session

HB 2468 - Work Session

HB 3003 - Work Session

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.

Tape/#	Speaker	Comments
Tape 45, A		

010	Chair Shetterly	Calls the meeting to order at 1:19 p.m.
<u>OPENS WORK SESSION ON HB 2793</u>		
012	Bill Taylor	Committee Counsel Discusses HB 2793 and -1 amendments to the bill (EXHIBIT A) .
020	Rep. Starr	MOTION: Moves to ADOPT HB 2793-1 amendments dated 3/20/97.
		VOTE: 4-0 EXCUSED: 4 - Rep. Bowman, Rep. Eighmey, Rep. Prozanski, Rep. Uherbelau
022	Chair Shetterly	Hearing no objection, declares the motion CARRIED.
024	Rep. Starr	MOTION: Moves HB 2793 to the full committee with a DO PASS AS AMENDED recommendation.
		VOTE: 4-0 EXCUSED: 4 - Rep. Bowman, Rep. Eighmey, Rep. Prozanski, Rep. Uherbelau
027	Chair Shetterly	Hearing no objection, declares the motion CARRIED. REP. SHETTERLY will lead discussion on the floor.
<u>OPENS WORK SESSION ON HB 2468</u>		

038	Bill Taylor	Committee Counsel Discusses HB 2468 and -1 amendments to the bill (EXHIBIT B) .
040	Rep. R. Beyer	MOTION: Moves to ADOPT HB 2468-1 amendments dated 3/18/97.
		VOTE: 4-0 EXCUSED: 4 - Rep. Bowman, Rep. Eighmey, Rep. Prozanski, Rep. Uherbelau
043	Chair Shetterly	Hearing no objection, declares the motion CARRIED.
047	Rep. R. Beyer	MOTION: Moves HB 2468 to the full committee with a DO PASS AS AMENDED recommendation.
		VOTE: 4-0 EXCUSED: 4 - Rep. Bowman, Rep. Eighmey, Rep. Prozanski, Rep. Uherbelau
051	Chair Shetterly	Hearing no objection, declares the motion CARRIED. REP. R. BEYER will lead discussion on the floor.
		<u>OPENS WORK SESSION ON HB 3003</u>
062	Bill Taylor	Committee Counsel Discusses HB 3003.
067	Rep. Starr	MOTION: Moves HB 3003 to the full committee with a DO PASS recommendation.
		VOTE: 4-0 EXCUSED: 4 - Rep. Bowman, Rep. Eighmey, Rep. Prozanski, Rep.

		Uherbelau
069	Chair Shetterly	Hearing no objection, declares the motion CARRIED. REP. PROZANSKI will lead discussion on the floor.
<u>OPENS PUBLIC HEARING ON HB 2948</u>		
090	A. Charles Sheketoff	Attorney at Law/Legislative Advocate, Oregon Law Center Testifies in favor of the concept of HB 2948. I'm not crazy about this becoming a separate entity. I think many of the problems can be fixed without a separate office. Current ex parte regulations aren't tough enough. Gives example to illustrate his position. Discusses suggestions for amendments.
140	Sheketoff	Continues testimony.
190	Sheketoff	I would suggest that ORS 183.460, in section 33, page 19, of the bill, be amended to always require, if there is a proposed order, that the proposed order be produced. Points out sections that appear to contradict one another - sections nine, three, and three (b).
212	Chair Shetterly	Section three deals with modification of any part that does not constitute findings of fact.
214	Sheketoff	That would be a problem because only section three says that modification must be explained.
218	Chair Shetterly	You are saying that a kind of "show your work" notification should be included.
220	Sheketoff	Yes, and the reason that has to be there is because, in section 34 of the bill, it says that the court will review. If substantial evidence is present in the proposed order, you win, or you can appeal. It is important to have a thorough record.
243	Chair Shetterly	Are you inferring, or do you specifically know of cases like this, where the hearings officer wouldn't sign because he/she did not agree with the changes to the order?
245	Sheketoff	Hearings officers have told us that. We've seen documents signed by the manager and not by the officer. Explains that he feels facts are being changed and where he believes they are being changed. Recites court decision, relating to issues addressed in the bill. Continues his suggestions for making HB 2948 better.
295	Sheketoff	Continues testimony.
345	Sheketoff	Continues testimony.

395	Sheketoff	Continues testimony.
TAPE 46, A		
040	Rep. Beyer	Is the Department of Human Resources (DHR) now in section five?
047	Sheketoff	Some of DHR is, and there is an amendment to put DHR in. There should be a public record of decisions. Gives examples and suggestions. Continues testimony.
085	Rep. Prozanski	Would it also be appropriate to require the agency to change those, if they could show good cause?
092	Sheketoff	Yes, but I don't think "good cause" would be best to use.
099	Rep. Prozanski	In dealing with an agency that differs from the hearings officer (regarding the proposed order), and no order is actually filed by the hearings officer, would it be appropriate to require whatever draft exists for the order to be part of the record?
108	Sheketoff	Absolutely.
109	Rep. Prozanski	Do you think all changes can be done within the existing structure?
111	Sheketoff	I think all the changes I suggested could be done within the existing structure, and the existing structure is preserved, in many ways, by the bill because it says that you can assign a group of people to an agency. Gives example.
148	Rep. Prozanski	Have you had the opportunity to review the report that was prepared in 1989?
154	Sheketoff	No.
156	Chair Shetterly	I've asked Mr. Sheketoff to help with some of these amendments he's talked about, and we can make sure he gets a copy of that report.
157	Rep. Bowman	I still haven't heard you say, "Yes you support this bill or no you don't and why."
163	Sheketoff	I support making the changes I suggested and many of the changes in the bill. I don't think it's critical that we have a new "office." I think the process is not a fair process now. It's hard to explain to my clients that it's fair; it's hard to see it as fair. It doesn't do the fundamental change in standard of review. If you really want to make change, you would change the standard of review. I don't think we'll get that far, but I think the bill would take things a great deal forward, in that there would be a better record to take to the Court of Appeals.
174	Joe Gilliam	National Federation of Independent Business, Chair of the Oregon Small Business Coalition Submits written testimony in support of HB 2948 (EXHIBIT C) .

224	Gilliam	Continues testimony.
246	Rep. Bowman	You were here Wednesday, so you heard testimony of people that were concerned about a new bureaucracy and the creation of a new state agency that would have mega-power and not answer to anyone. Would you respond to that?
256	Gilliam	I think that's a perception, but if you are taking a process that is currently being done and consolidating, there is a creating of a new agency, and I question that. But, if you are taking process from other agencies, I think that's okay. It's really a lateral move, as far as the growth of government issue is concerned. As far as not answering, I think they have the ultimate responsibility to answer to the executive branch. What we are cutting off here is the fact that hearings officers are answering to the administration of the agencies that are making the determination, and I think that's a good thing. I think the director would have to answer to the executive branch, and that's no different than any department.
270	Rep. Bowman	What would your perspective be on making some changes to the current system versus creating a new agency?
282	Gilliam	My concern is that it doesn't allow us to execute the ex parte provision efficiently enough. I think you need to remove the hearings officers from the location and control of the agency. I think there needs to be a fire-wall. I don't think you can do that without the creation of a new agency. Gives example to illustrate his concern.
297	Rep. Prozanski	Based on recommendations from your clients, if "fairness" and "proof" were put in place, why would we need to worry about the ex parte? At that point, there would be freedom for the hearings officer to propose an order and to be honest without worrying about publication.
312	Gilliam	One thing we don't have the benefit of is a daily, even casual, conversation about the facts, the case, etc., so the conversation is one-sided, even if the hearings officer is independent, without the ex parte. I think this just sets the standard that the hearings officer is independent, and they should not have conversations with that agency without all parties being there.
327	Rep. Prozanski	Is there anything that stops you or your client from doing that now?
333	Gilliam	I don't believe, under the law, it stops us. As a practical matter, I suppose you could come down and do that, but I don't believe that provides you an unbiased set of facts. It's everybody or nobody. That way you don't have any type of undue influence on either side.
341	Rep. Prozanski	Assuming that we go with the creation of a new agency, many costs will be involved: new building, support staff, etc. Would you agree that might have to be done?
351	Gilliam	My initial thought on this is, because hearings processes are duplicated in agencies, you can find efficiencies and cost savings by shifting those personnel out of those agencies.
357	Rep. Prozanski	Where are you going to shift them -- what building?

363	Gilliam	I don't think it requires a new building. It may require restructuring within a building -- moving people around.
365	Rep. Prozanski	At that point, do we have the Chinese wall, the "fire-wall," you were talking about, even though it might be a floor difference or a new office down the hall?
368	Gilliam	I believe you do, if the law states that. Gives example. It can be done without a law, but I think the law gives absolute guidelines and direction.
384	Chair Shetterly	I think, for fiscal reasons, that would be the best. It's different when you have hearings officers, who are not assigned to any particular agency, sharing a building with a particular agency. They have contact, daily, with the same people that appear before the hearings officers. You have a broader mix of people, in this case, even if the hearings officers are in a building that already houses another agency.
TAPE 45, B		
007	Gilliam	I would agree because, as the case is shifting, you aren't going to have that continual conversation with the agency.
009	Rep. Prozanski	If there are some costs here that can't be overcome, who would pay for this? Would your clients be paying for it, as well as any other user of the system, or should the whole state be asked to pay for this?
014	Gilliam	My initial reaction is that we should have open discussion on this, but I would find it difficult for an agency to cite an individual and say that they would now have to pay for this process, particularly if they prevail over the state. I think that would be extremely unfair. I think it would be our approach that you define how much you have, within the administrative process now, and determine how you can do it for that money.
020	Rep. Bowman	Are we going to hear from hearings officers? I'm concerned that we are hearing from people who either like them or don't, and we haven't had the opportunity to hear how that process actually works.
024	Chair Shetterly	You did hear from Ms. Krem on Wednesday, who was five years the Chief of the Oregon Liquor Control Commission's (OLCC) hearings section and a hearings officer for the Department of Revenue prior to that, and there was written testimony from David Marcus on behalf of the Oregon Administrative Law Judges Association, which is the association for hearings officers. Ms. Krem is here today if you have any further questions.
038	BethAnne Darby	Oregon Board of Chiropractic Examiners Submits testimony in opposition to HB 2948 (EXHIBIT D).
060	Dianne Middle	Board of Parole and Post-prison Supervision Submits testimony regarding HB 2948 (EXHIBIT E) and asks for exemption.
102	Fred Van Natta	Oregon Building Industry Association We like what the bill is doing, but we have a problem with part of it. Requests exemption for Construction Contractors Board. Explains how the Board goes through proceedings.
152	Van Natta	Continues testimony.

171	Chair Shetterly	Discusses -1 amendments (EXHIBIT F).
181	Bill Cross	Oregon Landscape Contractors Board Submits written testimony (EXHIBIT G) and asks that the Board be excluded from HB 2948.
206	Tim Martinez	Oregon Medical Association Discusses -2 amendments (EXHIBIT H). Points out an error in the amendments. (On line two, it should read "line 2," not "line 3.")
240	Grover Simmons	Adult Foster Home Industry Testifies in favor of HB 2948. Discusses -3 amendments to the bill (EXHIBIT I).
308	Rep. Bowman	You were a hearings officer. Correct?
313	Janice Krem	Yes. I was a hearings officer for the Department of Revenue, and then I went to the OLCC and was the Chief hearings officer there for eight years.
316	Rep. Bowman	You are in support of this bill.
317	Krem	Very much so.
318	Rep. Bowman	When you were a hearings officer for the Department of Revenue, most of the hearings you dealt with dealt with people not liking their tax bills and challenges to tax bills. Is that correct?
320	Krem	Frequently, yes. The Department of Revenue's major caseload was property tax cases, and that was probably my major caseload.
323	Rep. Bowman	Is it your opinion that you were not able to render appropriate decisions based on your proximity to the Department of Revenue?
325	Krem	I think there are two parts to that question: whether people perceived we were giving them a fair hearing and whether officers are impacted by the agency. I don't know that I would say it ever changed one of my decisions, but I believe hearings officers will tell you that the close proximity does affect the attitude that they have to bring to the job. Gives example to illustrate her point.
354	Chair Shetterly	How was that perceived by the agency?
359	Krem	The agency wanted our space so bad; they couldn't wait for us to leave.
360	Chair Shetterly	So, hearings officers are back in the main building.
361	Krem	Yes.
363	Rep. Bowman	Who did you report to in the Department of Revenue?
364	Krem	The Chief hearings officer.
365	Rep. Bowman	So, there was a group of hearings officers and a Chief hearings officer.
		The Chief hearing officer reported to the Administrator of the Hearings

367	Krem	Division and the Hearings Division reported to the Head Administrator of Revenue.
374	Rep. Bowman	You worked in an environment of only hearings officers, and you reported to the Chief hearings officer, but you still feel as if there was a perception that the Department of Revenue controlled the process?
386	Krem	Yes.
387	Chair Shetterly	Describe what happens in the process. You conduct a hearing; you prepare a proposed order; then what?
389	Krem	I think it varies from agency to agency.
393	Chair Shetterly	Would you give us a couple of scenarios? Where do things go from a hearings officer's desk?
396	Krem	Explains the process as performed at the Department of Revenue (during the time she worked there).
TAPE 46, B		
009	Chair Shetterly	When you speak of the administrator, do you mean director of the agency?
011	Krem	Yes. The head, the final decision maker, issued the order.
012	Rep. Prozanski	Did you ever not give a fair hearing to someone?
017	Krem	Personally, no. I think hearings officers would tell you they give fair hearings.
018	Rep. Prozanski	Did you ever know of anyone giving a hearing that wasn't fair?
020	Krem	I don't know what you mean by "fair."
021	Rep. Prozanski	You've heard the testimony; you know what's fair.
023	Krem	I think most hearings officers understand that there are expectations, within the agency, that impact the way they conduct the hearing, whether that actually results in "unfairness" in a technical, legal, procedural determination, I can't speak for other hearing officers. As Chief hearings officer, I felt it was my responsibility to reassure people that they could make the right decision, and that was the expectation.
029	Rep. Prozanski	You believe you've never given anyone an unfair hearing.
031	Krem	That's my belief, yes.
032	Rep. Prozanski	When you were a supervisor, you never told any of your hearings officers to not give a fair hearing?
034	Krem	Certainly not.

035	Rep. Prozanski	Have you ever heard from any hearings officer that they have not given someone a fair hearing?
036	Krem	I have not heard the words, "I can't give them a fair hearing." I have heard hearings officers complain that they were concerned about how the case was going to be perceived by the agency. I have received comments from agency staff which were intended, I think, to cause me to exert pressure on staff, which could have resulted in an unfair hearing.
047	Rep. Prozanski	Did you ever do that?
048	Krem	No I did not.
050	Rep. Bowman	Asks for clarification of how the process proceeded through the ranks of the Department of Revenue.
054	Krem	It's hard for me to recall exactly. It was more than 10 years ago. Explains the process, for her individually, as she remembers it.
060	Rep. Bowman	You make your finding; you give it to your supervisor. Is that correct?
061	Krem	That's how it worked.
062	Rep. Bowman	From the supervisor, it went to the administrator (at the Department of Revenue).
064	Krem	That's my recollection, yes.
065	Rep. Bowman	When does the public person, who has filed the complaint, find out what the findings are?
066	Krem	When they get the final order of the agency.
067	Rep. Bowman	Who releases that final order?
068	Krem	The administrator.
069	Rep. Bowman	Is there a timeline from when you have made your ruling to when the administrator sends out what the findings were?
074	Krem	That's usually statutory. I don't recall that there was a set timeline. Revenue was not an Administrative Procedures Act (APA) agency.
083	Rep. Bowman	For myself I need to understand what happens when someone files a complaint, what the process is, how much time is involved, and what that specific steps are from the beginning to the end. Maybe we can invite in someone in to provide me with that information.
086	Chair Shetterly	I would bet that your answer would be different from agency to agency. From Ms. Krem's testimony, I would guess that different agencies have different internal processes. There may be some generalities, but the specifics will be different.
091	Krem	Explains procedures under the APA.
110	Jane Myers	Oregon Dental Association My concerns are regarding costs it may take to create a separate agency. Explains how funds are handled within the Dental Association.

146	Rep. Wells	You're already contracting with the hearings officer, but you feel there would be more costs because of the "bureaucracy." What is the difference?
152	Myers	The dentists pay fees to the Board of Dentistry for their licenses, and the Board, I believe, in most cases, contracts out to a hearings officer. The Board, itself, does not do that.
156	Rep. Wells	What would be different about getting a hearings officer from this pool?
159	Myers	This pool is set up as a separate government agency. The hearings officer for this agency is a state employee; the hearings officer that the Board contracts with is not. The Board of Dentistry would be paying that person for their services, but they are not paying, directly, for the building, employment benefits, etc. That's the difference. It's as if you hired an employee or contracted out with a person to deliver the service.
169	Rep. Wells	I don't know that we ever determined what the costs are going to be with this bill. I guess that's kind of an unknown here. I can see that some of the agencies who don't hire a hearings officer and try to do it themselves, as a board, would be incurring some new expenses.
178	Rep. Shetterly	Section 11 of the bill authorizes the director to charge the covered agencies for the use of the hearings officers, so there would not be a regular expenditure drawn out of a particular agency's budget to fund this. It would be on a per charge basis. It would be very similar to what they already have.
186	Myers	I understand partly what this bill is doing. The bottom line is not filled in, regarding costs. We do have some concerns, where the fee payers have sort of the same standing as tax payers. If you are creating a new agency and the fee payers are going to be paying for it, they want to know what those costs are going to be. I don't want to kill a good idea, if it's going to save money and be more efficient. However, in section 11, there are charges. The language "need not be limited to" is used, and that's a real qualifier. It says that we'll charge you for salaries, personnel, and capital outlay, but we are not limited to those charges. I have to ask what else would be included. In section 13, there is an estimate, of advance in expenses, that the agency will cost a certain amount of money to operate, and the people who will use the services of that agency are going to be expected to pay for it. There's going to be some sort of advance estimate of what that payment will be. If some of these agencies are currently using general fund tax dollars to pay for their hearings, and some of them are using fees, I'm not sure that I can tell my members that "You won't get some cost shifting. Your fees are increased to cover what used to be general fund dollars." I think we are very concerned that hearings be fair, and we are going to look at that issue, but we are also concerned that fees do not grow without clear understanding of what is expected and what those fees will be.
231	Chair Shetterly	The structure, of charging the agencies, is based on what the Department of Justice does, in terms of Attorney General charges to the agencies. I don't know if that addresses what you are concerned about, but I appreciate you bringing that forward.
238	Myers	I will have to research a little more, but we're certainly interested.

259	Chair Shetterly	Submits written testimony of Janice Krem, per Rep. Uherbelau's request (EXHIBIT J). Closes Public Hearing on HB 2948.
		<u>REOPENS WORKS SESSION ON HB 2793</u>
264	Chair Shetterly	Requests unanimous consent for Rep. Prozanski and Rep. Bowman, who were absent earlier, to cast their votes.
265	Rep. Bowman	Aye.
266	Rep. Prozanski	Aye.
		VOTE IS NOW: 6-0
		EXCUSED: 2 - Rep. Eighmey, Rep. Uherbelau
268	Chair Shetterly	Closes Work Session on HB 2793.
		<u>REOPENS WORK SESSION ON 2468</u>
270	Chair Shetterly	Requests unanimous consent to allow Rep. Bowman, Rep. Eighmey, and Rep. Prozanski, who were absent earlier, to cast their votes.
271	Rep. Bowman	Aye.
272	Rep. Prozanski	Aye.
273	Rep. Eighmey	Aye.
		VOTE IS NOW: 7-0
		EXCUSED: 1 - Rep. Uherbelau

274	Chair Shetterly	Closes Work Session on HB 2468.
<u>REOPENS WORK SESSION ON HB 3003</u>		
277	Chair Shetterly	Requests unanimous consent for Rep. Bowman, Rep. Eighmey, and Rep. Prozanski, who were absent earlier, to cast their votes.
279	Rep. Bowman	Aye.
280	Rep. Prozanski	Aye.
281	Rep. Eighmey	Aye.
		VOTE IS NOW: 7-0
		EXCUSED: 1 - Rep. Uherbelau
282	Chair Shetterly	Closes Work Session on 3003.
<u>REOPENS WORK SESSION ON HB 2793</u>		
284	Chair Shetterly	Requests unanimous consent for Rep. Eighmey, who was absent earlier, to cast his vote.
285	Rep. Eighmey	Aye.
		VOTE IS NOW: 7-0
		EXCUSED: 1 - Rep. Uherbelau
287	Chair Shetterly	Adjourns at 3:00 p.m.

Submitted by, Reviewed by,

Lisa Fritz, Sarah Watson,

Administrative Support Office Manager

EXHIBIT SUMMARY

A - HB 2793, proposed amendments (-1), Legislative Counsel, 1 page.

B - HB 2468, proposed amendments (-1), Legislative Counsel, 1 page.

C - HB 2948, written testimony, Joe Gilliam, Oregon State Director of the National Federation of Independent Business, 2 pages.

D - HB 2948, written testimony, BethAnne Darby, Oregon Board of Chiropractic Examiners, 1 page.

E - HB 2948, written testimony, Dianne Middle, Oregon Board of Parole and Post-prison Supervision, 2 pages.

F - HB 2948, proposed amendments (-1), Legislative Counsel, 1 page.

G - HB 2948, written testimony, Bill Cross, Government Affairs Representative of the Oregon Landscape Contractors Board, 1 page.

H - HB 2948, proposed amendments (-2), Legislative Counsel, 2 pages.

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

J - HB 2948, written testimony, Janice Krem, Attorney at Law, 9 pages.