

House Committee on Legislative Rules & Reapportionment May 22, 1991 -
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statements made during this session. Only text enclosed in quotation
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report a speaker's exact words. For complete contents of the
proceedings, please refer to the tapes.

HOUSE COMMITTEE ON LEGISLATIVE RULES AND REAPPORTIONMENT

May 22, 1991 Hearing Room E 5:00 p.m. Tapes 40 - 42

MEMBERS PRESENT: Rep. Greg Walden, Chair Rep. Peter Courtney,
Vice-Chair Rep. Ray Baum Rep. Ron Cease Rep. Beverly Clarno Rep. Carl
Hosticka Rep. Bill Markham Rep. Randy Miller Rep. Fred Parkinson

MEMBER EXCUSED: Rep. Margaret Carter Rep. Tom Mason

STAFF PRESENT: Greg Leo, Committee Administrator Mary Walling,
Committee Assistant

MEASURES CONSIDERED: SB 296 - Oregon Government Ethics
Commission SB 292A - Oregon Government Ethics Commission HB 2167 -
Oregon Government Ethics Commission

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statements made during this session. Only text enclosed in quotation
marks report a speaker's exact words. For complete contents of the
proceedings, please refer to the tapes.

TAPE 40, SIDE A

004 CHAIR WALDEN: Calls the meeting to order at 5:00

(Tape 40, Side A) SB 296 AND SB 292A - OREGON GOVERNMENT ETHICS
COMMISSION, PUBLIC HEARING Witnesses: John DiLorenzo, Attorney
Patrick Hearn, Executive Director, Oregon Government Ethics Commission
Gail Ryder, Senate Government Operations Committee

CHAIR WALDEN: Explains the SB 292-A8 amendments (EXHIBIT A).

>These amendments are a compilation of a number of the bills that the
Committee has received from the Senate. Asked that these amendments be
drawn up as an omnibus amendment to SB 292 A.

>Would like Committee to work through these amendments and look at the
issues that are in the bills.

023 JOHN DILORENZO, ATTORNEY: Testifies in support of SB 296.

>Testified last March with other attorneys before the Senate Government Operations Interim Committee. Shared with that committee their frustrations about the viability of procedures or lack of procedures that control the deliberations of the Oregon Government Ethics Commission.

>At that time specific examples were reviewed that appeared to be procedural abuses by the Ethics Commission that contributed to an environment where public servants were forced to endure the specter of media trials of their character fueled by prejudicial statements by staff outside of the scope of Ethics Commission proceedings.

>The impact that type of conduct has upon the individuals who were subject to Ethics Commission scrutiny is devastating.

>Since that time the makeup of the Ethics Commission has changed. It has appointed a new executive director, Mr. Hearn. However, the degree of justice and procedural due process that one can expect from an agency should not be wholly dependent upon the good graces of the person who happens to occupy the position of its executive director.

>It should be guaranteed in the law. If procedural due process is guaranteed in the law, no Executive Director of the Ethics Commission could ever trample upon the rights of those for which the law was designed to protect.

>While the Ethics Commission took its time, sometimes as much as two years, the accused was able to witness his public reputation go down the drain slowly.

>Proposals made at those early hearings included: -Governor appoint the members. -confidentiality of proceedings. -timelines in providing for speedy hearings. -allow prevailing public official an award of his attorney's fees.

>Presents amendments (EXHIBIT B) and copy of Administrative Rules and Procedures (EXHIBIT C) that indicates the present status of the law concerning attorney's fees.

>There is currently in the law no procedure for an award of attorney's fees to a prevailing respondent at the administrative hearing level. The trial of a full-blown contested case before the Ethics Commission is likely to cost an official between \$25,000 and \$40,000.

>A public official should not be faced with the cruel choice of having to admit wrong doing where he knows none has occurred versus potential financial ruin.

>Opponents of the concept of awarding attorney's fees to prevailing officials give a couple of reasons: -There is no provision for the award of attorney's fees where a defendant in a criminal proceeding prevails. -An award of attorney's fees would act as a chilling factor in the Ethics Commission pursuit of cases.

>It is important to recognize the distinction between a criminal proceeding and Ethics Commission proceeding. A criminal proceeding is generally initiated by a district attorney or a grand jury which has

already examined evidence in some detail. In the case of the Ethics Commission it is anyone who cares to file a written complaint.

>Most criminal cases are not initiated in the midst of a politically charged environment. Ethics proceedings are almost always initiated in the midst of a politically charged environment and command incredible press scrutiny.

>There are examples in the Administrative Procedures Act where attorney's fees are awarded to prevailing respondents on appeal.

>Proposed amendments do a couple of things: -Provide that the public official who prevails following a contested case is entitled to an award of reasonable attorney's fees. -Section 2 provides for the situation where the public official prevails after contested case hearing and there is no appeal filed by the agency. In that case, the public official files a petition in the Marion County Circuit Court and goes through a rule of civil procedure that is already established for the award of attorney's fees in civil cases. The public official would submit an affidavit, would indicate the amount of attorney's fees that are reasonable, the agency would have an opportunity to object, there would be a hearing, and the court would then go ahead and award the fees.

>Subsection 3 provides for fees in the case of an appeal and subsection 4 answers the issue of whether or not the award of attorney's fees would chill the Ethics Commission.

182 REP. CEASE: What is the financial impact of what this might amount to in a year's time?

DILorenzo: Not many instances where the Ethics Commission proceeds to a full contested case hearing. These amendments would not provide for an award of attorney's fees during the preliminary review phase of an investigation, or initially upon the filing of a complaint. They would provide for fees once the case had gone the entire contested case route.

>Only one contested case within the last two years, which was the Phillips' matter that actually went to a hearing. Question should be addressed to Mr. Hearn when he testifies.

>It is unlikely that state would be incurring significant charges in that (1) the frequency is not all that great, and (2) the respondent would have to prevail.

225 REP. CEASE: State agencies are told to be very careful about the costs of their attorney's fees.

DILorenzo: The fees would be awarded from the General Fund.

237 REP. MILLER: There is a bill in Judiciary Committee that would pretty much run this route on all kinds of cases. It is something called the English rule. That the winner wins. That includes wins the cost in attorney's fees in being the defendant in certain situations.

262 >Discussion regarding whether costs incurred should be added. More concerned with the attorney fees than adding additional issues.

326 PATRICK HEARN, EXECUTIVE DIRECTOR, OREGON GOVERNMENT ETHICS COMMISSION: Testifies in opposition to SB 296B and SB 292A

>The issue of attorney's fees was debated extensively in the Senate Government Operations Committee.

>After the Committee deliberated at length, heard testimony, and considered the fiscal impact, the Committee dropped the attorney fee segment from the bill that was introduced before it left Committee.

>Fiscal impact is indeterminate. There is no way to know how many contested case hearings might come before the Commission in the biennium; if so, what the costs of those would be.

>Even one case of 25 to 40 thousand dollars would certainly be a pretty significant impact in an unbudgeted fund.

382 REP. CEASE: If it is that big an impact for the state, think how big an impact it is for an individual.

387 HEARN: The Ethics Commission's position is that it would be all right to allow attorney's fees if language were added to enable the Ethics Commission to also recover its costs of it prevails.

404 REP. PARKINSON: If the Commission wins, the costs are paid by the state, is that right?

HEARN: The Commission's position was that the state should be reimbursed for its costs if the respondent is reimbursed if he prevails.

422 CHAIR WALDEN: How many cases in the last year would have been impacted by this?

HEARN: In the 1989-91 biennium, there were four contested case hearings. One went to Court of Appeals and the Commission was partially affirmed and it was partially reversed.

>The other three were not appealed and the Commission prevailed.

461 REP. CEASE: Is there a fear that this could conceivably be a very large cost to the state? What is the reasoning for the argument that there is a fear about the money question?

HEARN: That is not representative of the potential.

TAPE 41, SIDE A

043 REP. MILLER: What is the fairness of having the prevailing public official pay for their attorney's fee.

HEARN: The Ethics Commission felt it is carrying out statutorily mandated responsibilities when it pursues the complaint of a public official. It has a responsibility to do so.

>By the same token the public official has a responsibility to comply with ethics laws. That failure to do so, or even if the Commission with good cause and based upon sound information initiated a review of a public official's action and even if he did prevail, the Commission was still doing its job and rightfully so.

>Discussion followed regarding fairness of expecting public official to pay costs of attorney's fees when he prevails.

093 GAIL RYDER, SENATE GOVERNMENT OPERATIONS COMMITTEE: Presents background on testimony heard by Senate Committee regarding these bills.

>This aspect was discussed favorably until the advent of Ballot Measure 5 and then they felt budgetary constraints. They discussed if award of attorney's fees would come from Commission budget or from the General Fund.

104 REP. HOSTICKA: If there is a contested case, who are the parties contesting?

DILORENZO: My understanding is that the parties are the Ethics Commission and the accused public official. The citizen who may have initiated the complaint, may be called the complainant but at the contested case setting that person is not a party because there are no remedies that can be sought against that party. It is the Ethics Commission that prosecutes the case.

194 REP. CEASE: The individual who is involved will frequently come to a settlement without taking the case further forward because of the money issue.

>Discussion regarding costs of attorney fees. Would they be paid from General Fund money or from Ethics Commission's budget?

>Discussion regarding whether public officials settle because they are afraid of large costs. Would the Ethics Commission take on fewer cases if they had to pay them from their budget?

215 CHAIR WALDEN: Concerned that appear to be more concerned about a hit on the General Fund and its impact on a five billion dollar budget than what that same cost does to a prevailing citizen who comes out clean on appeal.

260 HEARN: SB 296 is another bill that originated in the Senate Government Operations Committee. It incorporates segments of several bills which the committee introduced following its interim review of the Oregon Government Ethics Commission. It is similar to SB 292 in that both bills establish procedural changes in the way the Ethics Commission processes complaints against public officials.

>The most significant change in SB 296 would require the Ethics Commission to complete its preliminary review phase within 90 days after filing of the complaint and then complete its formal investigation phase within an additional 120 days, for a total of 210 days.

>These time lines if enacted by law would necessitate additional staffing, space, and services and supplies for the Commission. A legislative fiscal analyses came up with an anticipated fiscal impact of a \$146,135 for the 1991 - 1993 biennium. That would provide one additional investigator and an additional clerical position for a total staff of six.

>SB 292 has a provision in it that would require Ethics Commission to index and cross reference their advisory opinions and to do that within this biennium. It cannot be done without adequate automated data processing equipment. The Ethics Commission could install a very adequate local area personal computer network for about \$21,000. There

is money currently unscheduled in the Ethics Commission budget that the Ways and Means Committee authorized to be rescheduled this biennium if SB 296 passes both houses and is signed into law. However, time is running out. It needs to be ordered and invoiced before June 30th or it will be too late.

325 CHAIR WALDEN: Asks Mr. DiLorenzo if amendment to SB 296 could be used on SB 292 instead.

DILORENZO: Has not checked relating clause of SB 292.

333 CHAIR WALDEN: Either bill might be useable.

>What the -A8 amendments to SB 292 do is combine several bills that are before this committee into one issue so the Committee can take the issue as a whole.

346 >On page 1, Section 3, appointment of the Commission is made by the Governor. Currently the majority/minority leaders of both parties make appointments as well as the Governor.

353 HEARN: The Ethics Commission really did not adopt a formal position in opposing the proposal for changing the appointment process of its members.

>The Commission does not feel that it is needed nor that it would improve the performance of the Commission in any way whatsoever.

378 CHAIR WALDEN: The next change comes on Page 2, Section 5 (8). This is a change requested by the Ethics Commission. This is new language and begins on line 26. It deals with the potential conflict of interest statutes. On line 26 it changes "would" to "could". Same word change is also on Page 3, line 3.

HEARN: The Commission requested this change. Paragraph 8, is a definition of a "potential conflict of interest." The Ethics Commission feels it is more consistent to use "could" with the word "potential" in the definition.

>There is some concern that this would give the Commission much greater latitude in determining the existence of conflicts of interest. That certainly is not the reason behind the Commission's requesting this.

TAPE 40, SIDE B

010 DILORENZO: The changing of the word "would" to "could" might be a problem. The question then becomes who is to decide what "could" be? What kind of reasonableness standard applies to "could."

025 REP. BAUM: Existing language says the "private pecuniary benefit or detriment." What is the meaning?

046 REP. MILLER: It simply identifies that there is a conflict and indicates interest.

066 >Discussion followed regarding the change of language from "would" to "could" and regarding the meaning of the words "potential conflict of interest" and "pecuniary benefit or detriment."

091 CHAIR WALDEN: The next change is on page 3, line 23, and is

contained in HB 2172. This deals with cross referencing on reports of travel reimbursements on statements of economic interest.

HEARN: It was a cleanup measure. It was designed to clarify language. The intention here was to cross reference this section with another section solely for the benefit of public officials who have to file statements of economic interest. It is what is being done at the present time.

196 CHAIR WALDEN: On page 6 of the amendments, lines 26, 27, and 28, says "No person shall represent a client for a fee before an agency of which the person is a member." It should be changed to read "No person shall represent a client for a fee before the public body of which the person is a member." That was a recommendation from Legal Counsel.

>This pertains to cases where someone has been paid a fee and has literally participated in process such as in county planning commissions.

HEARN: Gives instance of member of planning commission that accepts a fee and then guides citizen through the beaureaucratic maze. When it comes time to vote, he excuses himself because of conflict of interest, and then steps down and advocates passage of the request.

254 DILORENZO: Suggests that committee search very carefully for the definition of public body. One possibility that comes to mind is the Oregon State Bar. The Oregon State Bar is a statutorily mandated association. If public body would include the Oregon State Bar, this language would preclude a lawyer representing for a fee another member of the bar during disciplinary proceedings and the like.

272 REP. PARKINSON: Needs clarification with second sentence in that paragraph: "This subsection shall not apply to the person's employer, business partner or other associate."

HEARN: If a real estate broker/planning commissioner was partner with another realtor and the other realtor wanted to represent someone before the planning commission, this provision would not prohibit that.

295 CHAIR WALDEN: Next change is on page 7, line 30, "Notwithstanding ORS 244 .020". This is the cross reference to the proposed amendment that was on page 3 relative to the reporting requirements.

304 >On page 8, line 1, the Ethics Commission is proposing that the threshold for reporting the travel related food and lodging be raised from \$50 to \$100.

>Also amends so that it is an annual indexation.

332 REP. HOSTICKA: In terms of clock ticking on time limits, what extent is clock stopped by actions of the defendent and how can they be prevented from delaying paying until past the deadline.

349 HEARN: When SB 296 was in the Ways and Means Subcommittee on General Government, that issue arose. At that time some interreaction occurred between the chair of that committee and Senator Otto to come up with some mutually acceptable additional language.

>Currently the language in SB 296 which passed the senate floor requires that if there is a continuance that it must be stipulated to by both

parties. During that time the clock stops.

>Then if the respondent in the matter requests additional time and is able to come up with additional information in their defense which would necessitate the Ethics Commission's need to respond, then the language would allow the Commission an additional one time continuance of thirty days. The Ethics Commission is comfortable with the language.

377 CHAIR WALDEN: There is some difference of opinion regarding the use of the words "cause" versus "probable cause." In the minority report that was voted on in the Senate "probable cause" was used. The majority report used "cause."

391 RYDER: What the interim committee on Government Operations originally suggested was tying the probable cause definition to the criminal definition for probable cause, because there was no other definition. That is only one in statutes that describes probable cause.

>The problem the committee had was the fact that there was no definition. They felt the definition the Commission was using in some cases was too broad and in some cases too loose a definition and was an inconsistent interpretation of that term.

>That decision was met with a lot of criticism and a lot of concern. They ultimately decided to change the term because there were different perceptions regarding what the term meant. They came up with the term "cause". What that means would be up to Legislative Counsel to interpret for us.

TAPE 41, SIDE B

110 HEARN: Reluctance on the part of the Senate Government Operations Committee to apply the criminal definition to this. Seemed to be a real concern of opening the door to criminalizing ethics laws and that is why the criminal definition was modified to the point it is now.

127 RYDER: The Committee was more concerned about the onus of the criminal definition. At the point in time when the Ethics Commission makes a finding of probable cause, it is at the end of the preliminary review phase. It is before they have launched an investigation and to place "probable cause" with a criminal definition would imply criminal relationship and they were uncomfortable with that.

>Lengthy discussion of the use of the word "cause" versus "probable cause."

179 CHAIR WALDEN: Suggests members take some time before next Wednesday and review this particular issue and come back with their own independent evaluations.

186 REP. MILLER: Suggests that Mr. Hearn and Mr. DiLorenzo could also present definitions of "cause" and "probable cause."

195 DAVID BUCHANAN, OREGON COMMON CAUSE: Testifies regarding SB 292.

>Explains that the Senate Committee felt the use of the words "probable cause" made it appear that there was a violation even before an examination of the charge. By saying "cause" they were attempting to get a neutral starting point and not to prejudge in any way.

>The Ethics Commission wants to be and ought to be neutral, balanced, and equal.

>Common Cause doesn't favor change of \$50 to \$100. Is not a major point.

>The greatest objection Common Cause has is the issue of the appointments process.

>Common Cause advocates that the four legislative positions would each appoint someone of their own party. The Governor would make three appointments. Could even say that the Governor appoints one from each major party and one from not a major party.

>Current system of appointment should be preserved.

355 CHAIR WALDEN: Asks Mr. Buchanan to work with committee administrator to draft language to accomplish this.

TAPE 42, SIDE A

>Lengthy discussion with ways to deal with frivolous or malicious charges.

>Suggestions included: -moratorium on accepting complaints near election deadline. -penalize person making frivolous complaint. -take office away from candidate who wins by ill gotten means. -Ethics Commission move quickly to dispel charges.

138 DILORENZO: Believes there is a solution. There are many politically motivated complaints that are filed.

>When news media state that Ethics Commission is considering allegations and hearings will be held, it gives the complaint validity and legitimacy.

>The panel of attorneys advocated a gag order be placed on the Ethics Commission staff and proceedings until such time as the Ethics Commission determines there is probable cause to proceed.

>This proposal would not prohibit the complainant from going to the press. The real damage is done when the Ethics Commission is maneuvered into lending an aura of legitimacy to the complaint.

183 HEARN: Disagrees with Mr. DiLorenzo. Mr. DiLorenzo is speaking of particular individuals who are no longer associated with the Ethics Commission. He is speaking particularly of one or two instances relating to one specific case.

>The Ethics Commission staff will not be talking to media. This has already been put into practice.

>Has made a commitment to Senator Otto that the Ethics Commission will adopt administrative rules to provide for discipline and penalty if staff violate that type of conduct code.

>By statute the complaint is a public record. Complainants have brought the media with them to the Ethics Commission office.

222 REP. BAUM: Suggests having a period of time before the complaint

becomes public. Certain amount of time the Ethics Commission would have to review.

279 BUCHANAN: Common Cause has a purist attitude towards public access to information. However, a few years ago when this issue first came up at Common Cause the board adopted a position saying that there would be a certain value to keeping the complaints confidential until the respondent has a chance to answer complaint.

>Considerable discussion regarding the value of having a gag rule and also if there should be a period of time after complaint filed before it becomes a public record. The discussion continued on whether it should be in an administrative rule or in the statutes.

>Discussion on a suggestion that Common Cause and other organizations get together and publicly oppose candidates who are making frivolous allegations during a campaign.

475 CHAIR WALDEN: Adjourns meeting at 7:30.

Submitted by: Reviewed by:

Mary Walling Greg Leo Assistant Committee Administrator

EXHIBIT LOG:

A - Amendments to SB 292-A8 - Staff - 8 pages B - Amendments to SB 296 - J. DiLorenzo - 1 page C - Administrative Procedures - J. DiLorenzo - 1 page