

Measures Heard SB 43 SB 46

SENATE COMMITTEE ON LABOR

January 23, 1991                      Hearing Room 50 3:00 p.m.                      Tapes 3 - 4  
MEMBERS PRESENT: SEN. GRATTAN KERANS, CHAIR SEN. LARRY HILL,  
VICE-CHAIR SEN. P1 ; TER BROCKMAN SE N. BOB KINTIGH SEN. BOB SHOEMAKER

STAFF PRESENT: ANNETTE TALBOTT, COMMITTEE COUNSEL ROBERTA WHITE,  
COMMITTEE ASSISTANT WITNESSES: MARILYN COFFEL, DIRECTOR OF  
INTERGOVERNMENTAL RELATIONS, BUREAU OF LABOR AND INDUSTRIES PAUL  
TIFFANY, ADMINISTRATOR, WAGE AND HOUR DIVISION, BUREAU OF LABOR AND  
INDUSTRIES SANDRA STERLING, MANAGER, BUSINESS OFFICE AND LICENSING UNIT,  
BUREAU OF LABOR AND INDUSTRIES MARTIN JACK DESMOND, NW REFORESTATION  
CONTRACTORS ASSOCIATION D. MICHAEL DALE, OREGON LEGAL SERVICES JACK  
POMPEI, ADMINISTRATOR, OREGON OCCUPATIONAL SAFETY AND HEALTH DIVISION,  
DEPARTMENT OF INSURANCE AND FINANCE

These minutes contain materials which paraphrase and/or summarize  
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 3, SIDE A

005 CHAIR KERANS called the meeting to order at 3:07 p.m.

OVERVIEW OF LICENSING UNIT

017 SANDRA STERLING, DIRECTOR, LICENSING UNIT, SUPPORT SERVICES  
DIVISION, BUREAU OF LABOR AND INDUSTRIES (EXHIBIT A) - Details Exhibit A  
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TAPE 3, SIDE A

SB 46 - MONEYS FOR ADMINISTRATION OF FARM LABOR CONTRACTOR LICENSING  
PROGRAM, PUBLIC HEARING

050 SANDRA STERLING, DIRECTOR, LICENSING UNIT, SUPPORT SERVICES, BUREAU  
OF LABOR AND INDUSTRIES (EXHIBIT A) - Details Exhibit A.

068 SENATOR SHOEMAKER: You testified that the annual registration fee  
for one of the programs is \$10 and for the other is \$100. If that's  
enough to do the job, who has the right to change that fee in the  
future?

STERLING: Only the legislature. It's statutorily set.

087 CHAIR KERANS: I would assume that the present FTE is supported by  
the General Fund? We are simply backing that out onto the table as a  
recapture, and replacing it with this revenue, is that correct?

STERLING: That's correct.

CHAIR KERANS: But as far as the budget is concerned, it's a zero sum  
game for the total budget, but for you it's a shift from the general  
fund to other fund. And it is included in the Governor's budget.

STERLING: That's correct.

SHOEMAKER: What happens to any excess funds?

STERLING: Probably there won't be that much left over. If there is, it will be carried forward for future bienniums, they will be dedicated to this program only.

101 CHAIR KERANS: When your budget is adopted by the Ways and Means Committee, you'll have expenditure limitations for both the Bureau and the various divisions with some expenditure limitations set for this office or would these funds be fungible, moved someplace else, or actually exceed the overall expenditure limitations set.

STERLING: I don't believe that it will be a separate item. I think it will be included in our other fund limitations. As far as I know, the funds would not be able to be switched to any other purpose or to another fund. The preliminary sketch of cost is that personnel alone on this will run about \$30,000 per year. This leaves about \$15,000 for S&S, which with rent and the postage will not leave much, especially because we have large Russian and Hispanic speaking groups that we have to provide with study materials in those languages, and interpreter costs are quite high. Any time you change a rule or a statute, we have to send it back and have it redone for those groups.

. These minutes contain errors which phrase and/or summarize statements made during this session. Only text CDCBaOd id quotation marks report ~ speaker's exact words. For complete content of the proceedings, please refer to the report. , Senate Committee on 1^~ January 23, 1991 - ~ 3

TAPE 3. SIDE A

WORK SESSION - SB 46

149 MOTION: SENATOR SHOEMAKER moved SB 46 to the Ways and Means Committee with a "do pass" recommendation.

VOTE: Hearing no objections, the motion carries.

TAPE 3. SIDE A

154 OVERVIEW OF FARM LABOR BILLS 163MARILYN COFFEL, DIRECTOR, INTERGOVERNMENTAL RELATIONS, BUREAU OF LABOR AND INDUSTRIES (EXHIBIT B) -Details Exhibit B. 216 CHAIR KERANS: Would you please clarify that last paragraph? Gives examples of abuses and camps being unlawfully operated. COFFEL: Most of those registered camps are probably exempt because they are owner operated, and under the terms of the statute, they are entitled to exemptions. When we've only got five of them that have the Camp Work Indorsement, that means that they were licensed as farm and forest labor contractor as well, but that they also lawfully reported that they were going to operate farm worker camps, and therefore must be registered with us. We assumed that authority in 1989, which had previously been with OR-OSHA. In terms of the urban camps, I will let Paul give you a couple of examples of that. 290JACK POMPEI, ADMINISTRATOR, OR-OSHA, DEPARTMENT OF INSURANCE AND FINANCE: (EXHIBIT C.) -Details Exhibit C. CHAIR KERANS: Will you give us the nature of the wilful violations, and what the circumstances were?. 299POMPEI: I don't have that information right now. - Continues to detail Exhibit C.

SENATOR HILL: Once an assessment is made for a wilful violation, is there a citation? POMPEI: A company or a business group has the right to challenge our citations and penalties. The rule is to have an informal conference within 45 days with a specific company. If neither side can reach an agreement, we go to the Worker Compensation Referee Board for a formal hearing. If neither side likes the verdict there, it is possible to go to the Oregon Appeals Court and to the Oregon Supreme Court, so there is a litigation process for all violations and penalties. SENATOR HILL: These have been appealed?

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HILL: Are they under appeal now?

POMPEI: Yes they are under litigation. We have stood our ground at the informal, and they are going to the next step. - Continues to detail Exhibit C.

388 HILL: Would anyone from the other two agencies like to take issue with the other side's version of the joint occupancy inspections? Are you in agreement that it is going well?

MARILYN COFFEL: We are very happy with what we've worked out. We got off to a rocky start, but we have worked it out.

415 HILL: What has been the response of the agricultural employers: positive, negative, or mixed?

POMPEI: No one likes to be cited and penalized for violation of OSHA safety rules, but my major concern is the splitting of agencies.

TAPE 4, SIDE A

SB 43 - EMERGENCY SUSPENSION OF FARM LABOR CONTRACTOR LICENSE OR FARMWORKER CAMP OPERATOR LICENSE. PUBLIC HEARING

029 MARTIN JACK DESMOND, REPRESENTATIVE, NORTHWEST REFORESTATION CONTRACTOR'S ASSOCIATION: - He and his association have been opposed to the Bureau of Labor and Industries, the Department of Justice and the Forest Service, as well as other federal and state agencies of the issue raised in SB 43.

- He cites an example of a contractor who saved \$50,000 during a project by being out of compliance with workers' compensation rules. The contractor simply paid the fines assessed by the workers' compensation division and never obtained the insurance required because it was so costly and would have cost him much more than the fines.

- Contractors are very concerned with other contractors who do not carry workers' compensation coverage because it gives those in non-compliance an unfair bidding advantage over those who remain in compliance with the law.

- Request that the bill be passed into law.

088 MARILYN COFFEL, DIRECTOR, INTERGOVERNMENTAL RELATIONS, BUREAU OF

LABOR AND INDUSTRIES (E;XHLBIT D) - Details Exhibit D.

111 CHAIR KERANS: I want the record to reflect that we are discussing more than just workers' compensation here. In fact, we are discussing virtually every other licensing power over these folks, not just workers' compensation.

COFFEL: Yes, that's correct.

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- Continues to detail Exhibit D.

157 SENATOR BROCKMAN: If a contractor has 30 people working for him and you suspend his license, what happens to the workers? Would someone logically come in and pick them up or do they just bounce onto welfare? I understand that that's a new possibility. PAUL TIFFANY, ADMINISTRATOR, WAGE AND HOUR DIVISION, BUREAU OF LABOR AND INDUSTRIES: To answer your question, there is no provision for those workers or their families in the bill. The person would have to stop working and his job would be picked up either by someone else who was contracted by the forest service to do that, or go to work for someone else.

175 SENATOR BROCKMAN: But there is now the possibility of welfare for these people.

SENATOR HILL: I think that's a good point - that these people make so little money anyhow they collect food stamps while they are employed. I wanted to clarify that the current law that you cite, 183.430(2) (EXHIBIT E) allows emergency shut-down, emergency suspension. So we are not creating that authority, we are correcting a glitch that allows you to implement the authority that you already have.

TIFFANY: I believe that's the correct characterization.

202 SHOEMAKER: I applaud the objective, but I question whether the standard "serious danger to the public health and safety" that you tie this into could be sustained if this were challenged. Has that standard been defined under the APA?

228 CHAIR KERANS: Let's ask the Bureau of Labor and Industries those questions. When we left here after making the changes to the law that we did the last time, wasn't it your working assumption that we had told you that was what you could do?

COFFEL: Yes, that was our understanding until we talked to the Attorney General and they said we couldn't revoke these on an emergency basis. However, there is no definition in the APA of health and safety, so I guess in a sense we are asking you to determine what constitutes, at least for purposes of the statute, a threat to public health and safety.

CHAIR KERANS: What are the rights of the contractor once he has received a ticket? And what are your obligations? What if the contractor failed to comply with a field sanitation requirement?

TIFFANY: The only way we would be able to take an emergency action on

that situation is if the proper authority in that case - OR-OSHA - had determined that a serious violation had existed pursuant to their responsibilities. Once a final order was issued in that case, we could use that as a means to act on an emergency basis to cease the person from continuing to under his license.

260 CHAIR KERANS: What are the legal rights of the employer who has had his license suspended on an emergency basis?

TIFFANY: The way you get your license back is by coming into compliance with the rules that

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you violated, and you do that by taking whatever action it takes. - CHAIR KERANS: At the time I got suspended, would you also tell me what I need to do to become unsususpended? TIFFANY: Absolutely, that's part of the notice. CHAIR KERANS: The notice would tell me what my obligations are and what your responsibilities are if I meet my obligations? TIFFANY: And what their rights are - it's all spelled out in the Attorney General's Model Rules. CHAIR KERANS: So the faster I comply, the faster I get my license back. Is there any kind of time line or notice provision or hearing or anything else that would slow down the reissuance of that license or lifting of the suspension? TIFFANY: Within the current Administrative Procedures Act, there is a 90 day provision, and once his license is taken, the contractor has 90 days to petition for a hearing. That doesn't get his license back right away, that just means he has 90 days for a hearing.

- We took action in two cases before the Attorney General said we could not do it. We did give notice that within two days or 24 hours, very quick notice, this person's license would be suspended. What in fact happened is the person is on the phone like that. We negotiated with that individual to come up with the insurance, and get the binder, and we assured ourselves that he was in compliance within 48 hours. That of course is what we're after anyway, we don't want to put anybody out of work, we go ahead and give them authorization to work. That doesn't stop the penalty action. But we want the guy working. So our whole intent in this particular action here is to give us a tool that will enable us to get the quick action that we need. But if we need to use it, it will also provide us with force or intimidation. 385 CHAIR KERANS: Don't move so fast on that point. TIFFANY: The contractor was beating laborers and not allowing them to leave the camps in that particular case, we don't want the person acting in that capacity at all. We don't want him there. So we might take his license right away, but the owner of the camp would have to get a new operator. We want people working.

SENATOR SHOEMAKER: What kind of process do you go through for an emergency suspension. 415 TIFFANY: What we have to do is make a determination that a set of facts constitutes a serious threat or danger to public health and safety. We as an agency make that determination. SENATOR SHOEMAKER: How do you do that? TIFFANY: We do that primarily by evaluating the mandate, the statute - what's prohibited and

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what isn't. What impact we believe the facts indicate to us are having on the people if there's no workers' compensation insurance, that kind of thing.

TAPE 3, SIDE B.

025 SENATOR SHOEMAKER? I can see a situation here where things could get out of hand because workers want to create trouble for the contractor. If the workers lie about refunds being made to them, what is the recourse if the contractor has been wronged?

TIFFANY: This kind of violation would require quite a bit of investigation to determine that we were correct. Players are required to keep records of all transactions of payment to their employees, and generally speaking, when they do pay, in a situation like that they do keep a very good record, so generally speaking, our record is such that where there's a toss-up, we don't normally act to take someone's license away. If someone has been beaten, that's one thing, but if someone has not been paid, that's quite another.

CHAIR KERANS: The thing that bothers me is the suspension so that the person can't continue to operate while in violation of the statute. If someone recruits workers from Texas and they come up here to no work, and if there is no refund of costs for transportation here, under you procedures, it will be 60-90 days before this case ever arrives for a hearing. Is that right?

COFFEL: That's correct.

064 CHAIR KERANS: So that if someone came to you in late May where you had that kind of a situation, it could be Labor Day before you take up the case.

COFFEL: That's correct, that's about the time line, and that's fast track.

CHAIR KERANS: Now let's talk about the other case. You are not absolved of your APA responsibilities in a contested case situation of having to prove the facts of your case. Is that not correct?

COFFEL: That's correct.

CHAIR KERANS: So that when they suspend on an emergency basis, you are not absolved of your burden of proof under APA to show that you acted responsibly and within the charge of the statute, and within the scope of your rules. And that you have evidence to document the action that you took and you are prepared to defend that in a contested case situation.

COFFEL: That's correct.

JACK POMPEI, ADMINISTRATOR, OREGON OCCUPATIONAL SAFETY AND HEALTH DIVISION, DEPARTMENT OF INSURANCE AND FINANCE: I want to go on record in support of this bill. No one regarding Occupational Health and Safety in the State of Oregon has the authority to shut down a camp except for health and safety reasons except the Department of Insurance and Finance Director, or his or her designee, which at this time is me. I will not discuss pulling the license for violating health and safety rules. However, it cannot be shut down for these rules unless the Director of DIF or I give the okay. My concern is we will

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be in some sort of game where somebody feels that a camp should be shut  
down if they pull the license, and if I say no because the health and  
safety problems do not warrant a shut down, well then we're going to  
have a legislative problem. When we are ready to shut down a camp, we  
discuss with social service people all the advocacy groups, and  
everything to make sure these people are housed. The Labor Commissioner  
under OSHA authority does not have authority to shut this camp down for  
occupational health and safety reasons - they can pull the license.

121 CHAIR KERANS: I don't think anybody claimed that and I don't think  
we have a problem in that regard.

125 D. MICHAEL DALE, OREGON LEGAL SERVICES: (EXHIBIT F) - Details  
Exhibit E. - Believes the process of licensing means that agencies  
believe they can control who has the license and that ultimately you can  
deprive someone who refuses to comply with the law of that license. -  
Believes that this system is breaking down but that this legislation can  
help to correct the problems. - Reads alternative language to the bill  
outlined in Exhibit E. 311

SENATOR SHOEMAKER: Can you give the  
contractor remedy against the Commissioner if, after a hearing, it turns  
out that the contractor was wronged, and that he was not guilty. DALE: A  
Waiver of Sovereign Immunity. SENATOR SHOEMAKER: I don't know whether  
that's the answer, but some sanction so that there's redress to the  
contractor if he is wronged and it is so established after the hearing.

341 DALE: I suppose that makes some sense. The likelihood of the  
Commissioner being that wrong is fairly remote. I would hate to see a  
climate in which people were reluctant to aggressively enforce these  
laws out of a fear of a lawsuit and the cost of defending a lawsuit.

SENATOR SHOEMAKER: I grant you that, but I am very uncomfortable with  
depriving people of due process. Sanctions without due process, and that  
is what this is. This is to permit significant sanctions without due  
process. CHAIR KERANS: What I am saying is we don't have any redress in  
the event of some egregious bureaucratic bungling that they did  
something they shouldn't have done. A restaurateur would have no  
recourse against the Division of Health. The same is true with the  
Department of Agriculture and their licensing. If we start that path, my  
concern is that we are going to follow it to a very logical but very  
difficult to maintain conclusion. 379

DALE: I also am concerned about  
due process. But I can tell you that the situations faced by farm  
workers at the hands of these contractors - the chance the someone is  
going to get ptomaine poisoning or an upset stomach in a restaurant  
pales by comparison to the loss and injury that our clients are  
suffering every day at the hands of these folks. SENATOR HILL: If the  
Commissioner exercised this power without having reasonable grounds to  
have made such a decision, the Department would be appalled. I don't  
think that we have Semlte Committee on Labor January 23, 1991- Page 9

anything that specifically speaks to the reasonable grounds test.

"Existing law says that any case where the agency finds a serious danger  
to the public health or safety and sets forth specific reasons for such  
findings". So there must be findings made in order for the suspension to  
occur.

445 DALE: Those findings would then be subject to review in an

administrative proceeding. What's at stake here is does that proceeding take place prior to the actual suspension of a license or does it take place as promptly as feasible afterwards.

TAPE 4, SIDE B

020 CHAIR KERANS: Invites Bureau of Labor and Industries Staff to respond to the questions and the amendments from Mr. Dale. Would it be better if we said, instead of "as soon as practicable after such demand, the agency shall have the hearing", make it a time certain such as five working days. That would make me feel a lot more comfortable. What do you think?

TIFFANY: I think that is the scenario that is intended to take place. I'm not familiar at this point with the Attorney General's model rules on emergency suspension of licenses. I believe that it's in those model rules themselves there are very short time frames in which the hearing is required to be offered and held.

CHAIR KERANS: Let's take a look at the model rules to see what the limits are of your obligations as far as having a hearing. My next question is where are you in relation to Mr. Dale's amendments versus the measure as presented to us.

COFFEL: I guess what we want is to be able to address the problem. We're not concerned about the specific language. My concern is I want the AG to look at this because I don't want us to pass something this session and we go out and think we can take care of the problem and the AG looks at this and says it does not say what you thought it said. I want the AG to look at the language before we look at this bill again. We just want the language that's going to do the job.

083 CHAIR KERANS: I ask Mr. Tiffany, Ms. Coffel and Ms. Talbott to see what the AG says, look at the APA expedited hearing standards - what their model rules say - see what the AG has to say about the language, and come back and make a joint recommendation to us.

126 - Meeting adjourned at 4:39 p.m.

Submitted by: Reveiwed by:

Roberta White Annette Talbott Assistant Committee Counsel Sen te  
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EXHIBIT LOG: A - Testimony on SB 46 - Sandra Sterling - 2 pages B - Testimony on SB 46 - Jack Pompei - 19 pages C - Testimony on Overview of Farm Labor - Marilyn Coffel - 16 pages D - Testimony on SB 43 - Marilyn Coffel - 9 pages E - Administrative Procedures & Rules (183.430)- Staff - 1 page F - Testimony on Amendments to SB 43 - D. Michael Dale - 1 page G - SMS reports on SB 43 and 46 - Staff- 2 pages H - Proposed Amendments to SB 43 - Staff - 2 pages

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