MINUTES

MONTANA SENATE
57th LEGISLATURE - REGULAR SESSION
COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on February 16, 2001 at 9:10 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:
Sen. Lorents Grosfield, Chairman (R)
Sen. Duane Grimes, Vice Chairman (R)
Sen. Al Bishop (R)
Sen. Steve Doherty (D)
Sen. Mike Halligan (D)
Sen. Ric Holden (R)
Sen. Walter McNutt (R)
Sen. Gerald Pease (D)

Members Excused: Sen. Jerry O'Neil (R)

Members Absent: None.

Staff Present: Anne Felstet, Committee Secretary
Valencia Lane, Legislative Branch

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing(s) & Date(s) Posted: SB 452, 2/13/2001; SB 467, SB 476, SB 477, 2/15/2001
Executive Action: None

HEARING ON SB 452

Sponsor: **SEN. SAM KITZENBERG, SD 48, GLASGOW**

Proponents:
Dan Frank, student at Montana State University
Bud Harringer, minister and youth counselor
Alexandra Newholy, Assistant Professor of Native American Studies at Montana State University
Anita Rosman, Montana Advocacy Program
Mel Davis, Mental Health Association of MT
RuthAnn Burley, RN

Opponents:
REP. GARY MATTHEWS, HD 4, Miles City
Anita Shawtymrak, Administrator of the Gallatin Co. Youth Detention Center
Winnie Orr, Policy and Training Bureau Chief for Department of Corrections
Jim Hunter, Department of Correction, Pine Hills
Jim Oberhoffer, MT Board of Crime Control
Lt. Michael Hagenlock, Gallatin Co. Sheriff's Office
Matt Robertson, Department of Corrections

Opening Statement by Sponsor:

SEN. SAM KITZENBERG, SD 48, GLASGOW, opened on SB 452, saying **Bud Harringer,** a minister and youth counselor from his district, had spent countless hours on this particular issue and would provide the information regarding the bill.

Proponents' Testimony:

Dan Frank, student at Montana State University, said he conducted interviews with Native American families who had experienced pepper spray incidents at Pine Hills. He presented a 10 minute video, but did not leave it for an exhibit.

Bud Harringer, minister and youth counselor, said he's visited 12 detention centers since 1999 pursuing pepper spray matters. He introduced **Sheldon Smoker,** a 5'4", 110 pound youth and **Glen Black-Eagle** who were accompanying him. He described his visits to youth detention centers saying he always asked, "How are staff treating you here?" The boys would reply with positive remarks about the staff care. However, even in caring facilities, the despair and depression could be overwhelming to the youth ages

14,15, or 16. If abuse was added into that equation, the depressions got considerably darker. According to the Department of Corrections policy papers he acquired as a result of a court motion for discovery, OC (Oleo Resin Capsicum) or pepper spray could possibly incapacitate an officer for 45 minutes because of the pain. He impressed upon the members of the committee the psychological terror and the emotional trauma inflicted onto children by adults of a different race using pepper spray frequently. He reported that a Pine Hills official testified in court that numerous Native American children at Pine Hills were pepper sprayed approximately 15 times each. He believe that number to be an under exaggeration. So, on July 14, 2000 a motion for discovery was filed with the 16th Judicial District Court. He felt the motion required Pine Hills to turn over to a defendant all the records in their files concerning the incidents where a youth had been pepper sprayed or incidents where other force had been used, including if the youth was handcuffed and shackled. He acknowledged documents noted incidents of the youth being handcuffed, shackled, and pepper sprayed. However, he felt the documentation was incomplete because the youth had presented a different story. In one incident, 5 boys were acting out. The 20 officer reports differed as to how many times OC was used and how many officers sprayed the chemical. He believed 5 officers sprayed OC and the youth were sprayed twice because when all 20 reports were combined, 5 officers were named and one report said the youth were sprayed twice. This theory matched the story by the 5 Native American youth. Also, he noted that the officers did not report on the shower that followed OC use. Two youth reported using their toilet bowls to decontaminate themselves.

{Tape : 1; Side : B}

He argued that if sheriff deputies or city cops were this unprofessional or had these kinds of discrepancies, the public would soon lose trust in the police department. So to, Native American people in Montana would lose their trust in the Department of Corrections. He described a second incident that did not have an official report, but a nurses report described chemical burns on a youth's neck and back. Another incidence was reported by a female staffer at Pine Hills. It said three Native American boys were pepper sprayed and five others were handcuffed and shackled. Every staff witness was supposed to file an incident report, but only one document pertained to this. He, families, and Native American leaders found this totally unacceptable. He said they were alarmed by what they knew based on documents, but they were more alarmed by what they didn’t know based on the documents that were not turned over to him from a court order. Of the documents he had, the ratio was 40-1 of Native American children being pepper sprayed verses children of the white race. The documents indicated a boy 5' 4" tall and 111

pounds was pepper sprayed, the same size as **Sheldon Smoker**. He felt SB 452 would address that issue. He read the physiological profile of one child from the State Mental Hospital at Warm Springs. This piece emotionally illustrated the effects of abuse and the use of pepper spray. He argued the bill provided measures for monitoring what was done for and to children in institutions. He felt maintaining the status quo was totally unacceptable because it placed children in danger, was irresponsible, unthinkable, and unforgivable. He noted **Governor Martz** said Corrections would be accountable to her and the legislature in her State of the State Address. The bill helped make Corrections responsible.

Alexandra Newholy, Assistant Professor of Native American Studies at Montana State University, provided her testimony, which was based on her analysis of the documents that **Mr. Harringer** received under a Discovery Order, **EXHIBIT(jus39a01)**.

Anita Rosman, Montana Advocacy Program, said they supported the bill.

Mel Davis, Mental Health Association of Montana, said they supported the bill.

RuthAnn Burley, RN, said she was an independent contractor with the Department of Health and Human Services. She supported the bill.

Opponents' Testimony:

REP. GARY MATTHEWS, HD 4, Miles City, said he was a correctional officer in Range Rides in Unit C, the high security units at Pine Hills. He was testifying as an informational witness. He felt some lies had been told and wanted to give a few facts. **Chris Michelotti**, who testified in the video, came out of Pine Hills in 1998 about the same time **REP. MATTHEWS** started. He believed **Mr. Michelotti** would shake his hand because he was treated with respect and dignity. He was very disappointed in **Mr. Michelotti** because his statement that he was sprayed 40 or 50 times at Pine Hills was a lie. **REP. MATTHEWS** indicated he worked in the unit **Mr. Michelotti** was in, but he could never remember **Mr. Michelotti** being sprayed on his shift. **REP. MATTHEWS** reported isolation was a consequence for breaking the rules. The isolation period could last from one to five days. **REP. MATTHEWS** noted **Mr. Michelotti** testified he would go four days without a shower, and was in his cell for 24 hours without recreation. However, that was not true because the correctional officers ensured the boys got their showers and recreation. **REP. MATTHEWS** said others would testify

about the need for pepper spray, but he noted shift leaders did not have the authority to get a can and spray a kid; it had to be authorized by someone higher. He said pepper spray was used in extreme conditions, when a juvenile was out of control and a danger to himself and other staff. He passed in a sheet indicating the use of pepper spray at Pine Hills, **EXHIBIT(jus39a02).**

Anita Shawtymrak, Administrator of the Gallatin Co. Youth Detention Center, reported they had an adult detention center and a youth detention center. **Lieutenant Hagan** who ran the youth detention center was also present. She felt people with the Department of Corrections would get more in depth about the use of force and how important and vital OC spray was in protecting the staff and using it in a use-of-force continuum. She said it was not whipped out and sprayed on someone for punishment purposes. She told about an incident in a different youth detention center where she and three other officers responded to a violent 16-year-old girl. The juvenile injured an officer's thumb and ripped out her hair. She injured the eye of another officer. She also kicked **Ms. Shawtymrak,** putting her in the hospital. One officer escaped injury. **Ms. Shawtymrak** would have preferred to have OC spray in that situation to alleviate the emotional and physical trauma to three officers. She argued these officers responded in an effort to physically control someone who was totally out of control, violent, and who meant harm. She asked consideration of why OC spray was used in the facilities, and also of its importance.

Winnie Orr, Policy and Training Bureau Chief for Department of Corrections, provided her testimony as well as Pine Hills' "Use of Force and Restraints policy and procedures", the "Use of Force Continuum", a "Use of Force Information Sheet", the "Use of Force Evaluation Report", the "Use of Chemical Agents policy and procedures", the "Yellowstone Co. Youth Service Center's Licensing Instrument Regarding Inflammatory Agents", and the Department's Lesson Plan on the use of OC spray. **EXHIBIT(jus39a03).**

{Tape : 2; Side : A}

Jim Hunter, Department of Correction, Pine Hills, said Pine Hills was very careful in it's documentation of use of force. It had been increased as time went by. He noted the Use of Force reports were given to the Department's Security Manager as required and he reviewed them almost daily. He felt they almost bent over backwards in their definition of Use of Force; it was anything requiring the hands-on impelling or impeding the movement of a juvenile. Therefore, Use of Force statistics were high because

anytime somebody broke up a fight, guided somebody who did not want to be guided, Use of Force was used and a report would be filed and reviewed. He also noted Pine Hills was accredited by the American Correctional Association. These standards were above and beyond Constitutional rights and levels. In order to achieve accreditation, they were subject to an audit on their policies and procedures. Their audit compliance rate was above 98%. He felt they were in compliance and would continue to be in compliance.

Jim Oberhoffer, MT Board of Crime Control, said he also represented the Youth Justice Council under the Board of Crime Control, and Peace Officers Standards in Training, under the Board of Crime Control. He noted the bill required the Board of Crime Control to develop an agency or committee to look into these incidence. However, this would be a duplication because the incidents were already investigated and should be in compliance records. He felt the Use of Force Continuum was a valuable tool because if it wasn't used, they would have to immediately step to the next level. This could put not only the youth but also the staff in jeopardy. He said the Board of Crime Control felt they would need at least a halftime FTE to accomplish what more the bill required.

Lt. Michael Hagenlock, Gallatin Co. Sheriff's Office, said he would like to believe that they were one of the good guys working within the detention center that the minister talked about because they did care about the safety and security of the facilities as well as taking care of the youth. However, OC spray was their last line of defense. Before OC spray was ever used, the youth knew of officer presence, part of the Use of Force Continuum. The officers began by talking to the child and try to get them to back down. After than, they looked at other options such as handcuffs, physical take-downs. He noted a child that was 5'6", 120 pounds could be very strong and ready to go when they were angry. When they got angry or were out of their situation, they had immense strength. OC spray helped in that back-up as a last resort. He said officers had to get authorization to use OC spray. He argued instead of taking away OC spray use at all facilities, the procedures and policies of those facilities that were not in compliance had to be reviewed and dealt with. OC spray was a back up that he would not want to lose should the occasion rise to use it.

Matt Robertson, Department of Corrections, said he was also a Special Deputy County Attorney for Custer County. He prosecuted the juveniles at Pine Hills. He was prohibited from responding fully to the allegations that were made regarding court-ordered discovery because of the ongoing nature of the prosecutions that

were going on presently regarding **Mr. Michelotti** and some of the other youth involved in those incidents. He noted he had reviewed all of the Use of Force in those cases. They were referred to him after several other levels of review. The reports were written, charges were filed, and several cases had resulted in convictions, others were still pending. None of the juveniles had been acquitted. They were charged with assaulting the correctional officers and staff at Pine Hills. He urged the committee to notice when the cases were completed. He could provide complete and full information on all of those cases. He said the bill removed a very vital tool used by correctional officers as a last resort to deal with juveniles who were very violent.

Questions from Committee Members and Responses:

SEN. STEVE DOHERTY asked for the statistics that indicated the use of pepper spray at Montana juvenile detention facilities over the last year. The number of incidences that had involved Native Americans, non-Native Americans, and the kind of information that the bill requested. **Jim Oberhoffer, MT Board of Crime Control,** replied those statistics were not gathered at this time. He clarified the duplication was because they were gathered, and were investigated by the Department of Corrections.

SEN. DOHERTY questioned if an argument against the bill was that it duplicated current practice, but the information could not be provided, didn't that mean that it was not being done. **Mr. Oberhoffer** clarified the Department of Corrections was handling it, not the Board of Crime Control.

SEN. DOHERTY re-referred to someone from the Department of Corrections. **Greg Budd, Security Manager for the Department of Corrections**, replied the bureau was responsible for collecting all reports of Use of Force incidents that occurred in all youth detention facilities as well as all Department of Correction facilities. They reviewed the reports for the appropriate response and followed up if indicated on the report. Currently they just had the reports; they were in the process of building a data base to compile the information that the bill spoke to.

SEN. DOHERTY asked the impetus for building the data base and when it would be built so the statistics would be available. **Mr. Budd** replied the ability to track the Use of Force reports was the impetuous for building the data base. The information would be used to better understand training issues and get basic statistical information. He thought the data base would be built and they would enter previous reports into it in about three or four months.

SEN. DOHERTY commented he felt **Mr. Harringer** made some very serious allegations against the Department of Corrections that correctional officers had not filed accurate reports or incident reports, and there had not been adequate controls. He thought **Mr. Harringer** had relayed anecdotal evidence, but talked about court orders and discovery motions. He asked what evidence he had and where it was. **Bud Harringer, minister and youth counselor,** replied they had evidence, documents, the court transcript, the motion that was filed, and the incident reports. He had many documents.

SEN. DOHERTY responded lawyers filed a lot of discovery motions. He wanted to know what the court said about the discovery motions that had been filed. **Mr. Harringer** said the discovery motion was filed, but Pine Hills only complied partially. They turned over some incidents, but they did not turn over all of the incidents. We had other documentation. He said the lawyer opted for a plea agreement, and didn't really want that discovery. Parents did, families did, the Indian people did, but she was going for a plea agreement and she really had no need to press the discovery issue.

SEN. DOHERTY asked **Mr. Robertson** to respond to that question. He understood that it was a criminal prosecution, not a civil law suit. He asked what was going on with regard to discovery and how he responded to the charge that incident reports didn't exist because people conveniently developed amnesia. **Matt Robertson, Department of Corrections,** acknowledged there was a discovery motion made in the case, State of Montana vs. **Dexter Earl White**, a.k.a **Dexter Earl Turntoes.** The attorney filed a motion for discovery regarding the incident at hand and they returned to her about a one inch thick packet of all the incident reports regarding what happened the day in question as well as the preceding days regarding his violations. She was asked specifically if she wanted all three years' worth of documentation. When she found out it's size, she said the packet she already had was sufficient. The plea agreement for **Mr. White** would go to hearing in March in Miles City.

SEN. MIKE HALLIGAN asked how soon after an incident an officer was required to write something down. **REP. GARY MATTHEWS, HD 4, Miles City,** replied before the officer got off shift. It might take a few hours depending on the number and type of reports, but the officer never left the facility before that report has been completed.

SEN. HALLIGAN commented the allegations appeared to say the officers falsified the reports, or at least neglected or certainly ignored tangible or important facts such as whether

pepper spray was used. He asked who checked the reports' accuracy. **REP. MATTHEWS** replied only shift supervisors could authorize use of pepper spray at Pine Hills Youth Correctional Facility. He said Use of Force (breaking up a fight or putting handcuffs on an individual to get him back to his unit) was different. According to reports, Pine Hills used OC 14 times since July of last year. There were 120 incidents of Use of Force. He argued there had to be a separation between Use of Force and going up to Continuum and using pepper spray.

SEN. HALLIGAN questioned in the case of a spontaneous altercation, how did the officers get approval to use pepper spray if it was determined that would be needed. Where was the person who gave authorization. **REP. MATTHEWS** replied in his unit one person was in the control room and two correctional officers were on the floor. There could be 16 to 20 kids at the tables eating lunch. Once an altercation broke out, one officer first removed all the bystanders back to their units to isolate the ones directly involved. The person in the control room determined the level to call in security, and possibly response from the recreation department or the units that were close by. Until security arrived, pepper spray wasn't used. They didn't have it available right there on the floor.

SEN. HALLIGAN asked if the person who brought the pepper spray was required to file an incident report as well as the correctional officers on the floor. **REP. MATTHEWS** said that was correct.

SEN. HALLIGAN questioned if the incident reports provided in the discovery included the correctional officers' and the supervisory personal's reports. Would they coincide with each other? **Mr. Robertson** responded the reports came from all staff who responded. He clarified if Use of Force was used, the officer on shift, the person in the control room, the officer supervising the return to the units, all the security that responded, and the security supervisor(the one who had the authorization to bring the OC to the unit) had to file a report. All of those reports were sent to **Jim Hunter** for review then sent to **Greg Budd** for further internal review at the department level.

SEN. HALLIGAN asked what was done if the reports didn't include the same information, such as the use of pepper spray. **Jim Hunter, Department of Correction, Pine Hills,** replied a cover sheet filled out by the incident commander (almost always the shift supervisor, not the shift leader) listed everybody involved and whether they filed a report. If a report was missing, he asked for the missing report.

SEN. HALLIGAN asked if he had information indicating how many pepper spray incidents occurred with Native Americans as opposed to Whites, Blacks, or Asians. **Mr. Hunter** said no.

SEN. HALLIGAN asked if anybody within the Department had it. **Mr. Hunter** thought the information was there, but it had not been compiled.

SEN. HALLIGAN questioned if the incident report indicated race. **Mr. Hunter** said yes.

CHAIRMAN LORENTS GROSFIELD asked if there was any disproportionate usage of pepper spray involving Native Americans as opposed to instances involving white juveniles. He clarified disproportionate to the population within the facility. **REP. MATTHEWS** said he didn't have the percentages, but 7% of Montana's youth were Native American. However there was definitely a higher percentage of Native Americans incarcerated in the high security unit at Pine Hills than whites. It was higher than the 7% population.

SEN. DUANE GRIMES commented it was awkward that they couldn't ask questions of those who spoke from the video because he had plenty of questions for those people. He asked what remedy a young person had in Pine Hills when they felt mistreated. **Mr. Budd** said they could file an internal grievances to the grievance process, talk to other staff members involved, and send letters out.

SEN. GRIMES questioned if a lot of grievances had been filed because of the mis-use of pepper spray. **Mr. Budd** replied he was unaware of any statistics like that.

{Tape : 2; Side : B}

SEN. GRIMES asked if there were witnesses (students) from inside the correctional institution who could disprove the number and the occurrence of these alleged incidents. **Mr. Robertson** replied he didn't know if any youth who would be willing to testify in support of what **Mr. Michelotti** said on the video tape. Generally they didn't want to talk because they would have to admit their involvement in the assaulted behaviors. As **REP. MATTHEWS** said, those who weren't involved were immediately taken to their units to prevent them from becoming collateral victims of the assaulted behavior.

SEN. RICK HOLDEN asked if the Native American population generally came from the reservation. **Mr. Robertson** replied that was not the case. Juveniles from the reservations were dealt with

in Federal Court. If they were from the reservations, they committed offenses off the reservations and were adjudicated in the county where they committed the offense.

SEN. HOLDEN then questioned what the reservations did with the juvenile delinquents. **Mr. Robertson** said generally they were dealt with in the federal system and when required were placed out of state in a federal facility because Montana did not have any federal facilities.

SEN. DOHERTY noted the discrepancy between pepper spray uses at Pine Hills. He asked how much pepper spray they purchased last year, the year before, and how much they currently had on hand. **Mr. Hunter** said he didn't have the inventory list, so he couldn't say.

SEN. DOHERTY then questioned if they had an increased need to buy additional pepper spray at Pine Hills. **Mr. Hunter** said he thought they had a decreased need.

SEN. AL BISHOP noticed page 2, second paragraph of **exhibit (1)** stated: "OC is frequently used to control and punish children, when other effective means are readily available." He asked what those other effective means were. **Alexandra Newholy, Assistant Professor of Native American Studies at Montana State University,** said the nurse who worked in the psychiatric unit could also speak to that. She understood that when behavior escalated or confrontation occurred, one of the first things was to try to calm the child by talking to them and speaking them out of the situation. The documentation she reviewed didn't indicate that. The incident reports required details on how the escalation in their Use of Force occurred to show that they tried lesser means of force before they resorted to OC spray. She pointed out that in one of the instances, which was a mixed group of kids (Native American and non-Native American) riot shields were used to break up a fight. Another incident involving the same number of kids and the same number of staff, OC spray was immediately used.

SEN. BISHOP asked if the pepper spray caused any permanent physical injury. **REP. MATTHEWS** said it caused a lot of irritation, but he didn't know about any permanent injury. He noted it made him cry too.

SEN. BISHOP asked **REP. MATTHEWS** if it was true that other means were not tried before using pepper spray. **REP. MATTHEWS** said that was not true. He felt there was a big exaggeration on the use of pepper spray. He assured the committee that **Mr. Michelotti** wasn't sprayed 40 or 50 times as he said in the video.

SEN. BISHOP asked if the juveniles ever got their hands on dangerous weapons such as a gun, a knife, or what ever. **REP. MATTHEWS** replied juveniles covered their unit's windows, and that was cause for concern because the person could be a danger to himself or to staff. In those cases, they did a cell extraction to make sure that everything was OK. If the person had a shank, a tool, or broken glass and would not lay down on his bed, pepper spray was used 90% of the time. That was an incident where there was danger to the staff or to somebody else.

SEN. GERALD PEASE said he was trying to figure out the similarities between OC spray and the spray hunters use for defense against bears. He asked if there was a similarity. **RuthAnn Burley, RN,** replied it was basically the same thing.

CHAIRMAN LORENTS GROSFIELD commented the bill outlawed the use of pepper spray. It required the Attorney General to do an investigation and develop a detailed report on the use of pepper spray over the last five years. In addition it required notification to the parent and the Board of Crime Control of any serious incident that occurred in these facilities. It said the parent would be notified of a suicide attempt and the death of a youth. He asked if the department notified the parents of those incidents under current practice. **Mr. Robertson** said yes, the department would have an obligation to immediately report a suicide or a death of a juvenile in a facility. He didn't believe that anyone would think the Department of Corrections would be so callous as to conceal that factor for any period of time. If that were to happen, and he didn't think ever had, it would be immediately reported to the parent and to the Attorney General's Office.

CHAIRMAN GROSFIELD clarified a suicide attempt. **Mr. Robertson** said that would be reported to medical personnel and the parents.

CHAIRMAN GROSFIELD questioned if Use of Force against the youth, by the facility staff was routinely reported to parents. **Mr. Robertson** said it did not go to parents. As **Mr. Hunter** testified earlier, Use of Force had to be documented every time physical contact was made with a juvenile to impede or impel him to do something or prevent him from doing something.

CHAIRMAN GROSFIELD asked what about a sexual assault. **Mr. Robertson** replied that would be more likely be referred to criminal prosecutors and the parents would be notified.

CHAIRMAN GROSFIELD questioned what about an injury requiring hospitalization. **Mr. Robertson** said hospitalizations were routinely documented and the parents were notified.

Closing by Sponsor:

SEN. KITZENBERG closed on SB 452. He clarified he told **Mr. Herringer** to provide some documentation and he advised him to proceed with legal means, which he did. **SEN. KITZENBERG** noted **Mr. Harringer** wrote a report called, "The Brutal Treatment of the Native American Children at Pine Hills Montana". **Mr. Harringer** also had more than three hundred documents describing nightmares of horror of Native American's detained at Pine Hills. **SEN. KITZENBERG** felt that was evidence, and this was a very serious situation. He empathized with what the correctional officers said; they were in a very difficult position. He felt some serious questions had been raised and he urged the committee to take serious consideration of the allegations.

HEARING ON SB 467

Sponsor: **SEN. DUANE GRIMES, SD 20, CLANCY**

Proponents: **Leo Berry, BNSF and MT Western RR**
Russ Ritter, MT Rail Link and MT Resources
Angela Janacaro, MT Mining Association

Opponents: **Erik Thueson, representing self**
REP. JIM KEANE, HD 36, Butte
Jamie Carey, Helena Attorney
Al Smith, MTLA
Darrell Holzer, State AFL-CIO

Opening Statement by Sponsor:

SEN. DUANE GRIMES, SD 20, CLANCY, opened on SB 457, a bill addressing a law established in 1905 regarding personal injuries caused by workers at railroad companies. The intent of this new legislation was to protect against a double jeopardy situation. It clarified that once employees went through collective bargaining or wrongful discharge, they couldn't turn around and use the old law in an unintended way.

Proponents' Testimony:

Leo Berry, BNSF and MT Western RR, said a Supreme Court decision on the Winslow vs. Montana Rail Link case prompted his testimony. He pointed out the preamble to the bill gave the basic nature of the case. He said the case blew a huge hole in the collective bargaining agreement process. He countered the claims that the bill and this issue was about injured workers. He said injuries for railroad workers were covered under the Federal Employee

Liability Act and injured miners were covered under the Workers Compensation Act. Both of those Acts were exclusive remedies. The bill addressed wrongful discharge claims because employees covered by collective bargaining agreements were not covered by the Wrongful Discharge Act established in 1987. He said clearly the legislature intended that if an employee was covered by a collective bargaining agreement, they used that process. He argued that was what employers and unions bargained for, a process to provide relief for people who were improperly discharged from their jobs. He explained the Winslow case: Mr. Winslow, who was covered by a collective bargaining agreement, was fired by Montana Rail Link. He went all the way through the process to the National Mediation Board, the arbitrator, and he lost at each step. He was found to be properly fired by Montana Rail Link. Instead of going to federal court, the next step under the process he filed an action in State Court, under this 1905 law for wrongful discharge, which in its history had never been applied to wrongful discharge. The District Court dismissed his claim because the statute did not cover wrongful discharge. It was intended to address injuries to workers, but it was no longer relevant because of the other Acts. The Supreme Court reversed the District Court decision. He asked for consideration of the bill to return to the status quo before the Winslow case. He felt the collective bargaining agreement provided a process to bring a claim against the company, and that was the process to use. If the collective bargaining agreement didn't include those rights, then the statute still stood. The Wrongful Discharge Act was the proper process in the absence of a collective bargaining agreement. He explained a House bill that repealed this section entirely was tabled.

{Tape : 3; Side : A}

He referred to the bill, page 2, line 22, which said the provisions of 703 would not apply to an employee covered by a collective bargaining agreement when that procedure allowed an employee to process a claim or grievance contesting alleged negligence, mismanagement, or misconduct.

Russ Ritter, MT Rail Link and MT Resources, noted an attorney from Missoula would be sending written testimony, **EXHIBIT(jus39a04). Mr. Ritter** said they felt this legislation better clarified what was available and prevented the use of a law that had been preempted by a series of opportunities to protect workers from the kinds of activities that a court would determine would be wrongful.

Angela Janacaro, MT Mining Association, said they believed the modifying language clarified the intent of the Wrongful Discharge Act.

Opponents' Testimony:

Erik Thueson, representing self, said he was an attorney practicing in Helena. **Mr. Winslow** had retained **Mr. Thueson** as his attorney after he was fired about six months short of his twenty years retirement eligibility. He provided the Supreme Court's reasoning in the Winslow case and other material in a packet called "Railroad Mismanagement Statute, **EXHIBIT(jus39a05).** He referred to **exhibit (5)** and used an easel to present his testimony, **EXHIBIT(jus39a06).** During his testimony, **CHAIRMAN GROSFIELD** asked if the statute was superceded by FELA. **Mr. Thueson** said no because FELA covered personal injury claims. There were no statutes in this state that cover the situation that **Mr. Winslow** found himself in.

REP. JIM KEANE, HD 36, Butte, noted he was on the Business and Labor Committee in the House, which tabled the bill that would repeal these two sections. He provided a handout from Butte's 'Round Town Review, **EXHIBIT(jus39a07).** It showed what happened in Butte the week of June 15, 1910. He argued some of these bills were written in the blood of the workers who built this state. Therefore, they needed to be very cautious. He urged consideration of the handout and for them to realize where this law came from.

Jamie Carey, Helena Attorney, felt collective bargaining was used by the railroad to intimidate workers that were injured. He read from some documents explaining his position, **EXHIBIT(jus39a08).**

{Tape : 3; Side : B}

He believed the mismanagement statute section 703 served a genuine and necessary purpose. Montanans should have redress to the judicial system through this statute to address this serious concern. He felt the collective bargaining agreement process was simply inefficient.

Al Smith, MTLA, passed around the amendments to HB 422 that were proposed February 2nd, **EXHIBIT(jus39a09).** He noted they were identical to this bill. He argued the law was still necessary to protect Montanans. It kept railroad and mining companies responsible and accountable for their actions. He said under the collective bargaining agreement, the facts of a case regarding termination of a worker were determined at the first hearing. The worker didn't have knowledge of the charges against him; his case

was set in that first unfair practice. He said workers were encouraged, harassed, intimidated not to report injuries, and when they did they were terminated for it. He felt the reason was because the less injuries that railroads reported the better chance they had to secure less regulation from the Federal government. He argued by removing the law, it removed the only tool left for railroad workers in Montana to ensure that they were treated responsibly and accountably.

Darrell Holzer, State AFL-CIO, offered opposition as well because more than everything that was already discussed, they felt this was a real slippery slope. Other bills this session stemmed from someone not agreeing with the law's interpretation. Other pieces of legislation further reduced, in various ways, the liabilities of corporations and employers, while at the same time seeming to raise the bar for the individual workers of the state of Montana. They believed there absolutely needed to be a balance there. They felt this law should not be taken away from Montana citizens to keep their families whole.

Questions from Committee Members and Responses:

SEN. STEVE DOHERTY asked if the amendments to HB 422 were ever offered. **Leo Berry, BNSF and MT Western RR,** replied no.

SEN. DOHERTY asked if he participated in drafting the amendments. **Mr. Berry** said he couldn't see the amendments, but he assumed he did. However, he reiterated they were not offered.

SEN. DOHERTY questioned if they weren't offered in case the bill was tabled so that SB 467 would not die at transmittal to be transmitted to the House. He asked if that was a fair characterization. **Mr. Berry** said of course not. The amendments were never offered. So he didn't think they could assume what the House committee would have done with them.

SEN. DOHERTY noted the bill basically repealed the Act if the employee was covered by a collective bargaining agreement. He asked how many employees or the percentage of employees at Burlington Northern Railroad were not covered by a collective bargaining agreement. **Mr. Berry** cautioned him to read the bill a little more carefully, and not make the assumption that it repealed the statute. He said some of the opponents to HB 422 argued that certain individuals within the rail industry did not have a collective bargaining agreement or did not have a remedy under that collective bargaining agreement that would allow them to bring claims for misconduct, mismanagement, or negligence. He didn't know of anyone, but if there were people that were subject to a collective bargaining agreement that did not allow them to

bring a cause of action or a claim under that for negligence, mismanagement, or misconduct, then they could still avail themselves of this section. For those employees who did have a collective bargaining agreement that allowed a claim for these type of allegations, then **SEN. DOHERTY** was correct. The provisions would not apply and that law would be repealed.

SEN. DOHERTY questioned since this arose out of an alleged wrongful discharge, why it wasn't processed saying a claim alleging wrongful discharge. **Mr. Berry** said he crafted the bill that way because of the provisions found on page 2 line 22. Without mirroring the collective bargaining agreement that covered negligence, mismanagement or misconduct then it interfered with the Wrongful Discharge Act. He didn't want to bring in the Wrongful Discharge Act because it was a much broader issue and potentially effected a larger variety of people. He tried to concentrate on the issue at hand.

Closing by Sponsor:

SEN. GRIMES closed on SB 467. He believed there were plenty of remedies for issues of injuries. He noted the bill was not retroactive and in no way affected the Winslow case. The bill established if a collective bargaining agreement was in place, then that would be used. Injuries would be handled somewhere else in the FEVA. He felt there were a lot of allegations made and he took strong deference to that, somehow there was a lot of mischievousness going on by the companies.

HEARING ON SB 477

Sponsor: **SEN. GREG JERGESON, SD 46, CHINOOK**

Proponents: **Rose Hughes, Executive Director MT Healthcare Association**
Janet Thomas, representing self
SEN. LINDA NELSON, SD 49
Harry Smith, AAPR
Jim Aherns, MHA
Denzel Davis, DPHHS

Opponents: **None**

Opening Statement by Sponsor:

SEN. GREG JERGESON, SD 46, CHINOOK, said a number of issues over the years had related to some of the regulatory climate, both at a federal and state level to which the long term care facilities in the state of Montana were subjected. He felt in any kind of

regulatory circumstance often times there were issues that were subject to interpretation. It was sometimes difficult to ascertain what an appropriate interpretation of a rule or regulation might be. The bill related to the use of safety devices like guard rails on beds. He relayed that his father needed nursing facility care and his family would have liked to see guard rails used for his safety. In those types of situations, this bill enabled the family to give instruction that the safety devices be used. It did not require that there be guard rails or other safety devices used. He thought every family would have to access the circumstances and determine whether or not they would wish to have that accomplished.

Proponents' Testimony:

Rose Hughes, Executive Director MT Healthcare Association, provided her supportive testimony, **EXHIBIT(jus39a10).**

{Tape : 4; Side : A}

Janet Thomas, representing self, identified herself as a legislative spouse. She explained that her mother was in a nursing home for over 10 years. In that time bed rails were used and not used. During the time when the facility was afraid to use bed rails for fear of legal action, she witnessed many injuries to the patients. She felt that families needed to be given the opportunity to request bed rails to protect their loved one. She emphasized the importance of bed rails for the patients in a nursing home.

SEN. LINDA NELSON, SD 49, said they had a very good nursing home in Sheridan County. However, they were written up for non-compliance and told that they would be able to take no more medicaid patients until all the restraints were gone. The families and patients protested, and even presented their concerns to the Department of Health and Human Services. She was told there was nothing they could do to allow safety restraints because it was a federal issue. She pointed out there were safe-guards built into the bill to avoid the patients being abused by nursing homes. She believed that the people in the nursing home should have self determination in this issue. She argued no restraints were as bad as total restraints in our nursing homes.

Harry Smith, AAPR, said in lieu of the time he would just simply say they supported this legislation. They thought it brought common sense into the field.

Jim Aherns, MHA, said they supported the bill and urged support.

Denzel Davis, DPHHS, said the department supported this bill.

Opponents' Testimony:
None

Questions from Committee Members and Responses:

CHAIRMAN LORENTS GROSFIELD said he'd been through this too with his father. He didn't notice any kind of liability relief for nursing home facilities contained in the bill. He commented that was probably good. He asked for some comment on the liability aspect. **Rose Hughes, Executive Director MT Healthcare Association,** acknowledged they were not seeking relief from liability when bed rails were used and in fact the bill specifically stated that they were still responsible for monitoring the patients in accordance within normal standards of practice when a bed rail was used. They were responsible for reevaluating the fact that the bed rail was up, and knowing when rails weren't appropriate. She noted the bill dealt with a very limited set of circumstances in which the patient and the family could request the rail. It also required the facility to alert the family and ask them to reconsider their request because it was actually a dangerous situation because the patient climbed over.

CHAIRMAN GROSFIELD said page 2 line 10, said safety devices did not include protective restraints in 21 CFR and so on. He asked what kinds of things that referred to. **Ms. Hughes** said the FDA definition including the very restrictive devices such as tie-on devices, various straps, and so forth were include in the information she passed out, **exhibit (10).** Basically patients didn't ask for those types of things. Therefore, those devices are handled under completely separate procedures in terms of assessment that normally took place now.

CHAIRMAN GROSFIELD questioned if they could be used if medically necessary. **Ms. Hughes** said yes, they just were not the subject of this bill.

CHAIRMAN GROSFIELD said in the case of his father they eventually lowered the bed, and other residents just slept on a mattress on the floor, so that if they fell out of bed it was no big deal. He asked if there were any regulations in that area. **Ms. Hughes** said facilities did offer lower beds, mattresses on floors, and in some cases they put mattresses next to the bed so if the person fell they were cushioned. She suggested that sometimes those things weren’t the right approach, and sometimes the people in the family didn’t want it.

CHAIRMAN GROSFIELD clarified federal regulations didn't prohibit that sort of thing. **Ms. Hughes** replied no.

Closing by Sponsor:

SEN. JERGESON closed on SB 477 saying **SEN. GROSFIELD** and his circumstance regarding the willful independence of their parents were probably much the same. But he thought it was those kinds of issues that families ought to assess in working with the health care providers to determine what was the best course of action. That was what the bill would permit and authorize.

HEARING ON SB 476

Sponsor: **SEN. BOB KEENAN, SD 38, BIG FORK**

Proponents: **Rose Hughes, Executive Director MT Healthcare Association**
Harry Smith, AARP
Jim Aherns, MHA
Denzel Davis, DPHHS

Opponents: **None**

Opening Statement by Sponsor:

SEN. BOB KEENAN, SD 38, BIG FORK, opened on SB 476 saying it also dealt with nursing homes. He said two major problems for the nursing homes were Medicaid rates and the regulatory climate. SB 476 addressed that regulatory climate.

Proponents' Testimony:

Rose Hughes, Executive Director MT Healthcare Association, presented her testimony in writing, **EXHIBIT(jus39a11).**

Harry Smith, AARP, said they supported this bill. They thought it helped take away some of the syndrome: "damned if you do or damned if you don't".

Jim Aherns, MHA, said it wasn't often that they asked for regulations, but in this case there were regulations, rules, and policies out there that they really didn't realize. This attempted some kind of collaboration with the department. It defined those regulations and standards so nursing homes could be measured against them correctly. They urged support of the bill.

Denzel Davis, DPHHS, said the department supported the bill. He referred to the July 1, 2000 date for the rules. In particular if item two, the informal dispute resolution, turned out to be a process that developed a cost then the department would probably have to delay the rules until they could come back to the legislature to try to appropriate money for it.

Opponents' Testimony:

None

Questions from Committee Members and Responses:

CHAIRMAN LORENTS GROSFIELD asked if a fiscal note was needed for this bill. **SEN. KEENAN** said from what he understood, no.

CHAIRMAN GROSFIELD asked what it would cost to go through this process. **Denzel Davis, DPHHS,** said they believed they had sufficient funds in the current budget to go ahead and put the committee together and draft the rules. If one of the processes they implemented took additional funds, then they'd have to ask for some money for that, but that would be two years down the road.

CHAIRMAN GROSFIELD asked if he was suggesting extending the date a little bit. **Mr. Davis** said he didn't have a problem with the date. They could get the rules written by the date. However, if they needed additional money, they'd have to wait for the next appropriation cycle.

CHAIRMAN GROSFIELD said something that always made him uneasy was giving the department the go-ahead to adopt rules, but there wasn't much in the way of guidelines for them. The bill said they'd do it in consultation with long term provider groups, ombudsman, consumer groups, and so on. He asked if the sponsor was comfortable that there would be enough input by the groups in this process so that the rules were responsive to the needs. **SEN. KEENAN** said he shared the concern, but he had come to realize they had broad rule-making authority because they dealt with Public Health. Regarding the specific issue, he thought it was up to those people that were named to speak up, stand up, and if the rules were over-reaching, to come to the legislature and discuss them in two or four years.

Closing by Sponsor:

SEN. KEENAN closed on SB 476.

ADJOURNMENT

Adjournment: 12:20 P.M.

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SEN. LORENTS GROSFIELD, Chairman

_____
ANNE FELSTET, Secretary

LG/AFCT

EXHIBIT(jus39aad)