MINUTES

MONTANA SENATE
57th LEGISLATURE - REGULAR SESSION
COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN LORENTS GROSFIELD**, on March 1, 2001 at 9:05 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. Mike Halligan (D)
Sen. Walter McNutt (R)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)

Members Excused:
Sen. Steve Doherty (D)
Sen. Ric Holden (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: HB 208, HB 119, HB 176, HB 182, 2/22/2001
Executive Action: HB 176

HEARING ON HB 119

Sponsor: **REP. STEVE VICK, HD 31, BELGRADE**

Proponents: **John Northey, Legal Council for Legislative Audit Division**
Craig Thomas, Executive Director of the Board of Pardons and Parole

Opponents: **None**

Opening Statement by Sponsor:

REP. STEVE VICK, HD 31, BELGRADE, opened on HB 119, an audit committee bill. He said it was simple and the changes by the audit committee were in section 2. Line 1, page 2 allowed the board's designee to conduct the hearings. He said the increase in the number of prisoners and facilities in the state had created a problem for the board in attending all the hearings regarding parole eligibility and releases. The law was changed in 1981 authorizing the board to designate hearing officers to do that. They interpreted that to mean the designee could conduct any sort of hearing. The bill required an inmate's initial parole appearance occur before a hearings officer instead of before the board itself. An audit indicated an inmate's initial appearance before a hearings officer did not comply with current statutory requirements. SB 119 amended 46-23-202 to specifically allow either the board or the designee to conduct initial parole hearings. He said that was the practice, but the audit determined it didn't comply with current law, so the bill brought the practice into compliance. He noted the House Judiciary committee added, lines 23-26, on page 1.

Proponents' Testimony:

John Northey, Legal Council for Legislative Audit Division, noted the original draft of the bill was a housekeeping bill to amend current law to conform to present practice. At the time the parole board was created a few 100 prisoners were in Deer Lodge and the Board met there once a month to conduct hearings. Currently, there were facilities scattered throughout the state and it was a practical impossibility for the Board to conduct all the hearings. The Legislature recognized this in 1991 and amended the laws to allow designation of hearings officers. One section was not amended, so this bill allowed the use of hearings officers for the initial parole hearings. The audit committee agreed to carry the bill.

Craig Thomas, Executive Director of the Board of Pardons and Parole, said the Board supported the bill to clarify the perceived problems with the statutes. However, the amendment to the bill complicated the situation and introduced a fiscal impact. Currently the Board conducted hearings using hearings officers to review inmates who committed crimes prior to March 20, 1989. The amendment required a majority of the Board review the offenders who committed crimes prior to March 20, 1989. In all honesty, the Board did not have sufficient resources to provide two board members to conduct the hearings. He supported the bill, but not the amendments.

Opponents' Testimony:

None

Questions from Committee Members and Responses:

SEN. GERALD PEASE questioned how the bill would change the Board of Pardon's authority. **REP. VICK** replied he didn't think it would affect their practice in any way.

SEN. PEASE re-referred the question. **Craig Thomas, Executive Director of the Board of Pardons and Parole,** said the Board conducted hearings in various ways. The original statute allowed the Board to designate hearings officers who conducted hearings at pre-release centers and regional facilities, and a few out of state facilities with Montana prisoners. They took the testimony from various sources, then made recommendations to the Board. The Board made the final decision. Originally, the bill clarified the Board's current procedures, excluding the House Judiciary committee amendment. The amendment required the Board to change procedures and provide for two board members to conduct all the hearings.

Closing by Sponsor:

SEN. VICK closed on HB 119 saying he was comfortable in removing the House amendment. He felt the bill should pass either way because it was a benefit to the Board and the system. He reiterated that the Board wanted the amendment removed.

HEARING ON HB 208

Sponsor: **REP. CHRISTOPHER HARRIS, HD 30, BOZEMAN**

Proponents: **Robert Throssell, Montana Magistrates Association**

Opponents: **None**

Opening Statement by Sponsor:

REP. CHRISTOPHER HARRIS, HD 30, BOZEMAN, opened on HB 208, which passed unanimously through the House Judiciary Committee and the House. This indicated there was no opposition to the bill. It clarified the contempt of court procedures in Montana. Those procedures were addressed in several Supreme Court decisions and they differentiated between civil and criminal contempt and they needed to be observed. The bill also said due process must be followed in both types of contempt proceedings. The bill codified the Supreme Court decisions, making it clear to judges, litigants, and attorneys the difference between civil and criminal contempt. Even when contempt was committed in the presence of the court, there must be a modicum of due process. He noted the amendment that wasn't addressed by the Supreme Court decisions. The amendment clarified when a court had a contempt situation and it followed a court order, it was not necessary to bring in another judge to hear the contempt proceeding, unless it could be shown that the judge was not impartial. He said it was important to have this clear law on the books.

Proponents' Testimony:

Robert Throssell, Montana Magistrates Association, said Justice of the Peace and City Court Judges heard many contempts that were their own orders, i.e.: imposition of fines. If it necessitated calling in a second judge, it would bring the lower court proceedings to a halt. The amendment was necessary to make it a workable bill.

Opponents' Testimony:

None

Questions from Committee Members and Responses:

SEN. JERRY O'NEIL stated that he had requested a judge to be disqualified and requested a jury trial when he was charged with contempt of court. The judge refused the requests. He asked if the bill would allow the right to disqualify a judge and request a jury trial on a contempt of court charge. **REP. HARRIS** replied the bill followed current procedure. Full due process rights would be afforded, but not necessarily a jury trial. In a criminal proceeding, the standard of proof would have to be proven beyond a reasonable doubt. The bill didn't inject a trial by jury and neither the U.S. nor Montana Supreme Courts said

contempt must be handled by a jury. It could be handled by an impartial judge.

SEN. O'NEIL clarified that the bill required a different judge, so he wouldn't have to disqualify the judge. **REP. HARRIS** said the contempt proceeding itself would provide full due process rights. If the contempt was committed in the presence of the court, then the court could impose civil or criminal summary punishment, provided the judicial process integrity was at stake. When contempt was committed outside the court, then the judge normally could not hear the case. That addressed the disqualification issue. With the exception of what was accomplished in the amendment, which stated if a hearing had already been conducted on the merits and there was a violation of the court order, then the judge who was the subject of the contempt, could address it unless it was shown that the judge was not impartial. He asked if that answered the question.

SEN. O'NEIL said not quite and clarified his question. In assisting someone else by writing up documents, he was found to be in contempt. He did not prepare them in court, but delivered them to the person in jail. He didn't know if it qualified as in or out of court contempt. **REP. HARRIS** replied regardless of the merits of that specific issue, it seemed like an out of court allegation and it would be clear that the judge who cited contempt could not address the contempt because of due process rights.

SEN. MIKE HALLIGAN asked if **REP. HARRIS** saw the letter from Judge Langton, **EXHIBIT(jus47a01)**. **REP. HARRIS** said no.

SEN. HALLIGAN asked for his opinion on the letter. **REP. HARRIS** said the Judge was a participant in one of the cases before the Supreme Court. He said a contempt committed in the presence of the court could be punished summarily; it was in current law and the bill. The bill, required by the Supreme Court decision, including the case that involved Judge Langton, said that the accused of the contempt had an opportunity to present his/her side of the story. It was required by due process and required by the Supreme Court decisions. The bill followed the due process requirement as laid out by the Montana Supreme Court. It did not interfere with the ability of a judge to maintain discipline in a courtroom or to impose necessary punishments to maintain that discipline and the integrity of the judicial process.

Closing by Sponsor:

REP. HARRIS closed on HB 208 saying it was a good bill that offered clarifications. In the long run it would save time, energy, and money in terms of avoiding unnecessary litigation.

HEARING ON HB 176

Sponsor: **REP. LARRY JENT, HD 29, BOZEMAN**

Proponents: **Mark Taylor, Montana Judges Association**

Opponents: **None**

Opening Statement by Sponsor:

REP. LARRY JENT, HD 29, BOZEMAN, opened on HB 176, which increased the pool of judges eligible to be recalled to active duty. He said the bill created another class of judges who had become vested for retirement, but had not yet retired. A judge could retire under the current law at the age of 65. The bill allowed judges who had not yet reached retirement age, who had at least eight years of service, but were not eligible to receive their retirement pay to be recalled to active duty by the Chief Judice for service. The compensation was provided on page 1. The bill allowed judges, not quite 65, to be able to serve as a District Judge when called into duty. He noted the bill had an immediate effective date.

Proponents' Testimony:

Mark Taylor, Montana Judges Association, noted a couple things: 1) HB 176 addressed a loophole that existed in the statute before **REP. JENT** brought it forward. It addressed the period of time between when a judge voluntarily chose not to run for re-election and the date when he would be eligible to receive the retirement service benefit. For example, if a judge chose not to run for re-election at age 55, HB 176 allowed the judge to be eligible to be re-called to duty by the Chief Justice until the current-law age of 65. 2) He refreshed the committee that **SEN. HALLIGAN** brought forth a bill reducing the eligibility age of judges from 65 to 60 and was passed by the Senate 50-0. Even in that event, there would still exist in certain situations the loophole mentioned and HB 176 addressed that. He mentioned a letter by **Chief Justice Gray** saying that the policy statement in the letter addressed why HB 176 was important. He quoted from the letter, **EXHIBIT(jus47a02).** He closed by saying HB 176 broadened the pool of judges eligible for re-call to duty.

{Tape : 1; Side : B}

Opponents' Testimony:

None

Questions from Committee Members and Responses:

SEN. MIKE HALLIGAN clarified that it was the Chief Justice alone and not a District Court Judge who could re-call a judge back into duty. **REP. JENT** replied it was only the Chief Justice.

Closing by Sponsor:

REP. JENT closed on HB 176. He reiterated that **Justice Gray's** letter noted that this was one way to solve over-crowding in the District Courts by increasing the pool of judges.

HEARING ON HB 182

Sponsor: **REP. BRAD NEWMAN, HD 38, BUTTE**

Proponents: **Mark Taylor, Montana Judges Association**

Opponents: **Donald Steinman, representing self**

Opening Statement by Sponsor:

REP. BRAD NEWMAN, HD 38, BUTTE, opened on HB 182, which was one more piece of the pie as described in **SEN. HALLIGAN's** bill and **REP. JENT's** bill. It addressed the same problem. He provided a letter from **Chief Justice Gray, EXHIBIT(jus47a03).** He said HB 182 also would expand the pool of retired judges who were eligible for temporary recall by the Chief Justice in cases of emergency or need. He said the letter stated it succinctly. He argued criminal, juvenile, mental health cases with statutory and Constitutional preference, and civil litigants weren't getting their day in court in a timely fashion because of the over-crowded dockets and the unavailability of judges due to death or illness. A further factor included judges' school for newly elected District Judges. He said a time would come when a substantial number of District Judges would not be available to proceed with the dockets. HB 182 struck one word from the statute, 19-5-103 included the word "voluntarily", which was struck. In essence, if a judge had served a minimum of eight years, ran for re-election but lost, the judge would still be eligible for temporary recall by the Chief Justice to serve as needed. He mentioned three safeguards about recalling a defeated judge: 1) the eight year requirement for an appointed judge, the judge ran and was victorious at least once. In the case of a

judge not appointed, but ran for the office initially, the judge had been elected at least twice before a subsequent defeat in an election. These were experienced judges with adequate training, and they knew the kinds of cases they would be called to address in times of emergency. 2) The judges were subject to call only by the Chief Justice. 3) In the case of a judge removed from office and not defeated in an election, that judge would not be eligible to serve as a judge, and in fact could not practice law anymore. He reiterated that it was a straight-forward bill. He said an expanded pool would assist in the crowded dockets.

Proponents' Testimony:

Mark Taylor, Montana Judges Association, said they felt that the safeguards adequately addressed the concerns that the legislators brought forward.

Opponents' Testimony:

Donald Steinman, representing self, said SB 176 already provided provisions for judges to be recalled. He felt this bill undermined the decision of the voters and gave Supreme Court Justices a right to tear down the voters' say. He believed in the long term it undermined the government itself by giving the message to the citizens that their vote didn't count. He suggested defeating this bill and finding other means to deal with judicial problems.

Questions from Committee Members and Responses:

SEN. JERRY O'NEIL said he was a part of a protest group against a judge who treated people poorly. The protesters picketed and wrote letters to the editor. They got the judge voted out of office. He wondered if this judge could be eligible for duty again. **REP. NEWMAN** responded without knowing the judge and how many years the judge served, he couldn't answer that with any degree of certainty. If the judge had served more than 8 years, it was possible the judge could be in that pool. He was remiss in mentioning a fourth safeguard: the litigants had a right under statute to substitute the judge within 10 days of the initial filing of an action or the first action that created a cause of action. For example, if a person had a conflict with a judge, that person had a right to substitute the judge for no cause. The person would not have to have the case adjudicated by a judge who the person had a personal conflict with.

SEN. O'NEIL said the judge had 12 years on the bench, but he wasn't able to substitute. He noted it cost $200 to substitute a judge and many people would not know the judge was not good. How

would they substitute a judge without having to pay if the bill went through. **REP. NEWMAN** said with the four safeguards, it was not a substantive problem. He said all attorneys were aware of the procedures for substituting a judge and didn't see it as a practical problem.

SEN. MIKE HALLIGAN asked if the statute stipulated a length of time a temporary judge could be appointed. He noted it wasn't in this bill, but where was it? He asked for any other "side-boards". **REP. NEWMAN** said he understood there was a 180 day limit, but he didn't know which statute contained it.

SEN. HALLIGAN asked for a response to the comments that the bill eviscerated the will of the people by appointing judges after defeat. **REP. NEWMAN** replied it was a thoughtful comment. As stated on the outset, this did not thwart the will of the people when justice was given in a speedy and efficient fashion. It didn't thwart the will of the people when a judge with a minimum of eight years or more experience and training and expertise in handling cases of a variety of sorts. He said frankly it wasn't thwarting the will of the people simply by calling a defeated judge back into practice. For example, in the case of two good candidates, he didn't think it was the will of the people to discard one of them. Rather the voters opted for a judge they felt would be better than the other. He thought it was a fair question because with the word "voluntarily" being struck, it was the first question people had.

SEN. HALLIGAN suggested that the Chief Justice would appoint a judge to a different area than the district the person was defeated in because of sensitivity to that issue. **REP. NEWMAN** said that was the case; they were placed in other jurisdictions rather then the jurisdiction they were from. **Justice Gray's** letter indicated over-crowded dockets were in Eastern Montana and judges from other areas would cover. There was no requirement that the judge be retired from the jurisdiction from which he/she was appointed.

SEN. HALLIGAN asked if it was still thwarting the will of the people if someone were appointed to a different area.
Donald Steinman, representing self, said yes. He didn't think it was good for the legislature to decide the will of the people was mute. He felt it undermined the republic and diminished the legislature in the eyes of the people. It sent a message to the people that a judge would be placed whether the people liked it or not.

SEN. O'NEIL said the judge he spoke of earlier hurt hundreds of litigants. After defeat, he wiped out his computer files so the

next judge could not have the forms to use, and the Supreme Court put him on a judge pro tem circuit around Montana. He wanted to know how people could expect him to be better after he was voted out than when he was in office. **REP. NEWMAN** said he wasn't familiar with the judge, nor the facts involved. He understood that there was a personal conflict, but he didn't think it was his place to comment on that because he didn't know anything about that judge's qualifications, experience, training, or investment in judicial education. It would be pure speculation to comment on a particular judge of whom he wasn't acquainted.

SEN. O'NEIL asked if it was fair to use the voters input as consideration of a judge. **REP. NEWMAN** said it would be fair if the voters were asked that question. If the voters were asked a question of "should this judge be temporarily appointed in cases of emergency", and the voters voted no, it would be a different factor. As the situation stood, judges were defeated by another judge of equal or higher abilities and voters never considered the question of whether or not the defeated judge should work part-time or temporarily in the case of emergency. The voters made a call about who they wanted in the judge's role for the next six year period. Frankly, he felt that "thwarting the will of the people" was overstated. The voters weren't addressing that question when they chose who would be their judge for the next six years. The question was valid because on the surface, that's what the bill did, but that's not what question the voters were asked.

SEN. O'NEIL wondered if the voters were being asked to consider which judge was moral and which one was immoral. **REP. NEWMAN** said based on his limited experience of running for office, he felt they decided elections based on a variety of factors; morality was one of them. It would change with the individual voter.

VICE CHAIRMAN GRIMES said the bill stated that the judges wouldn't get paid much after 180 days. He assumed that the intention was to use it primarily in the case of a judge's absence due to judge school. He wanted to know how long that school took. However, **Chief Justice Gray** wanted the bill to fill in holes and workload problems. What was the intention? **REP. NEWMAN** said the bill was not restricted to the situation of the judges attending judge school. He understood judge school was a four or five week process. It was significant when a number of judges were removed from the state for that period of time. The bill was designed to address those types of judicial absences, but also judicial absences in case of death, serious illness, and for over-crowded dockets. He believed **Chief Justice Gray** was clear and forthright and the bill addressed all types of absences.

{Tape : 2; Side : A}

VICE CHAIRMAN GRIMES asked how long a defeated judge could be utilized; maybe six months. **REP. NEWMAN** said there was a limit and they were temporary appointments.

VICE CHAIRMAN GRIMES clarified temporary appointments were the intent. **REP. NEWMAN** said yes.

Closing by Sponsor:

REP. NEWMAN closed on HB 182. He asked the committee to consider all remarks. He believed the bill was one piece in a difficult puzzle. He said Montanans had a Constitutional right to full and speedy legal redress. He said the three bills were means of putting teeth into that Constitutional right.

EXECUTIVE ACTION ON HB 119

Discussion:

SEN. AL BISHOP noted proposed amendments and asked **Valencia Lane** to explain them.

SEN. DUANE GRIMES asked if the amendments were simple enough to cover now.

Valencia Lane, Legislative Staffer, replied the bill originally did not amend 46-23-104. The House put on amendments toward that code. On page 2 of the bill, the amendments required two board members to travel out of state. The Board of Pardons and Paroles objected to those amendments. It wasn't difficult to remove.

SEN. JERRY O'NEIL felt those amendments were an attempt to stop it acting as an expos facto law because of prisoners' rights.

Ms. Lane said she didn't know the House concerns, but it did appear they were trying to preserve certain rights that existed before a certain date. No one addressed that question, so she didn't know the reasoning.

SEN. GRIMES said they would hold on HB 119.

EXECUTIVE ACTION ON HB 208

Discussion:

Valencia Lane, Legislative Staffer, mentioned the amendments requested by Judge Langton, **exhibit (1).** However, the sponsor did not consider them friendly amendments.

SEN. DUANE GRIMES said the amendments should be before the committee to consider, so they wouldn't take action on the bill. He felt there could be an issue about whether or not a judge could issue an order on the spot or not.

EXECUTIVE ACTION ON HB 176

Motion: **SEN. HALLIGAN** moved that **HB 176 BE CONCURRED IN.**

Discussion:

SEN. WALT McNUTT asked which of the two fiscal notes applied.

VICE CHAIRMAN DUANE GRIMES noted the one with the later date wasn't signed by **REP. JENT,** but the fourth assumption was interesting.

SEN. McNUTT wondered if it would become a cat and dog bill and not go anywhere. He asked if there was an explanation of why it might not cost $10,000 a year.

SEN. MIKE HALLIGAN said the bill was a very good idea and over the long-term it prevented creation of judicial districts. He said judges would want to get the cases done as quickly as possible. He acknowledged that it could be a dog and cat.

SEN. JERRY O'NEIL said the government was supposed to provide justice for its citizens and this was a way to increase the justice system of Montana and even if it did cost more money it was a necessary bill.

Vote: Motion that **HB 176 Be Concurred In carried 6-0; SEN. JERRY O'NEIL** to carry the bill; **SEN. STEVE DOHERTY, SEN. RIC HOLDEN,** and **SEN. LORENTS GROSFIELD** excused.

ADJOURNMENT

Adjournment: 10:05 A.M.

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SEN. LORENTS GROSFIELD, Chairman

_____
ANNE FELSTET, Secretary

LG/AFCT

EXHIBIT(jus47aad)