

OBSERVATIONS REGARDING THE NISS LETTER

Kelly Jenkins, PER Board General Counsel

November 30, 2005

1. Qualifications of Executive Director –

- Niss premise: “The Governor’s budget director has been quoted as explaining several times that the training and experience of the executive director of [MPERA] are important ... particularly given the losses by the Board of Investments

Query: What does the executive director of MPERA have to do with the investment performance of the Board of Investments?

Note: The Governor has been quoted as saying he “isn't necessarily opposed to the choice of Tiechrow [sic]” as executive director of MPERA. Billings Gazette, November 22, 2005. **So the Governor’s office must have no problem with Mr. Teichrow’s training, experience and qualifications. Or with the Board’s selection of Mr. Teichrow, based on his training, experience and qualifications.**

- Niss suggestion: “Legislation could be passed to amend 19-2-404 to require appropriate qualifications for this position.”

Query: What are “appropriate qualifications” for the position? Who has the appropriate qualifications to decide what the “appropriate qualifications” for the position should be? If not the PER Board, **how is the Board supposed to meet its constitutional duty to administer the retirement system, without the authority needed for such administration?**

2. Hiring Authority for PERB Staff –

- Niss premise: “There have been allegations that the employment of the new MPERA Executive Director ... has not been an ‘arm’s length’ transaction and that equally, if not more qualified applicants were passed over in the hiring process.”

Note: The word “allegation” is just a fancy way of saying “assertion without evidence”. In any event, no such allegations were made in any legal action. Since there are no legal qualification requirements, there is no possible basis for an assertion that more “qualified” applicants were passed over. Such an assertion is purely inflammatory.

- Niss suggestion: “One potential solution would be to bring the authority for hiring the PERB staff back under the Department of Administration (DOA), where this expertise resides”

Note: **The PER Board relied on the technical expertise of the Department of Administration in the current hiring process.** The technical expertise of the DOA did not preclude technical errors in the process. But by requesting technical assistance, the Board demonstrated proper concern for the proper administration of the hiring process.

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NOVEMBER 30, 2005
EXHIBIT # 19**

Note 2: **While DOA may have hiring expertise, it does not have public retirement system administration expertise.** Design of the application process and evaluation of the applications can only be accomplished by the PER Board, which has experience in and constitutional responsibility for retirement system administration.

Note 3: **Greg Petesch previously opined that having the DOA hire the PER Board Executive Director was constitutionally “suspect”, while the PER Board control of the hiring process was “defensible”.** That’s as close as the legislative counsel will come to saying it is not constitutional for DOA to manage the executive director hiring process.

3. Appointment and Confirmation of PERB Members –

- Niss premise and suggestion: “To the extent that the current situation involving the PERB can be seen as a lack of accountability or arises from a lack of appropriate constitutionally based checks and balances between the Executive Branch and the Legislative Branch, a statutory requirement for confirmation by the Senate would seem appropriate.”

Note: The phrase “To the extent that” is just a fancy way of saying there isn’t even enough support for the proposition to call it an “allegation”. **There is no basis for the offensive premise of this argument and no basis to believe that the Senate confirmation process would resolve any problem, if one existed.** However, the Board doesn’t have any objection to timely review of the Governor’s appointments, if appointments can be made during the interim, subject to ratification during the session. Board member terms expire on a staggered basis each year and at times Board member resignations have created openings. A full Board is necessary for Board business.

4. Amendment of Statutes Involving Public Notice and Participation –

- Niss premise and suggestion: “Exactly what decisions are addressed in 2-3-111, MCA [requiring an opportunity for the public to submit views and data] could be further clarified ... so as to include the type of decisions made by the PERB to hire a new executive director.”

Note: Niss recognizes that statute currently does not require – or at least does not clearly require – public input on PER Board hiring decisions. If that is the case, much of the concern otherwise expressed about the Board’s hiring process seems misplaced.

Note 2: **Current Department of Administration rules require that application and selection materials be confidential, and allow an agency to “withhold personal information relating to any applicant from any person not involved in administering the hiring process.”** A.R.M. 2.21.3728. If an applicant’s personal information can not be confidential during the process, fewer qualified applicants are likely to apply. Moreover, the Board may not be able to obtain complete and candid information about the candidate if personnel employment decisions are made public.

Note 3: Individual privacy interests in personnel matters have long outweighed the public's right to know under the Montana Constitution. *Missoulian v. Board of Regents*, 207 Mont. 513, 675 P.2d 962 (1984). "Our previous decisions have shielded certain personnel matters from public review, and have opened those discussions only to the entity responsible for such things as hiring, disciplinary action, and supervision." *Citizens to Recall Whitlock v. Whitlock*, 255 Mont. 517 844 P.2d 74 (1992).

Note 4: The retirement boards have responsibility for administration of the retirement systems. Effective administrative requires appropriate authority. Interference with the retirement boards' authority necessarily interferes with effective administration.

5. Extend Time for Filing Certain Public Disclosure Legal Actions –

- **Niss premise:** "As the current controversy demonstrates, it would be difficult to meet that 30-day deadline [to void an agency decision if the meeting agenda weren't properly posted] if the agency is sufficiently secretive so that knowledge of the meeting is not gained until more than a month later."

Note: The current controversy demonstrates the opposite: The rationale for change has no basis in this situation. **The PER Board was not secretive but simply made a mistake (in reliance on the Department of Administration). The 30-day deadline was met by the filing of a legal action.**

- **Niss suggestion:** "For this reason it would be appropriate ... to provide that the 30-day period begins to run when the agency's action is known or reasonably should be known to the public."

Note: **There is value in the finality of governmental decisions – for example in awarding contracts – and in requiring vigilance and timely action by those challenging the decision who seek a special, statutory remedy.** If someone wants to challenge a decision on constitutional grounds, that option is not foreclosed at the end of a 30-day period. For example, a declaratory judgment action would still be available.

Note 2: This suggestion does not just affect executive branch agencies but all governmental agencies, state and local, including the Supreme Court. §2-3-203, MCA. It arguably also may cover legislative actions, including party caucus actions like appointment of legislative leadership (under the rationale of *Common Cause v. Statutory Comm.*, 263 Mont. 324; 868 P.2d 604 (1984), as applied by *Associated Press v. The Montana Senate Republican Caucus*, 286 Mont. 172, 951 P.2d 65 (1997)).

6. Widen Category of Person Eligible to Bring Certain Public Disclosure Actions –

- **Niss premise:** Notice and opportunity to be heard are the same as open meetings requirements and should have the same statutory standards.

Note: Others who have invested more time in the issue have recognized that there is a difference between open meetings laws, which can be challenged by

the public, and agency decisions in violation of notice provisions, which require that the person seeking to void the improperly noticed decision be “prejudiced” by the decision. **Open meetings are a matter of public interest because mere attendance is the right being asserted. Improper notice and opportunity to be heard are personal to those with the right to be heard. The remedy should be limited to those individuals.** Otherwise, persons who had no right to participate in the decision, even gadflies seeking to make a political point or to gum up the public works, could challenge the decision.