



# Legislative Council

## 65th Montana Legislature

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### COMMITTEE STAFF

SUSAN FOX, Executive Director  
TODD EVERTS, Legal Division Director  
FONG HOM, Secretary

## MINUTES LOG

December 28, 2018

### Conference Call

Room 350, Capitol Building  
Helena, Montana

Please note: This document is a Minutes Log and provides a notation of the time elapsed between the beginning of the meeting and the time at which the item was presented or discussed, a motion was made, or a vote was taken. The narrative presented here is provided only as a guide to the audio or video record of the meeting. The official discussion, motion, or vote is available on the audio or video archive of this meeting. The Legislature does not prepare a transcript of meeting activities. The time designation may be used to locate the referenced discussion on the audio or video recording of this meeting.

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### COMMITTEE MEMBERS PRESENT

SEN. EDWARD BUTTREY  
SEN. TOM FACEY  
SEN. JP POMNICHOWSKI  
SEN. SCOTT SALES  
SEN. JON SESSO  
SEN. FRED THOMAS

REP. JENNY ECK  
REP. SHANE MORIGEAU  
REP. CASEY SCHREINER

### COMMITTEE MEMBERS EXCUSED

REP. SETH BERGLEE  
REP. WYLIE GALT  
REP. AUSTIN KNUDSEN

### STAFF PRESENT

SUSAN BYORTH FOX, Executive Director  
TODD EVERTS, Legal Director  
FONG HOM, Committee Secretary

## VISITORS' LIST (Attachment 1)

## AGENDA (Attachment 2)

## COMMITTEE ACTION

### CALL TO ORDER/ ROLL CALL

- 10:05:28 Sen. Thomas called the meeting to order at 10:05. The secretary called roll. Rep. Berglee, Galt, and Knudsen were excused. Julianne Burkhardt, Todd Everts, and Kelly DeSilva were also present.
- 10:07:13 Sen. Thomas said that this meeting is to consider the proposed amendments to the Harassment and Discrimination Policy and to consider proposed amendments to Joint Rule 10-85.

### CONSIDERATION OF AMENDMENTS

- 10:02:00 Susan Fox, Executive Director, discussed proposed amendments to the Policy of the Montana Legislature Prohibiting Discrimination and Harassment. **(Exhibit 1)**

#### Proposed Amendment 1

- 10:02:36 Ms. Fox said that in No. 1, Policy and Objective, the list of characteristics (race, creed, color, culture, social origin, etc.) were deleted in two different places. The fourth paragraph clarifies its policy of the Legislative Branch to prohibit discrimination or harassment on the basis of any characteristics protected by law. The same amendment also occurs in the definition of harassment in No. 2, Definitions of harassment, retaliation, on page 2 of the Policy.

#### Discussion

- 10:03:40 Rep. Eck said that she recalled where that language of characteristics prohibiting discrimination came from and that it was a desire to make sure that the policies lay out at the beginning who is protected and on what grounds. She said she does not understand why that language would be pulled out.
- 10:04:41 Sen. Sales asked who drafted the amendment.
- 10:05:01 Sen. Thomas said that Rep. Regier had brought this concern to his attention and that Rep. Regier's idea was to make sure that discrimination, harassment, and retaliation are addressed as per law to include the characteristics.
- 10:06:40 Rep. Schreiner said that the Council has already passed this policy and might run the risk of narrowing it where we are holding ourselves to a lower standard than is set out by others around the country. He will not vote to get rid of the language.
- 10:07:35 Sen. Thomas asked Ms. Fox if there was anything in this language where it suggests being struck from race, creed, color, social origin, etc. Is anything that is not against the law to discriminate against somebody that is included in here or written in here, is there anything that this adds to current law?
- 10:08:08 Julianne Burkhardt, Staff Attorney, said that the Montana Human Rights Commission has been interpreting some of the categories more broadly based on some federal court opinions, but as it stands today, mostly likely no.
- 10:08:40 Sen. Sesso suggested leaving the language as it is. This is about a number of things that people are being harassed about, and putting it in one spot in the

10:10:03 policy manual seems to have value.  
Sen. Thomas said that this came up as a concern from a legislator. It doesn't take away from the policy. He favored the amendment.

#### **Motion**

10:11:06 Sen. Sales moved to adopt the amendment as discussed.

#### **Vote**

10:11:32 The motion failed on a voice vote with Sen. Sales, Sen. Thomas, and Sen. Buttrey voted aye, and Sen. Sesso, Sen. Facey, Sen. Pomnichowski, and Rep. Eck, Rep. Morigeau, and Rep. Schreiner voting no.

10:12:14 Sen. Sesso said he appreciated Rep. Regier's thought process in suggesting change. Sen. Thomas has made references to religious ideas versus the word "religion". We can meet halfway and say discrimination on harassment on the basis of race, creed, color, culture, social origin, religious ideas, and leave the list of characteristics in there but change religion per se to religious ideas.

10:13:17 Sen. Thomas said that he is referring to Rule 10-85, has the term "religious ideas" in it. The policy has the term "religion" versus the term "religious ideas". He suggested waiting until the committee discusses 10-85 to fix it.

#### **Proposed Amendment 2**

10:14:40 Ms. Fox discussed the second amendment to No. 3, Reporting and Inquiry or Investigation Procedure When Alleged Offender is a Legislator. She discussed the time a complaint and resolution must be retained by the Legislative Services Division (Second paragraph on page 5, under item 4, Records and Confidentiality). She said that the State Records Committee for the Executive Branch has specifically states that complaints and resolutions be stored for seven years in the Legislative Services Division Office.

#### **Discussion**

10:15:50 Sen. Thomas asked what the statement "stored for seven years" means.

10:15:59 Ms. Fox right now we keep personnel files in cabinets in the office. She brings this subject up to let the Council know what LSD will default to unless the Council wants to be more specific about how long you want records retained. The first paragraph says, if a complaint is withdrawn and you may not get through the inquiry and investigation phase. The second paragraph talks about the record of the complaint and the resolution.

10:17:11 Sen. Thomas discussed the first amendment would potentially amend language that says "the record shall be maintained with confidence."

10:17:30 Rep. Eck said she understands that Ms. Fox is just highlighting the language to show it is subject for potential discussion.

10:18:01 Ms. Fox said that she addressed that in the "Comments" whether this needed more information or not, such as the phrase "in confidence."

10:18:14 There was a discussion about the words "in confidence". Rep. Eck said that she would support the phrase "in confidence", but asked what does that mean? Sen. Sesso said it means confidential. Rep. Eck said if it mean to be confidential,

confidential from whom? Sen. Sesso said it would be confidential to the Human Resources Office and Manager. He said that two paragraphs down, the process provides that the chief legal counsel and the Human Resources Manager will staff these panels.

**Motion**

10:20:43 Rep. Eck said that she make that motion. Sen. Thomas said that without objection, an amendment will be included to add the words "in confidence" as it is written on page 4 of the Policy.

**Timeframe for Public Records Management Policy**

10:21:17 Sen. Sesso asked if Ms. Fox was suggesting that we might refer to the number of years that all records are being held for about seven years. It seems like that this would be a nice spot where we could refer to the way it works now for all records rather than singling out this record.

10:21:55 Ms. Fox said that because in the Executive Branch, they do have a separate line as a specific item because it is a shorter retention schedule for other personnel records, especially payroll records. Legislative Services Division states that they are in storage for 50 years. To have that in our public records management policy as a specific line item because then it would be disposed of in a more reasonable time than other records that need to be kept for other reasons. We could refer to the records management policy.

10:22:50 Sen. Facey said he understood that Ms. Fox said three years until a person leaves and kept for seven years after that. That seems reasonable except there is a...that would be a 10 year keeping period, except it would be something that he would bring to the committee's attention is that if someone leaves the Legislature, then 4 years comes back as a lobbyist, you might want to keep that time clock going until the person leaves as a lobbyist. And then the clock starts again until we get to the end of the time period.

10:23:50 Sen. Thomas said that we don't have any jurisdiction over lobbyists. This is a human resources personnel file of the Legislature. We could not open this for somebody having something to do outside of a legislative body. Is that generally accurate, Ms. Burkhardt?

10:24:16 Ms. Burkhardt said that she hasn't researched that specific point, but she believes that Sen. Thomas is correct.

10:24:24 Sen. Thomas said that it seems to him that this is germane to somebody who served as a legislator. To him, those records should be purged when the legislator's term has ended, unless they were re-elected and serves another term.

10:26:17 Sen. Sales said that people come and go and that there is merit to retaining the records for a period of time.

10:26:59 Sen. Thomas said that if you did the three years and the seven years after service, you can come back at any point in time after eight years.

10:27:19 Rep. Eck said that it is reasonable if you take out what is standard practice and so with Human Resources, that seems reasonable, there's confidence for it. That's probably the most obvious way to go.

10:27:38 Sen. Facey asked Ms. Fox to help him with a motion to put into our policy the existing practice that the administration has about their recordkeeping. It is his

understanding that it is three years on site and then seven years for computer records.

### **Motion**

10:28:33 Ms. Fox restated the motion to say that the record of each complaint and resolution shall be maintained by the Legislative Services Division for a period of three years at the end of term and retained in storage for seven years after which time those documents may be disposed of.

### **Discussion**

10:29:12 Sen. Sales said the only concern he has with that language is the actual term "term" because there is an actual definition of what "term" means. We wouldn't want it to be only three years from a "term" if somebody might serve four terms. Maybe say, time in service rather than term.

10:29:48 Sen. Pomnichowski asked if we could simplify this more by just referencing the standard documentation retention schedule and just not use the term "time of service" or "term", or whatever.

10:30:24 Sen. Thomas said that Sen. Pomnichowski was saying, should we reference the protocol that we have in writing somewhere.

10:30:38 Ms. Fox said that the Council will be reconsidering the Public Records Policy at one of its first meeting this interim and she could get that in there. She said that the Council will have to adopt it today. We could call it "Refer to the Montana Legislative Branch Public Records Management Retention Schedule".

10:31:19 Sen. Facey said that he would accept that as a friendly amendment to the motion. Sen. Thomas said that the motion before us is to adopt standard length of time for retaining records and that with the understanding that staff will consider the best way of crafting the language.

### **Vote**

10:32:10 The motion passed unanimously by voice vote.

### **Discussion on Amendment to Preliminary Inquiry**

10:32:27 Sen. Thomas referred the committee to page 4 where there is language for preliminary inquiry and inserting "securing a statement from the subject of the complaint." This had to do with making it clear that somebody that has had a complaint filed against them, has a right to make a statement and/or defending themselves.

10:33:17 Ms. Fox said that in making it clear that you must secure a statement from the subject of the complaint. As I was reading this, it just seemed that the order was part of the problem because we were already talking about the results of the preliminary inquiry before we talked about what had to be involved in it. That is why that language was moved down, hoping that that would then make people see exactly what was going to happen in the procedure for inquiry or investigation, and then what the result of that preliminary inquiry was.

10:33:55 Sen. Thomas said that the proposed amendment is the the paragraph "The procedure for inquiry or investigation into a discrimination or harassment report may include but is not limited to: .... by putting language "securing a statement" in front of "from the subject of the complaint" and then moving the section "The

preliminary inquiry may be resolved, etc., items 1 through 3..." below as noted. He said that he would accept that as an amendment.

10:34:28 Sen. Facey discussed striking the word "may" and inserting the word "must" so the statement reads, "must be secured by everybody..."

10:34:42 Sen. Thomas said that Sen. Facey is pointing out the language above that, "The procedure for inquiry or investigation into a discrimination or harassment report", to replace the word "may" with "must".

#### **Motion/Vote**

10:35:20 Sen. Sesso moved to adopt the amendments as discussed. The motion passed unanimously by voice vote.

#### **Additional Business**

10:36:08 Ms. Fox discussed the companion amendment to Joint Rule 10-85.

10:36:35 Sen. Sesso asked if the highlighted section on page 5 be added to the language regarding retention policy, or will that language be inserted in the language "but the Human Resources Manager shall maintain the documentation." Ms. Fox said that it would fit best in the records and confidentiality section on page 5 and in section 4 when the words "in confidence" is inserted.

10:37:46 Sen. Thomas said that so far as this committee is, the Council has not adopted changing that language as it was proposed in the Policy. He asked if that needed to be readdressed and if it is in front of the rules committee, they could change the religious ideas issue.

10:38:30 Sen. Sesso said that he isn't certain why it's written differently here, but why wouldn't we at least match up the 10-85 rule with the referenced sections of the policy the way we've discussed, and just insert "religion" and take out "religious ideas" just so it's the same.

#### **Motion**

10:39:36 Sen. Sesso moved that Joint Rule 10-85 be amended to delete the words "religious ideas" and insert the word "religion" after social origin and take the order and the words that are in the Policy and put it in the rule 10-85.

#### **Vote**

10:41:13 The motion passed unanimously by voice vote.

#### **Adoption of the Policy**

10:41:29 Ms. Fox asked if the committee wanted to discuss the issue of the legislature adopting the Policy.

10:41:55 Sen. Sesso discussed subsection (2) of the 10-85, where it says, the policy of the Montana Legislature prohibiting discrimination, harassment, and retaliation, as adopted by the Legislative Council... He said that a concerned legislator wanted to insert "and approved by the Legislature".

10:43:40 Todd Everts, Chief Legal, said that by the Legislature adopting these rules, they are putting their stamp of approval on the policy itself as an appendix to these rules. He would say that it is redundant, however, no harm, no foul in terms of redundancy.

- 10:44:37 Sen. Sales said that he doesn't know how the body could adopt an house resolution policy.
- 10:44:53 Sen. Thomas said that was a good point in that you have the body delegate to the Legislative Council the authority to make this policy.
- 10:45:16 Mr. Everts suggested language, after as adopted by Legislative Council, insert "and the Legislature by adoption" of these joint rules must share with the members, etc., etc.
- 10:46:21 Sen. Sesso discussed 10-85 where it says the policy of the Montana Legislature prohibiting discrimination, harassment, and retaliation, as adopted by the Legislative Council, must be shared.

#### **Motion/Vote**

- 10:47:31 Sen. Sesso moved to amend Joint Rule 10-85 by inserting "and the Legislature by adoption of these joint rules, must be shared with members." The motion passed unanimously by voice vote.

#### **PUBLIC COMMENT**

None.

#### **Further Business**

- 10:48:42 Ms. Fox said that Amy Christensen, an attorney, will conduct training on harassment at 1:30 p.m., January 9, 2019.
- 10:50:03 Mr. Everts discussed scheduling a meeting for the Joint Rules.
- 10:50:42 Mr. Everts discussed the number of bill draft requests to date.

#### **ADJOURNMENT**

- 10:52:28 Sen. Thomas adjourned the meeting at 10:52 a.m.

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