

MINUTES
SENATE STATE AFFAIRS COMMITTEE

DATE: Monday, January 20, 2014

TIME: 8:00 A.M.

PLACE: Room WW55

MEMBERS PRESENT: Chairman McKenzie, Senators Davis, Fulcher, Hill, Winder, Lodge, Siddoway, Stennett, and Werk

ABSENT/ EXCUSED: None

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman McKenzie** convened the Senate State Affairs Committee (Committee) meeting at 8:00 a.m. with a quorum present. The business from Friday will be continued regarding review of temporary rules from the Department of Administration. **Chairman McKenzie** invited Teresa Luna, Director to continue with the presentation of the rules and answer questions from the Committee followed by public testimony.

CONTINUED FROM FRIDAY, JANUARY 20, 2014

IDAPA 38 - Department of Administration, Teresa Luna, Director

DOCKET NO. 38-0406-1301 **39.04.08 Rules Governing Use of the Exterior of State Property in the Capitol Mall and Other State Facilities - page 58**

DOCKET NO. 38-0408-1301 **38.04.08 Rules Governing Use of the State Capitol Exterior - page 68**

Ms. Luna brought to the Committee's attention a memo that was sent out on Friday in response to Senator Werk's request (Attachment A). **Senator Siddoway** thanked the Director for the memo and observed that there were two options; if we approve the rules we are going to get sued, or if we disapprove the rules we are going to get sued. **Ms. Luna** agreed. The rules before the Committee today are the rules written after last year's session that were based on input from the Legislature and include those issues with which Judge Winmill had concerns. However, those rules are not being enforced until the court process is completed. The Department has been advised by their attorneys that, in their opinion, it is necessary that those pieces that Judge Winmill declared invalid stay intact so they have a basis for appeal. **Ms. Luna** is asking that these rules be accepted as written with the understanding that they will not be enforced until there is resolution to those pieces Judge Winmill has called into question.

Senator Werk asked that if the Committee were to approve the rules with the exception of all of the parts that have been ruled unconstitutional, where does that leave the Committee. **Ms. Luna** said that the Attorney General's Office has advised them that if those sections that the judge has ruled against are rejected, it will inhibit their ability to appeal. **Senator Werk** asked that if they approved the rules and rejected those pieces that the judge has ruled unconstitutional, would it negate the State's ability to file an appeal. **Ms. Luna** said that it would not negate their ability, but the basis of the appeal would be lessened if those rules are not actually in the rules.

Senator Werk asked that if the Committee rejected those sections of the rules that have been ruled unconstitutional by the court, would there be any reason for the Department to file an appeal. **Ms. Luna** said "Yes, we believe there would be." **Senator Werk** asked if the Committee were to reject those pieces of the rules that have been ruled unconstitutional, would the Department pursue an appeal. **Ms. Luna** said "Yes, we believe we would."

Chairman McKenzie asked for further questions from the Committee then allowed for public testimony.

The following people testified in opposition to the rules, or parts thereof:

- Mary Bolognino representing The Homeless Coalition
- Dean Gunderson representing himself
- Barbara Kemp representing herself
- Monica Hopkins representing the American Civil Liberties Union of Idaho
- Ann Housrath representing herself
- Susan C. Philley representing Transform Idaho
- Gene Bray representing himself

The primary concerns of those testifying revolved around the approval of rules that had been deemed unconstitutional by the court, rules that undermined citizen's First Amendment rights, litigation cost to tax payers, the balance of authority between citizens and the Department, allowing state sponsored speech over other speech, arbitrary application of costs and fees, and the broad limits on duration.

Senator Werk asked Ms. Hopkins if she is recommending to the Committee that all of the rules be rejected or only those rules that were deemed unconstitutional by the court. **Ms. Hopkins** recommended that the Committee reject only the sections that had been deemed unconstitutional.

Chairman McKenzie stated that **Docket No. 38-0406-1301** and **Docket No. 38-0408-1301** was before the Committee and asked for the will of the Committee.

Senator Werk stated his appreciation for the Department's efforts in constructing the rules and to the citizens who attended both Committee meetings to share their concerns. It appears that the most logical way to move forward is to approve those rules that have been deemed constitutional by the court and to reject those rules that were deemed unconstitutional.

MOTION:

Senator Werk moved, seconded by **Senator Stennett**, that the Committee approve **Docket No. 38-0406-1301** and **Docket No. 38-0408-1301** with the exception of those rules that have been deemed unconstitutional by the courts which will be rejected.

Rejected Rules:

Docket No. 38-0406-1301:

- Page 64-200.03 in its entirety - State Events & Exhibits
- Page 64-201 in its entirety - Public Use Duration
- Page 66-400.01 in its entirety - User Retains Liability
- Page 67-400.03 in its entirety - Indemnification

Docket No. 38-0408-1301:

- Page 72-200.03 - in its entirety - State Events and Exhibits
- Page 72-201 in its entirety - Public Use Duration
- Page 79-400.07 - in its entirety - Fees and Costs
- Page 80-500.01 in its entirety - User Retains Liability

Chairman McKenzie and **Senator Davis** each restated the rules that were to be rejected. **Senator Davis** then stated that, in all other respects, the proposed Administrative Rules from the Department of Administration would be accepted. **Chairman McKenzie** concurred.

Senator Davis asked to have **Docket No. 38-04-8-1301** - Rule 400.07 explained. **Ms. Luna** said that the concern by the court on fees and costs was that there were no set limits. **Senator Davis** asked if the court meant to suggest that the State had a duty to subsidize speech. If the rule was to be read that the State had the right to charge for actual costs, then was Judge Winmill suggesting that the state of Idaho had an affirmative, constitutional duty to pay for speech rights? **Ms. Luna** explained that the court's concern was primarily with the word "may" instead of the word "will". The intention was to recover costs, and with the word "may" the Department could pick and choose who they would recover costs from. **Senator Davis** said that he would support the motion and outlined the reasons why.

Senator Stennett clarified Senator Davis' concern with Rule 400.07 and quoted that section from Judge Winmill's Amended Memorandum Decision and Order, Case 1:12-cv-00076-BLW Document 122, filed January 9, 2013, page 24 (Attachment B).

Senator Winder asked for information about the ability to appeal and the appeal process, as well as duration. How could competing individuals'/organizations' right to use the facilities be protected without potential conflict? **Ms. Luna** responded that the decision of whether to appeal or not is not that of the Department although they play a role in it. The decision is made in cooperation with the Attorney General's Office and executive branch. Regarding the seven day limit, the original wording was a set seven day limit. The new wording that the judge still had concern with allows the use of the facilities for seven days in any one location and then they can move to another location. The intent was not to allow one group to occupy the Jefferson steps for extended periods of time at the expense of others. It was hoped that this would address the judge's concerns.

Senator Siddoway stated his hesitancy to strike that provision but would be amenable to change the word "may" to "will" which would remove the Department's discretion about who would and wouldn't be charged for costs incurred for cleanup etc. **Senator Davis** explained that the act says that one can strike, insert, modify, or delete. However, only two of those principles have been tested and, as a result, the Legislature's practice has been to only accept or reject because of those untested principles. The Department can bring back a similar rule incorporating Senator Siddoway's suggestion.

Chairman McKenzie asked for other discussion. There being none, **Chairman McKenzie** called for a roll call vote on the motion which was to accept the dockets except for the rejection of the specific subsections that were outlined.

The motion carried by **roll call vote**. **Senators McKenzie, Davis, Winder, Lodge, Siddoway, Stennett and Werk voted aye**. **Senators Hill and Fulcher voted nay**.

ADJOURNED: There being no further business, **Chairman McKenzie** adjourned the meeting at 8:54 a.m.

Senator McKenzie
Chair

Twyla Melton
Secretary