MINUTES OF THE
SENATE COMMITTEE ON LEGISLATIVE OPERATIONS AND ELECTIONS

Seventy-Seventh Session
February 14, 2013

The Senate Committee on Legislative Operations and Elections was called to order by Chair Pat Spearman at 8:01 a.m. on Thursday, February 14, 2013, in Room 2144 of the Legislative Building, Carson City, Nevada. The meeting was videoconferenced to Room 4412 of the Grant Sawyer State Office Building, 555 East Washington Avenue, Las Vegas, Nevada. Exhibit A is the Agenda. Exhibit B is the Attendance Roster. All exhibits are available and on file in the Research Library of the Legislative Counsel Bureau.

COMMITTEE MEMBERS PRESENT:

Senator Pat Spearman, Chair
Senator Mark A. Manendo, Vice Chair
Senator Barbara K. Cegavske
Senator James A. Settelmeyer

COMMITTEE MEMBERS ABSENT:

Senator Kelvin D. Atkinson (Excused)

STAFF MEMBERS PRESENT:

Carol M. Stonefield, Policy Analyst
Melissa Mundy, Counsel
Mary Moak, Committee Secretary

OTHERS PRESENT:

Jackie Muth, Lieutenant, Commander, Office of Professional Responsibility, Department of Public Safety
Ron Cuzze, President, Nevada State Law Enforcement Officers' Association
Ronald P. Dreher, Peace Officers Research Association of Nevada
James M. Wright, Deputy Director, Department of Public Safety
Pam Del Porto, Inspector General, Department of Corrections
Juanita Clark, Charleston Neighborhood Preservation

Chair Spearman:
I will now open the Senate hearing on Senate Bill (S.B.) 16.

SENATE BILL 16: Authorizes the issuance of administrative subpoenas by state law enforcement agencies. (BDR 23-334)

Chair Spearman:
Senate Bill 16 is requested by the Department of Public Safety (DPS).

Jackie Muth, Lieutenant (Commander, Office of Professional Responsibility, Department of Public Safety):
I am here today to present S.B. 16, which is a bill to grant State law enforcement agencies the authority to issue an administrative subpoena requiring the production of books, papers or other tangible items to further an administrative investigation of personnel employed by a State law enforcement agency. I have provided a copy of my testimony for the Committee (Exhibit C).

When referring to an administrative investigation into personnel, I am referring to the internal affairs function of a law enforcement agency. The function of internal affairs is to implement an honest and fair fact-finding process that uncovers the truth. It is essential to maintain a process that protects the rights of all involved. Those rights include law enforcement agencies and accused employees as well as the public. The internal affairs function is essential in building and maintaining mutual trust and respect between law enforcement agencies and the public.

Administrative investigations into violations of chapter 284 of the *Nevada Revised Statutes* (NRS) refer to State employee misconduct. The Nevada Rules of Professional Conduct are the guidelines of the Personnel Commission. Results of the investigation, if sustained, could result in an employee's suspension, demotion or termination from State employment.

An administrative subpoena, as intended by this bill, is an official order that compels a person or entity to provide the law enforcement agency with information. The bill is not intended to compel witness testimony; rather it is specific to books, papers and other tangible items that may be relevant to an investigation.

Before an administrative subpoena would be issued, certain requirements should be met, which include: the investigation is conducted for a legitimate purpose; the agency does not already have the requested information; the evidence is competent and relevant; the demand for information is definite; the purpose of the investigation is authorized by statute; and proper administrative steps are followed in issuing the subpoena.

The subpoena would clearly state it is intended to further an administrative investigation. It would be signed by the chief executive officer of the State law enforcement agency or the command officer designated by the chief executive officer, which means an officer in charge of a department, division or bureau.

If failure to comply occurs, the administrative subpoena will be enforced through the district court, consistent with all other administrative subpoena powers given to agencies within this State.

The use of administrative subpoena power is not new to State government. Nearly all boards and commissions have subpoena power when dealing with items within their jurisdictions. Many State entities are given administrative subpoena power for the investigation portion of their activities. For example, the Assembly, the Senate and legislative committees have authority to issue subpoenas pursuant to their investigative powers. The State Board of Pharmacy has authority to issue subpoenas for production of papers for purposes of investigation. The Division of Insurance has power of subpoena when conducting investigations. The Commission on Judicial Discipline may issue a subpoena during any stage of disciplinary proceedings, including investigations. These are just a few examples of the many entities that have subpoena power.

It may not be often when an administrative subpoena is needed; however, when it is, it is crucial to obtain all relative facts to enable an agency to make fully informed decisions regarding employee misconduct. The subpoena is beneficial to both the agency and the employee. Without sufficient investigatory powers, including some authority to issue administrative subpoenas, agencies are limited in fulfilling their responsibilities to both the law enforcement agency and the public.

We owe it to all parties involved to be fully informed when making these decisions, which could ultimately lead to termination of an individual's employment.

Senator Settelmeyer:
Could you explain the definition of "the demand for information is definite"? What do you mean by definite?

Lt. Muth:
We mean we know the information or evidence we are trying to obtain. The item we are trying to recover versus having an open-ended subpoena for information we may not know exists.

Senator Settelmeyer:
If you find information that is not definite, can you utilize it, or is it fruit of the poisonous tree?

Lt. Muth:
We are trying to limit the use of an open-ended subpoena. If we are looking for surveillance video from a specific incident, we would draft the administrative subpoena in support of obtaining that item of evidence rather than providing an administrative subpoena and hope there is electronic video present. Definite means we know the item of evidence is there and tangible.

Senator Settelmeyer:
If you find additional information, what do you do with that information? You have a subpoena request for the tape, but instead you found a gun. The gun may be related to the particular action you are investigating. What do you do with this discovery?

Lt. Muth:
As long as we abide by the guidelines of the administrative subpoena and it leads us in a legal way to a different matter, then I would say we would be legal to use that evidence.

Senator Cegavske:
Is there a particular case you are basing this on?

Lt. Muth:
In the past 2 years, we have needed administrative subpoena powers on multiple cases. Some items we would have obtained but were unable to included social networking records, surveillance video, telephone records, bank records, business receipts, hotel records and postal information—items that

would have been helpful in our investigation. Approximately 5 percent of our yearly cases would need administrative subpoena power.

Senator Cegavske:
Would this bypass having to go to a judge to get permission to obtain the information?

Lt. Muth:
The administrative subpoena power gives the law enforcement agency the authority for administrative subpoena without judicial review. The administrative subpoena is granted broadly within agencies, both State and federal. However, it has to stand up to judicial review if it were challenged or quashed.

Senator Cegavske:
You would like to have the same power that other federal and State agencies have for subpoena?

Lt. Muth:
We are not looking for more power than any other agencies or committees. We would just like to be included in the issuance of administrative subpoena powers that the federal and many State agencies enjoy for investigation purposes.

Senator Cegavske:
Could we have a list of who has that now? Other than the FBI and Metro, who else has that power?

Lt. Muth:
I provided the Committee with a summary of State entities with subpoena powers that exist within the NRS (Exhibit D).

Senator Cegavske:
I would like a complete list of everyone that has this subpoena power. Is this a complete list of all of the agencies that have subpoena power within our State?

Lt. Muth:
That is approximately 90 percent of the businesses and entities in the State that have subpoena power.

Senator Cegavske:
What are the other 10 percent?

Lt. Muth:
I left off certain commissions that were very remote and not often utilized. I would be happy to provide a complete list of all agencies.

Senator Cegavske:
Maybe there is something we need to delete from the NRS?

Chair Spearman:
In reference to Senator Settelmeyer's question, when you obtain the subpoena and find something you were not looking for and the information leads you down another road, as long as it is within the legal confines of the investigation, you could use it. If you find something that is very personal in nature, how do you ensure chain of custody? How do you ensure that only those who have a need to know do in fact know? Are you putting protocols in place to protect individuals' privacy?

Lt. Muth:
We have processes in place for confidentiality of sensitive investigations, which are made confidential by *Nevada Administrative Code (NAC).* We have penalties and prohibitions that prohibit any employee who has the need to come into contact with this kind of information from sharing the information. If that were to happen, we would take action swiftly and immediately. This would include any information and sensitive material that would come through administrative subpoena.

Chair Spearman:
What implications are there for people who have collective bargaining rights or associations if S.B. 16 were to pass?

Lt. Muth:
We are proposing this bill be placed in chapter 284 of the NRS. It is specific to State employees. State employees do not have collective bargaining rights or association matters. The bill would have to be modified, or dealt with in a separate issue, to involve the city and county law enforcement agencies that do have collective bargaining rights.

Chair Spearman:
Is there anything in this bill that would impede or impeach any of the contractual arrangements that have already been made?

Lt. Muth:
The collective bargaining is not bound by chapter 284 of the NRS, as far as I know. I am not knowledgeable enough to speak on how this affects collective bargaining.

Chair Spearman:
You are saying there would be no implications or criminal activity to this. Correct?

Lt. Muth:
That would be correct.

Ron Cuzze (President, Nevada State Law Enforcement Officers' Association):
We support this bill. The purpose of an administrative investigation is to get to the truth. The only way you can get to the truth is to have all of the evidence. Once all the information is gathered by an administrative subpoena, it is discoverable to both sides, the employee and the State. We fully support this with an amendment to where the employee gets the same right.

Senator Cegavske:
You want the employee to be able to request a subpoena?

Mr. Cuzze:
Not the employee, but one of the attorneys or the Association. We have had cases where we knew there was evidence in existence, same as the State, but there was no way to get it. Usually when we do get the evidence, it is more toward the State's favor than our employee's favor.

Senator Cegavske:
Are you asking for an amendment to this bill?

Mr. Cuzze:
The bill would become part of chapter 284 of the NRS. I do not know if we would amend the bill or the NAC.

Senator Cegavske:
It cannot just happen. It has to have an amendment. Lt. Muth, is this something you are supporting?

Lt. Muth:
The Department would be willing to discuss any potential modification or amendments with the Association. I think the Association would like access to information we receive through administrative subpoena. Ultimately, the Association gets the information at the conclusion of our investigation.

Senator Cegavske:
From my understanding, Mr. Cuzze is asking for the same subpoena power you are asking for.

Mr. Cuzze:
We are asking for a mechanism to ask the Department of Public Safety or the Office of Professional Responsibility (OPR) to say it has reason to believe that there is evidence that could prove either our employee's innocence or guilt.

We had an employee who was recently fired. The investigation involved social media. If we had known about the evidence against the employee, we could have saved the Department a lot of trouble. We would have taken the employee aside and said you are not going there. Let us try and make the best deal possible. You are guilty.

Chair Spearman:
Are there other means by which you may obtain the information Senator Cegavske asked about earlier? Could you go to a judge? If so, why are those avenues not as accessible or expedient to the investigation?

Lt. Muth:
There is a 90-calendar-day requirement for us to conclude an investigation before an employee is disciplined. Time is an issue for us. The only mechanism we have to obtain the information, other than through administrative subpoena, would be a criminal investigation. The criminal investigation would request a subpoena through a grand jury or whatever means to obtain the information. A criminal nexus would need to apply to the case. When that happens, we are now exposing the employee to a criminal investigation, which increases our time limitation. We then have to go through the process of a criminal investigation,

obtain the evidence and then have it forwarded to us so we can do the administrative investigation. This is legal, but it is a more convoluted way to get the same evidence which we could obtain with an administrative subpoena.

Ronald P. Dreher (Peace Officers Research Association of Nevada):
We are opposed to S.B. 16. I do not see why we need administrative subpoena power when we already have powers through the court, as Lt. Muth stated. Amending the provisions of NRS 284.387 by adding the ability of State administrators and chief executive officers of State law enforcement to issue administrative subpoenas to obtain books, papers or other tangible items is an improper way to obtain information in administrative internal affairs investigations. Senate Bill 16 circumvents the process by allowing individuals who are not attorneys, assistant district attorneys or from the Office of the Attorney General to request administrative subpoenas.

The bill is an attempt to circumvent the provisions of NRS 289, which defines the rights of peace officers. The provisions of NRS 284.387, which this bill would amend, actually relates to all State employees. This bill indicates that it will now provide law enforcement a separate section. Why do we need this when we already have NRS 289 to cover the same provisions? I would ask the Committee to look at the provisions of NRS 284.387 and then compare those same provisions with NRS 289.060. They both relate to notifications to State employees of their due process rights in an internal affairs investigation. The NRS 289.060 provides notice of an initial internal affairs investigation for law enforcement officers. We do not want to see the separation of peace officers' rights to a separate section of NRS 284. There is no need for the issuance of administrative subpoenas in State law enforcement internal affairs matters. Due process protections are afforded our peace officers in NRS 289.060 and other provisions of that chapter.

The objective of OPR is to determine whether or not an administrative violation has occurred. An internal affairs process begins and an admonishment, what we call the *Garrity* Warning, is given to an officer. The *Garrity v. New Jersey,* 385 U.S. 493 protection section says you are being compelled to provide an involuntary statement under threat of insubordination. Your failure to do so could result in termination. Any comments that you make and any compelled statement are protected from being used in criminal investigations.

If access to an employee's social media account, such as Facebook or LinkedIn, is needed for an administrative investigation, you can request permission from the employee or by a court order.

I ask the same question as Senator Cegavske, what case prompted the State to come forward and ask this Committee to change the law when we have not had this provision before?

If the administration wants records or discovery prior to an investigation to further their case, what about our side? We would like to have the information that the administrative investigators are discovering. We would like to be provided with the issues, who the complainant is and the records you have. If rumors are being spread or innuendos appear on Facebook, we want to get to the bottom of that.

Written in 1791, the Fourth Amendment to the U.S. Constitution states the right of the citizens to:

> Be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This is why we have a court that looks at the subpoenas. When an attorney issues a subpoena, it is to require a person to appear or to obtain evidence for a court proceeding. I am opposed, even after hearing Lt. Muth's testimony, to grant powers to request administrative subpoenas in these types of settings. It is something that is going to go against the due process rights we have worked so hard to get in NRS 289. With that, Madam Chair, I will ask the Committee to please not support S.B. 16. We oppose this bill.

Senator Settelmeyer:
I can see a benefit for both sides of this, the ability to clear things up in a timely fashion.

The information on Facebook can be deleted. The concept of saying ask me first where I stashed something, that applies both ways to both entities.

What would be wrong with inserting on page 1, line 7 of S.B. 16, "information that actually could clear an employee"? Then on page 2, lines 17 and 18, I do not believe in the concept of a command officer. This kind of power is specific. It is powerful and should be limited to select individuals. A section 3 could be added stating the employee can request administrative subpoenas following the same protocols and rules. What would be the objection to making sure both sides are on equal footing?

Mr. Dreher:
There would be nothing against that. The first thing the attorney asked me was what about our side? Can we do the same thing? Can we get administrative subpoena powers?

However, you are opening Pandora's Box. Initially, through a subpoena power, we would be asking for: who is the complainant, what are the complaints in this investigation, is there an allegation of misconduct or excess of force? I would like the records to see where that is coming from.

Do you see the problem I am having with this? In addition, this is the same concern our attorney voiced. He has a problem with both sides. If you want to be equal about it, that is one way to do it. Give both sides the subpoena power. I am not sure that we are going to like the results, but that is equality.

Senator Settelmeyer:
The parameters that were set forth in the testimony should actually be within the bill in order to ensure that both sides do not have the right for a fishing expedition. The concept of going in and looking for an individual's name is merely a fishing expedition. You are not asking to look at somebody's Facebook account; you are not looking for information the other way. The question you just asked, Mr. Dreher, constitutes an open fishing expedition that, if I was an administrative individual, I would not grant.

Mr. Dreher:
I have current cases involving rumors on Facebook. You cannot get an administrative subpoena to obtain cell phone records or to get Facebook information. You can get a court order and go through that process.

There is a way to narrow the focus like you were saying, but we already have that process in place.

Chair Spearman:
Lt. Muth indicated the bill is referring to civilians and not peace officers. According to her previous testimony, this would not have extended implications for police officers. Can you speak to that? It sounds like you are saying that if this were to pass, the applicability would extend to peace officers regardless of what the bill says.

Mr. Dreher:
I stand corrected. This is a State bill; it applies mainly to State employees if you keep it under NRS 284. It will not affect collective bargaining the way we have it but will have an effect on NRS 289. This bill has law enforcement in it, and we already have provisions under NRS 289 that protect and provide due process rights. This should be under NRS 289 and not NRS 284, because it is specific to law enforcement. I spoke with Lt. Muth about that and she responded the Department is trying to expand it, in addition to law enforcement, to chief executive officers and the like. That is not what the bill says. The bill says law enforcement. That is the concern I have.

Lt. Muth:
This is not a new issue. The enforcement of administrative subpoenas has been vetted through the court system. It has been heard by the U.S. Supreme Court; it is judicially sound. We are not asking for anything that has not been presented to other agencies and to the federal system. The system has been tried and tested. It would have to stand up to judicial review if a subpoena was challenged.

The cases that Mr. Dreher is speaking of are primarily the criminal investigations. Yes, under a criminal investigation we are able to obtain the evidence via criminal investigation subpoena. The majority of our cases do not involve criminal activity. We are talking about administrative violations of NAC 284 and NRS 284. For the majority of these, we do not have the ability to make a criminal nexus in order to obtain subpoenas. The majority of Mr. Dreher's clients, the members that he represents in these hearings, are not bound by NRS 284 as we are at the State agencies. He and his members are not limited to the 90-calendar-day period our employees are bound by. Therefore, the time limitation is a significant issue that was brought into effect last Legislative Session.

I would like to address the *Garrity* protection issues that were a concern brought up in opposition to this bill. The *Garrity* protection applies to the employee. Any compelled statement or information we receive from our employee is protected from any criminal wrongdoing when criminal wrongdoing is involved. The employee's U.S. Constitutional Fifth Amendment rights against self-incrimination are protected. The administrative subpoenas we would be issuing are not to the employee. We are not compelling any information of the employee that could be used in a criminal investigation. The administrative subpoenas are for members of the public, business and entities. We would not issue this subpoena to an employee. So there will not be a *Garrity*-related issues crossover between the criminal and civilian.

The majority of our cases do not have criminal implications. We are not able to obtain any court order under an administrative investigation to obtain these items. If there is a system in place, which Mr. Dreher is addressing, with which we can obtain this information, I would like to know what that is, because we do not have that. I would love for any of my counterparts who conduct internal investigations for other agencies, besides the Department of Public Safety, to speak to that as well.

The timeliness issue that we are bound by, the 90 days, is a relative factor for this. This bill is not being submitted for the purpose of any fishing expeditions. We are already bound; we already have parameters on how we conduct our investigations listed in NRS 284 and NRS 289. We already know what our limitations are and we cannot work outside of those boundaries or guidelines. It is already settled in statute. We cannot go beyond that by utilizing this administrative subpoena power. The advantage of the administrative subpoena power is it gives us the ability to obtain exculpatory or incriminating evidence for an investigative body making decisions on an individual's employment status. This reduces potential liability as these cases proceed.

Senator Cegavske:
Whom did you talk to when creating this bill? Normally you would talk to people who would have issues and see if you can come to a compromise. Were you able to go to the entities you thought might be in opposition and have some dialogue? Who is with you and who is against you?

Lt. Muth:
We worked with the primary association that we come in contact with during our business, Mr. Cuzze's group, Nevada State Law Enforcement Officers' Association. We did not reach out to Mr. Dreher's group, Peace Officers Research Association of Nevada. We worked in conjunction with our fellow State law enforcement agencies that also deal with internal affairs.

Senator Cegavske:
When you were reviewing the bill, were there any unforeseen circumstances that would make us say we should not have passed that legislation?

Lt. Muth:
This bill has a positive impact on what we are trying to do. We want to come to the truth for all involved. This is the tool. We would not otherwise be able to obtain the information until a postdisciplinary hearing. Then it is too late; the tangible employment action has already taken place. I can see nothing that would be a negative in enforcing this bill. I would like to reiterate this is not going to be used on every investigation we do. The DPS does approximately 125 internal affairs investigations a year. I can think of five cases last year where we could have utilized this subpoena power. It is not the majority of our cases; it has a limited scope. I think it is for the betterment for the employee, as well as the Department and the public. It is not designed for a fishing expedition.

Senator Cegavske:
Would you prefer the bill goes as written, without an amendment? The amendment would make the process longer.

James M. Wright (Deputy Director, Department of Public Safety):
In the working relationship we share with the Association, as Mr. Cuzze stated, it is both sides' responsibility to get to the truth, to get to the information we need to clear the employee or to deal with the employee in a disciplinary manner. If we move the bill forward as written, with the working relationship we have, we could work through the issues.

Chair Spearman:
You indicated that during the discovery process, it was not intended to have any criminal implications. If it does and you have to make that crossover, who determines that gray area?

Lt. Muth:
Are you asking who makes the determination if we obtain criminal evidence?

Chair Spearman:
You indicated the administrative discovery process was not intended to produce any criminal implication, but if it does, who determines when the case goes to a criminal hearing? If it does, what happens then? Discovery is discovery; you cannot put the genie back in the bottle.

Lt. Muth:
Usually, the prosecuting attorney would request any information regarding a criminal case and make the determination on whether the information would be applicable in a criminal trial. There can also be a summary review by the sitting judge who would make that determination. If we are requested by a prosecutor to provide information, as long as it fits within the guidelines and is not compelled from our employee, then we will provide that to a prosecutor. These are rare circumstances. I can think of fewer than five internal affairs cases where we have turned over information to a criminal prosecutor.

Chair Spearman:
In my experience as a military police officer, there are times during an investigation when you reach the point that it becomes clear in your mind that you might be getting ready to cross the line. Do you have protocols in place for concurrent Miranda warnings?

Lt. Muth:
If we are conducting an administrative investigation and we discover information that has criminal implications, we will stop the investigation at that point and refer it to a criminal investigative body. In our case, that is the Office of the Attorney General, because it has the first right of refusal on any criminal violation committed by a State employee. We would keep the criminal and administrative investigations separate.

Chair Spearman:
Who notifies the person who is the subject of the investigation?

Lt. Muth:
I am sure there is a different protocol by each agency. There is nothing statutorily that defines who would provide that information to the subject

employee. For the Department of Public Safety, the Office of the Attorney General would make notification to the employee.

Mr. Cuzze:
I want to clear something up. I know that our fellow associations in the cities and counties are worried about this. *Nevada Revised Statutes* 284 make up the State's personnel regulations; these regulations do not affect cities and counties that have collective bargaining. Also, this is not just for peace officers. My association represents parole and probation specialists, dispatchers and forensic techs. We are talking about sworn and nonsworn employees. Mr. Dreher mentioned NRS 289, the chapter delineating the rights of peace officers, which does not pertain to State civilians. Under both NRS 284 and NRS 289, referring to a peace officer is already in the law. The safeguards are already there, especially in NRS 284. This bill is designed to get to the truth. We do not see this as infringing on anybody's rights. This is an administrative investigation; it must be completed within 90 days. We believe this is just as much in our favor as it is for OPR.

Pamela Del Porto (Inspector General, Department of Corrections):
I am here in support of S.B. 16. I agree with Mr. Cuzze. At the completion of the administrative investigation, the employee, peace officer or not, who could face disciplinary charges would have full access to review that file. Should the employee wish to appeal disciplinary action, then he or she gets a full and complete copy of everything in that file. It is a violation if we do not provide this information to the employee. I would like to reiterate with Lt. Muth's testimony that we cannot subpoena anything until we are at the point of an appeal. At that point, we need to request information from the hearing officer of the Division of Human Resource Management's Employee-Management Committee. We can ask employees and their representatives for access to their cell phone records if we suspect a violation where an inmate may have gotten a cell phone or somebody may have taken a cell phone into an institution. We are talking about serious security concerns. We also have had instances when we need video or surveillance footage from a Wal-Mart or a local business. The subpoena further assists us in getting that information in a timely manner. If the employee appeals any disciplinary action, that information must go to the employee and the Attorney General's Office.

I want to speak on behalf of the Department of Corrections in the matter of criminal versus administrative investigations. If we have the appearance of a

crime and an administrative issue, we do the criminal investigation first. Because there are serious implications of violations of administrative rights of employees, we will have the criminal investigation begin because files can be shared at the point of prosecution or denial. However, on the return side, we choose not to share anything in an administrative file with criminal investigation unless we get a subpoena. We have had instances of computer usage violations where the initial complaint of a violation was the report that distinguished what the violation was. During the initial inquiry, we will consult a criminal specialist if it shows there is pornography, since that is a very different issue.

We have more than 125 internal affairs cases a year. We do not have that many cases where we would use this subpoena. It is important when we do because we do have employees who refuse to produce records, which they claim are gone, cannot be obtained or AT&T will not provide. The subpoena is a means by which we can get full and complete information of what is occurring.

Chair Spearman:
You do not provide any administrative information to those who would pursue a criminal investigation unless it is subpoenaed? Should you find something in an administrative investigation, what protocol is in place that says the case moves to the Attorney General's Office? How is the employee notified? As an example, you may have obtained cell phone records from someone; these cell phone records indicate there may be criminal activity involved, and it has been determined that you need to give this to the Attorney General. If that happens at 9 a.m., when is the employee notified? At the time you have made this determination, do you Mirandize that person, or do you simply say we are getting ready to turn this over so the person knows that it has gone from administrative to criminal?

Ms. Del Porto:
We have not notified the employee that we are doing an administrative investigation because that starts the 90-day clock. If we are conducting an administrative investigation and discover criminal activity, then we will stop the internal affairs review and refer the matter to the Attorney General's Office. If the Attorney General does not accept it, we may continue our own criminal investigation. We do not notify employees of the nexus to criminal until we are ready to bring them in or the Attorney General makes the decision to bring them in for the Miranda interrogation.

Chair Spearman:
If you find evidence in an administrative investigation that is criminal, what is the protocol to turn it over to the authorities who would pursue a criminal investigation? How is the employee notified? Do you Mirandize that person?

Ms. Del Porto:
We are concerned about safety and security. If it is a severe violation, we may have to take action, such as not allowing the employee into the secure confines of an institution. We may move a person from inmate supervision to indirect supervision; it just depends on the potential violation. Until a matter is adjudicated criminally or administratively, the employee still has certain rights and is innocent until shown otherwise. It depends upon each situation and the seriousness of the allegation. There are times we can move employees away from the immediate area and they can still do their jobs, just in different locations.

Mr. Dreher:
Lt. Muth and Ms. Del Porto told you several times that under NRS 284.387 there is a 90-day limit for notification of possible disciplinary action. There also is a 60-day extension if evidence is produced that shows the investigation is not completed. There is not a binding to 90 days.

When it comes to crossing over between the criminal and investigative portion of the administrative hearing, under NRS 289.060, if something else is determined in the course and scope of the investigation that deals with other alleged misconduct not in the notice, the agency has to stop the investigation and notice the employee again. There is no provision under NRS 284.387 that mandates that the State stop an investigation if additional misconduct is noted.

If the State discovers evidence as a result of the subpoena and there is a compelled statement in the administrative investigation, then I go back to the *Garrity* admonishment that says that any information obtained in this compelled statement cannot be used against the officer in any subsequent criminal investigation. That is not limited to just peace officers. It applies to all employees regardless of whether they work for the State or a local government.

Mr. Wright:
The intent of this bill was to focus the attention on the State DPS employees. We do have a 90-day clock that starts on the investigations. The ability to

request a 60-day extension is not looked upon favorably. We try to maintain that 90-day completion period.

In my discussion with Mr. Cuzze, he said the Nevada State Law Enforcement Officers' Association would be comfortable now, as I stated earlier, with our relationship to his and other associations and that there would be no need to amend this bill.

Chair Spearman:
Even though there is a 60-day extension, it is not looked upon favorably. What are the consequences of that extension for the people who are actually doing the administrative investigation?

Mr. Wright:
It is a time constraint on the investigators to get the job done. With your experience, you know how complicated and complex investigations can be and where they can lead. We need to use every tool we can provide our investigators to get that job done in that 90-day period.

Chair Spearman:
If you are looking for justice and equity, that the investigation is complete and all the evidence that can be obtained is obtained, why would it be looked upon unfavorably to have an extension?

Mr. Wright:
My term "looked upon unfavorably" is that DPS would have to ask for permission for the extension from the Division of Human Resource Management. We would have to explain the compelling reasons. We can do that. Our department prefers to meet the mandate of the 90 days as put in statute rather than ask for an extension.

Chair Spearman:
If you need the 60-day extension, is it understood that this is in the interest of fairness and justice to the employee to ensure that the investigation accomplishes what was intended?

Mr. Wright:
If there is need to ask for an extension, we certainly would. I take back my choice of words, "looked at unfavorably." We would prefer to meet that 90-day

time constraint if we can. If we cannot and more information is needed, we would ask for an extension to bring out all the information we need.

Juanita Clark (Charleston Neighborhood Preservation):
In observing the testimony here this morning, I only heard a 90-day limit. Why would we use the word limit when actually there is an extension? Limit means the end to me, a stop sign. There is no continuation. Yet somewhere, evidently, there is mention made of a 60-day extension. Is it clear that when I hear a 90-day limit, I am also hearing a possible 60-day extension? That was not in the testimony. I never heard a 60-day extension until just the past few minutes of the testimony.

Lt. Muth:
The 90-day limit we are referring to was put into statute last Legislative Session for a couple of reasons. One is to minimize the stress and the time period for the employee to be under investigation. That is to the benefit of our employees. The 90-day limit is also designed to save on costs when employees are placed on administrative leave. Prior to the 90-day rule, we would have employees on extensive administrative leave time periods.

The 60-day extension is in statute. We have to show just cause in order to request it. We cannot request the extension because we have too many cases or we have family medical leave or furloughs. We have to show just cause based on the complexity of the investigation and the need for obtaining information that is timely. We can request that 60-day window, but the Department of Human Resource Management will grant it only if we have just cause. It is not something that is available without a significant need. We will request that if we need to, depending on the need for the investigation.

The Office of Professional Responsibility has one investigator for every 425 employees. Our staffing level is not high, but that would explain why we have the 90 days plus 60 potential days.

Ms. Clark:
Would the person under a 90-day investigation limit know there was a possibility of a 60-day extension?

Chair Spearman:
At the onset of the investigation you, as the subject of the investigation, would know that there is an opportunity for a 60-day extension.

Lt. Muth:
I would say that most employees know because it is written into statute. Most employees are represented by an employee representative or association. They are very well versed on the guidelines and rules contained in statute regarding administrative investigations. Most State personnel know that there is the opportunity for a 60-day extension.

Chair Spearman:
Shall we say that within the confines of these concerns that all deliberate speed will not compromise due process?

Lt. Muth:
Yes.

Chair Spearman:
For our witness in Las Vegas, you may want to contact the Department of Human Resource Management for specific answers to your questions. I am not sure we can answer within the scope of the bill before us.

Ms. Clark:
I was looking for clarity that a layman could understand and not have a surprise pulled out. I appreciate your accommodation.

Chair Spearman:
Do I hear a motion to introduce Bill Draft Request (BDR) 23-727?

BILL DRAFT REQUEST 23-727: Revises provisions relating to collective bargaining. (Later introduced as Senate Bill 168.)

SENATOR MANENDO MOVED TO INTRODUCE BDR 23-727.

THE MOTION FAILED FOR LACK OF A SECOND.

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Chair Spearman:
We conclude the business for the Committee on Legislative Operations and Elections today at 9:26 a.m.

RESPECTFULLY SUBMITTED:

Mary Moak,
Committee Secretary

APPROVED BY:

Senator Pat Spearman, Chair

DATE:

EXHIBITS				
Bill	**Exhibit**		**Witness / Agency**	**Description**
	A	1		Agenda
	B	2		Attendance Roster
S.B. 16	C	5	Jackie Muth	Senate Bill 16 Testimony
S.B. 16	D	18	Jackie Muth	Legislative Investigations subpoena powers