

## NORTH DAKOTA LEGISLATIVE MANAGEMENT

### Minutes of the

## ADMINISTRATIVE RULES COMMITTEE

Monday, December 8, 2014  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Representative Bill Devlin, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives Bill Devlin, Randy Boehning, Joshua A. Boschee, Robert Frantsvog, Ben Koppelman, Kim Koppelman, Mike Schatz, Peter F. Silbernagel, Nathan Toman, Robin Weisz; Senators Kelly M. Armstrong, Joan Heckaman, Jerry Klein

**Members absent:** Representatives Mark S. Owens, Blair Thoreson; Senator Connie Triplett

**Others present:** See [Appendix A](#)

**It was moved by Senator Armstrong, seconded by Representative Boschee, and carried on a voice vote that the minutes of the September 15, 2014, meeting be approved as distributed.**

### NORTH DAKOTA RACING COMMISSION

Chairman Devlin called on Mr. Gunner laCour, Director, North Dakota Racing Commission, for testimony ([Appendix B](#)) regarding rules adopted by the North Dakota Racing Commission. Mr. laCour said the rule changes govern the licensure of multiple horse owners, equine medication, and qualifying foals under the North Dakota Breeders' Fund.

In response to a question from Representative K. Koppelman, Mr. laCour said the rules were presented multiple times at Racing Commission meetings. He said because the public hearings on the rules were not well-attended, the Racing Commission sought interaction with the horsemen to discuss the proposed rules.

In response to a question from Senator Klein, Mr. laCour said furosemide is the only medication that can be administered to a horse on race day. He said the purpose of the medication is to prevent a pulmonary embolism. He said other medications must be administered 24 hours or more before race day.

### STATE FIRE MARSHAL

Chairman Devlin called on Mr. Raymond Lambert, State Fire Marshal, for testimony ([Appendix C](#)) regarding the rules adopted by the State Fire Marshal. Mr. Lambert said the rules set the guidelines and standards for the adoption of the international codes and standards that are used throughout the state in all public and private facilities.

In response to a question from Representative Boehning, Mr. Lambert said the rules do not require residential homes to have sprinkler systems. He said the changes only update the rules from the uniform fire code to the international fire code. He said the State Fire Marshal does not charge a fee for any services it provides.

In response to a question from Representative K. Koppelman, Mr. Lambert said the updating of the code will not have have an effect on the day-to-day practices of his office. He said only specific sections of the international fire code are being adopted. He said the changes are the same ones the office has been using for some time. He said the state gives local communities much authority over fire regulations with little or no interference from the state. He said the state has authority over state-owned buildings and public schools.

### STATE LOTTERY

Chairman Devlin called on Mr. Randy Miller, Director, North Dakota Lottery, for testimony ([Appendix D](#)) regarding rules adopted by the State Lottery. Mr. Miller said the rules address changes to retailer duties and sales, conduct and play, validation of a ticket, and subscriptions. He said the rules also address changes to the 2by2 games and the North Dakota Lottery Players Club.

In response to a question from Representative Boehning, Mr. Miller said when a player buys a subscription, the full amount is charged to the player's account at the time of the subscription rather than by per play.

In response to a question from Senator Klein, Mr. Miller said the rules for the 2by2 game were the only rules adopted as emergency rules. He said this was done to meet the Multi-State Lottery Association's requirements. He said the North Dakota Lottery has had a subscription service since 2005; however, since July 2014, the subscription services have been Internet-based. He said about 1 percent of total sales are by Internet subscription. He said 2012 and 2013 were record-setting years for the lottery. He said sales, which are very dependent on large jackpots, are down slightly this year. He said big jackpots increase participation and there were fewer big jackpots in fiscal year 2014.

## STATE BOARD OF DENTAL EXAMINERS

Chairman Devlin called on Ms. Rita M. Sommers, State Board of Dental Examiners, for testimony ([Appendix E](#)) regarding the rules adopted by the board. Ms. Sommers said the rules significantly amended the content and structure of the board's rules. She said the board reorganized the rules, addressed adjunct services such as nitrous oxide inhalations, added definitions to support new duties, added clarification to licensure requirements, and amended language to expedite the credentialing process of dentists licensed in other states who want to come to North Dakota to provide care for indigent populations.

In response to a question from Chairman Devlin, Ms. Sommers said North Dakota Administrative Code Section 20-02-01-06 resulted from a statute that was accidentally removed. She said this rule replaces the statute.

In response to a question from Representative K. Koppelman, Ms. Sommers said a bona fide specialty must be one of those specialties listed in the definition. She said some dentists claim to be specialists in some other area, which can be misleading to the public. She said dentists cannot use the word specialty or specialize unless it is a specialty listed in the definition.

Ms. Sommers said when a dentist provides pro bono services, the intent of the dentist may not be to accept the patient as a patient of record. She said a rule change allows a dentist to accept the patient or to provide donated services without being a patient of record. She said if a patient is a patient of record, it would be a violation to refuse to see the patient. She said another rule change allows for the use of botox as a part of a total treatment plan. She said one example of the use of botox in dental treatment is to allow for lip correction after a denture fitting or after implants. She said the use of botox is not an expansion of dental scope of practice. She said there are many health care and nonhealth care providers who provide this service.

In response to a question from Representative Silbernagel, Ms. Sommers said the board may require an applicant to face the board when the applicant comes to the state. She said the board is moving to an online jurisprudence examination.

In response to a question from Senator Klein, Ms. Sommers said the board receives many complaints about advertising. She said the board has adopted a code of ethics in its administrative rules.

In response to a question from Representative K. Koppelman, Ms. Sommers said the advertising complaints come from both patients and practitioners. She said one of the biggest complaints is about dentists who advertise for free examinations.

Chairman Devlin called on Mr. Rod St. Aubyn for testimony ([Appendix F](#)) regarding the rules adopted by the State Board of Dental Examiners. Mr. St. Aubyn said he was representing the North Dakota Dental Hygienists' Association (NDDHA). He expressed the concerns the NDDHA has about the expansion of duties of dental assistants.

In response to a question from Representative B. Koppelman, Mr. St. Aubyn said he did not know the board's reasons for the changes to the expanded dental assistant duties.

In response to a question from Representative Frantsvog, Mr. St. Aubyn said there was much opposition to the changes, including opposition from several dentists.

In response to a question from Senator Armstrong, Mr. St. Aubyn said the one of the objections of the NDDHA is the lack of opportunity for public comment on a new rule that was proposed after the first public hearing. He said the new rule would permit dental assistants to do supragingival scaling. He said because of the objections to the new rule, the rule was amended to limit the patients on which the dental assistant could perform supragingival scaling to age 12 and younger.

In response to a question from Senator Klein, Mr. St. Aubyn said this rule change could be viewed as lowering the standard for professionals. He said, however, it is ultimately the dentist who makes the decision as to whether dental assistants can perform this duty.

In response to a question from Representative Boschee, Ms. Rachelle Gustafson, President, North Dakota Dental Hygienists' Association, said children age 12 and younger are at low risk for periodontal disease. She said this change is not being adopted in other states.

In response to a question from Representative Boehning, Ms. Gustafson said there is not an insurance code for supragingival scaling. She said the insurance company does not know from the coding whether a dental assistant or a dental hygienist performed the supragingival scaling. She said the coding is done by the service rather than the person doing it.

In response to a question from Senator Heckaman, Ms. Gustafson said there is no training required for supragingival scaling in the dental assistant program. She said continuing education and extra training would be required.

In response to a question from Representative Silbernagel, Ms. Sommers said expanding the scope of duties may be seen by the board as a safer route than allowing mid-level providers in the state to perform dental services.

In response to a question from Representative B. Koppelman, Ms. Sommers said access-to-care issues have been raised over last three to four years. She said the board's response is to use its own workforce and to educate those with the proper training and education. She said the board has always maintained there is not a shortage of practitioners.

In response to a question from Senator Armstrong, Ms. Sommers said it is up to dentist to delegate who does what within their scope of practice. She said all services are billed the same regardless of which person performed the procedure. She said if a professional comes across something they cannot handle, that professional will call in a professional who can. She said dental assistants do not diagnose periodontal disease nor do they read x-rays. She said, however, that does not mean a dental assistant cannot recognize or identify periodontal disease.

In response to a question from Representative Weisz, Ms. Sommers said she agrees that the age restriction is poorly worded in the rule. She said it is rare for children to have tartar below the gum line. She said the board felt with proper training, a dental assistant could perform supragingival scaling on a patient of any age. She said the 12 years and younger restriction was a compromise.

**It was moved by Representative K. Koppelman, seconded by Senator Heckaman, and carried on a roll call vote to carry over consideration of the rules adopted by the State Board of Dental Examiners to the next meeting.** Representatives Devlin, Boehning, Boschee, Frantsvog, B. Koppelman, K. Koppelman, Schatz, Silbernagel, Toman, and Weisz and Senators Armstrong, Heckaman, and Klein voted "aye." No negative votes were cast.

### STATE BOARD OF FUNERAL SERVICE

Chairman Devlin called on Mr. Dale G. Niewoehner, Executive Secretary, State Board of Funeral Service, for testimony ([Appendix G](#)) regarding rules adopted by the board. Mr. Niewoehner said the rules update licensing requirements for funeral practitioners, funeral establishments, and crematoriums and bring the rules up to date with current national standards.

In response to a question from Senator Klein, Mr. Niewoehner said there was a conflict between the statute and the rule as to educational requirements. He said the educational requirement has always been and continues to be two years of college plus mortuary school.

### STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Mr. Dale Patrick, Manager, Radiation Control Program, State Department of Health, for testimony ([Appendix H](#)) regarding the rules adopted by the department.

In response to a question from Chairman Devlin, Mr. Patrick said the last rules revision inadvertently omitted the a table relating to the release for unrestricted access when a facility that used unsealed sources of radioactive materials was closed or abandoned. He said the rule will assure that members of the public or successive property owners do not receive a radiation exposure that is above background radiation levels.

## EDUCATION STANDARDS AND PRACTICES BOARD

Chairman Devlin called on Ms. Janet Welk, Executive Director, Education Standards and Practices Board, for testimony ([Appendix I](#)) regarding a rule of the board carried over for consideration from the September 2014 meeting. Ms. Welk said to help clarify the rules for initial licensure of in-state graduates, the change to paragraph (6) of North Dakota Administrative Code Section 67.1-02-02-02(1)(b) should be deleted.

In response to a question from Senator Heckaman, Ms. Welk said federal law requires that special education students are entitled a teacher as qualified as a teacher as students who are not in a special education program.

**It was moved by Representative K. Koppelman, seconded by Senator Heckaman, and carried on a roll call vote that the change to paragraph (6) of North Dakota Administrative Code Section 67.1-02-02-02(1)(b) be voided.** Representatives Devlin, Boehning, Boschee, Frantsvog, B. Koppelman, K. Koppelman, Schatz, Silbernagel, Toman, and Weisz and Senators Armstrong, Heckaman, and Klein voted "aye." No negative votes were cast.

## STATE WATER COMMISSION

Chairman Devlin called on Mr. Bruce Engelhardt, Director, Water Development Division, State Water Commission, for testimony ([Appendix J](#)) regarding the rules adopted by the State Water Commission. Mr. Engelhardt said the primary reason for the rules was to clarify language and resolve ambiguities that arose during regulatory enforcement. He said substantive changes were made to rules regarding the drainage of water.

In response to a question from Chairman Devlin, Mr. Engelhardt said the changes to Article 89-12 received numerous comments from the Garrison Diversion Conservancy District. He said the primary purpose of the changes to Article 89-12 was to clarify and clean up the language. He said the language in this article is based on a federal program for rural water systems administered by the Garrison Diversion Conservancy District. He said the new language allows for more cooperation between the two entities in the administration of the program.

In response to a question from Representative Schatz, Mr. Engelhardt said the rules do not affect dredging of lakes or rivers. He said dredging would more likely be within the jurisdiction of the State Department of Health.

In response to a question from Senator Heckaman, Mr. Engelhardt said no comments were received on the rule with respect to tile drains and permits.

## REAL ESTATE APPRAISER QUALIFICATIONS AND ETHICS BOARD

Chairman Devlin called on Mr. Joe Ibach, Chairman, North Dakota Real Estate Appraiser Qualifications and Ethics Board, for testimony ([Appendix K](#)) regarding the rules adopted by the board. Mr. Ibach said the only rule that was the result of a statutory change was the authority of the board to conduct criminal background checks. He said the balance of the rules result from federal mandates.

In response to a question from Representative K. Koppelman, Mr. Ibach said Title XI of the Federal Financial Institutions Reform, Recovery, and Enforcement Act of 1989 charges the Appraisal Foundation with the responsibility of establishing, improving, and promoting minimum uniform appraisal standards and appraiser qualifications criteria. He said the federal legislation affects all mortgages that are federally insured.

In response to a question from Representative Boehning, Mr. Ibach said most users of appraisers are requiring certified appraisers. He said there are few who will take on apprentices.

In response to a question from Representative K. Koppelman, Mr. Ibach said the change in educational requirements only applies to new appraisers. He said in 2011 the state had 263 licensed appraisers. He said that number increased to 367 in 2014. He said many of the new appraisers in the state came from out of state and are being licensed or certified as a result of reciprocity agreements. He said the wait times for appraisals have been reduced, especially for residential appraisals.

In response to a question from Representative Frantsvog, Mr. Ibach said licensed appraisers can appraise property up to \$250,000 in value and are not authorized to appraise commercial property. Certified appraisers appraise properties over \$250,000. He said those amounts are set by the banking industry. He said certification requires a minimum level of education, passing an examination, and having a minimum number of hours of appraisal work. He said certification can take two to four years beyond a bachelor's degree.

**COMMITTEE DISCUSSION**

Chairman Devlin said in response to Mr. St. Aubyn's concerns, the State Board of Dental Examiners will be requested to provide information on whether the hearing notice for the rule was done properly and regarding the rule passed because of a statutory repeal. He said committee members should forward any other questions of concern to Committee Counsel.

No further business appearing, Chairman Devlin adjourned the meeting at 1:30 p.m.

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Vonette J. Richter  
Assistant Code Revisor

ATTACH:11