

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Wednesday and Thursday, July 14-15, 1999
Roughrider Room, State Capitol
Bismarck, North Dakota

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

Members present: Representatives William R. Devlin, LeRoy G. Bernstein, Rex R. Byerly, Duane DeKrey, Mary Ekstrom, Bette Grande, Pam Gulleon, George J. Keiser, Kim Koppelman, Stacey L. Mickelson, Jon O. Nelson, Darrell D. Nottestad, Sally M. Sandvig, Blair Thoreson; Senators Tom Fischer, Jerry Klein, Deb Mathern, Bob Stenehjem

Members absent: Senators John Andrist, Rich Wardner

Others present: See Appendix A

It was moved by Representative Nottestad, seconded by Representative Koppelman, and carried that the minutes of the previous meeting be approved as distributed.

Chairman Devlin welcomed committee members and said the Administrative Rules Committee serves an important function in legislative and executive branch relations. He said he expects the committee will have a substantial workload during the interim. He called on committee counsel for review of the Legislative Council supplementary rules of operation and procedure.

BACKGROUND MEMORANDUM

Chairman Devlin called on committee counsel for presentation of a memorandum entitled *Administrative Rules Review - Background Memorandum*. Committee counsel said the statutory provisions governing administrative rulemaking procedures are contained in North Dakota Century Code (NDCC) Chapter 28-32, the Administrative Agencies Practice Act. He reviewed the provisions determining which agencies are administrative agencies for rulemaking purposes and the definition of a rule. He said the volume of rulemaking was down during the last two biennial periods. He said this may indicate decreased rulemaking activity but the numbers of sections affected can be impacted by a single large set of rules such as those adopted by the State Department of Health on environmental topics.

Committee counsel said the Administrative Rules Committee has statutory authority to study administrative rules and related statutes and make recommendations to the Legislative Council if legislation is

deemed necessary. He said the membership of the Administrative Rules Committee is required by statute to include at least one member from each standing committee of the House of Representatives or the Senate in the most recently completed regular legislative session. He said the objective of this provision is to provide the committee with the benefit of the experience of members of standing committees regarding any topics considered during the rulemaking process that may relate to legislation recently considered.

Committee counsel reviewed the statutory provisions on rules review by the Administrative Rules Committee. He said the committee has authority to register formal objections to agency rules and to void agency rules. He said the question of whether to void agency rules must be considered initially within 90 days after the supplement in which the rules changes appear. He said the decision on whether to void rules may be carried over for not more than one committee meeting after initial consideration.

Committee counsel reviewed the rulemaking procedure that must be followed by administrative agencies. He said a 1999 legislative change was made with regard to newspaper publication of notice of rulemaking activity. He said for administrative rulemaking notices filed with the office of the Legislative Council after July 31, 1999, the 1999 change requires one publication of an abbreviated notice in 52 county newspapers rather than the previous requirement of two publications in only the nine daily newspapers. He said the average cost of newspaper publication will probably increase under the new requirement, and it was estimated that the publication costs would increase from approximately \$800 to approximately \$2,200.

Committee counsel said another 1999 statutory change requires that the rulemaking notice filed with the office of the Legislative Council must be accompanied by a copy of the proposed rules. He said if committee members wish to receive copies of proposed rules they should contact the Legislative Council office.

Committee counsel said a list of eight questions is sent to each agency that will appear before the Administrative Rules Committee and those agencies are requested to provide written responses to those

questions for the presentation. He reviewed the questions that are asked of agencies.

Committee counsel said a \$50 fee has been established for annual subscriptions to the administrative agency notice of proposed rulemaking service provided by the office of the Legislative Council. He said paid subscriptions have decreased from 31 to 22 in the last two years. He said some of the reduction in paid subscriptions may be attributable to the fact that notices were made available on the legislative branch web page beginning in 1998. He said it is the committee's responsibility to determine the fee amount. Chairman Devlin said the \$50 fee will remain in place unless a motion is made to change the fee. No motion was made.

Representative Byerly said some agencies make rules that are published in the North Dakota Administrative Code, some agencies make rules that are not published in the Administrative Code, and some agencies make guidelines that are not rules but may be enforced by the agency as though they are rules. He said he questions the legal status of published and unpublished rules and guidelines. Chairman Devlin requested committee counsel to brief the committee on these issues at the next meeting.

WORKERS COMPENSATION BUREAU

Chairman Devlin called on Mr. Reagan Pufall, Workers Compensation Bureau, for presentation of testimony relating to bureau rules that appeared in the February 1999 Administrative Code supplement. A copy of Mr. Pufall's prepared testimony is attached as Appendix B. Mr. Pufall said the rule arose from the North Dakota Supreme Court decision in *Cervantes v. Drayton Foods*, relating to workers' compensation coverage for temporary workers. He said the court ruled that businesses are not immune from being sued by temporary workers who are injured while working for those businesses. He said the rule was adopted as an emergency rule effective August 1, 1998. Mr. Pufall said enactment of 1999 Senate Bill No. 2272 resolved this issue through a statutory amendment and there is no longer any need for the amended version of this administrative rule.

SECRETARY OF STATE

Chairman Devlin called on Mr. Al Jaeger, Secretary of State, for testimony relating to May 1999 rules of the Secretary of State. A copy of Mr. Jaeger's prepared testimony is attached as Appendix C.

BOARD OF NURSING

Chairman Devlin called on Dr. Constance Kalanek, Executive Director, Board of Nursing, for comments on May 1999 rules of the Board of Nursing. A copy of Dr. Kalanek's testimony is attached as Appendix D. Dr. Kalanek described the rules relating to medication administration.

Representative DeKrey asked how these rules will affect small schools and administering medication students bring from home. Dr. Kalanek said schools are not subject to these rules. Representative Grande asked where in the rules the exemption appears for schools. Dr. Kalanek said there is no specific exemption in the rules for schools but, as she understands it, the board has chosen not to enforce these rules in schools.

Senator Fischer asked what effect these rules will have on the ongoing discussions between the Department of Human Services and the Nurses Association concerning 1999 House Bill No. 1403. He said he is concerned there may be a conflict between these rules and the 1999 legislation. Dr. Kalanek said an exemption was provided under 1999 House Bill No. 1403 effective through July 31, 2001, to allow a licensed nurse to delegate medication administration in a residential treatment center, care center for developmentally disabled persons, or residential child care facility. She said the exemption will expire in 2001, and the Department of Human Services and the Board of Nursing are to prepare a joint recommendation regarding administration of medication in these facilities. Senator Fischer requested the committee obtain an opinion from the Department of Human Services on whether the rules adopted by the Board of Nursing are in conflict with 1999 House Bill No. 1403. The chairman said these rules could be held over for consideration to the next committee meeting for the purpose of obtaining that information.

Representative Keiser said long-term care facilities were successful in achieving passage of legislation in 1999 to exempt their employees from the medication administration rules of the Board of Nursing. He said it appears there are approximately 6,000 employees working with the developmentally disabled who are covered by these rules and would be required to pay registration fees. He asked whether the board has had any indication that these facilities would seek exemption from these rules through legislation or otherwise and whether the board is aware of any problems in medication administration at these facilities. Dr. Kalanek said individuals at these facilities have been exempt since 1995 and that exemption will continue until 2001. She said this is one of the issues that will be examined during the study conducted this interim.

It was moved by Senator Fischer, seconded by Senator Stenehjem, and carried on a voice vote that the Board of Nursing rules relating to medication administration be carried over to the next committee meeting for consideration. Chairman Devlin said the objective of carrying over consideration of these rules is to receive further information from the Department of Human Services and Board of Nursing, and Department of Public Instruction if appropriate, relating to the recommendation for the next Legislative Assembly as required by House Bill

No. 1403 and the status of medication administration in schools under these rules.

DEPARTMENT OF BANKING AND FINANCIAL INSTITUTIONS

Chairman Devlin called on Mr. Robert Entringer, Chief Examiner - Banks, Department of Banking and Financial Institutions, for a presentation of testimony relating to December 1998 and January 1999 rules of the department. A copy of Mr. Entringer's prepared testimony is attached as Appendix E.

STATE ELECTRICAL BOARD

Chairman Devlin called on Mr. Donald Offerdahl, Executive Director, North Dakota State Electrical Board, for testimony relating to November 1998 rules of the board. A copy of Mr. Offerdahl's prepared testimony is attached as Appendix F.

In response to questions from Representative Ekstrom, Mr. Offerdahl said the State Electrical Board restricted the use of aluminum wiring in mobile homes several years ago but that is not an issue addressed in this set of rules. He said the board was concerned about which version of the electrical code would be used for mobile homes. He said the board suggested that the State Plumbing Board, State Fire Marshal, and State Electrical Board each have jurisdiction over applicable codes within their respective jurisdictions.

Representative Byerly asked if there is anything in this set of rules that will require anyone to change anything in existing electrical service or wiring. Mr. Offerdahl said nothing in these rules will require changes unless the use of the structure is changed.

Representative Gulleason asked whether anyone can do their own wiring. Mr. Offerdahl said individuals may do their own wiring but a wiring certificate is required from an electrical contractor on a job of over \$300.

Representative Koppelman said the rules appear to give electrical inspectors the authority to enter private land for making inspections. He asked whether this power should be set out in statute rather than in rules. Mr. Offerdahl said the Attorney General's office suggested the language in the rule, so he assumes it is an appropriate legal approach. Mr. Al Wolf, Special Assistant Attorney General for the State Electrical Board, said the review of these rules by the Attorney General's office resulted in a suggestion that this language should be included with regard to entering property for inspections, to comply with statutory authority.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Mr. Steve Tillotson, State Department of Health, for comments on May 1999 rules of the department. Mr. Tillotson distributed copies of testimony (attached as Appendix G) prepared by Mr. Neil Knatterud, Director, Division of Waste Management, State Department of Health,

relating to the rules on regulation of waste from concentrated or confined animal feeding operations or agricultural processing operations. He said these rules were adopted on an emergency basis in response to a district court decision that concluded that a hog farrowing facility in Grand Forks County was subject to the solid waste laws and that the administrative rules then in existence were overly broad in defining the exemption of agricultural waste from solid waste laws.

Representative Ekstrom asked how the definition of farming operation in these rules was derived. Mr. Francis Schwindt, State Department of Health, said the definition of farming operation was drawn from several sources in existing laws on other topics. Representative Ekstrom said she is concerned that the definition used in these rules may alter interpretation of the definitions under the property tax laws, corporate farming laws, and other similar provisions. Mr. Schwindt said this definition is limited in scope to these rules and should not have that kind of effect.

HIGHWAY PATROL

Chairman Devlin called on Mr. Doyle Schulz, Director, Motor Carrier Division, Highway Patrol, for testimony relating to February 1999 rules of the Highway Patrol. A copy of Mr. Schulz's prepared testimony is attached as Appendix H.

Representative Byerly asked why the rule changes were made to eliminate the heavyweight fee for out-of-state carriers and to reduce ton mile fees for overweight permits, resulting in a loss of \$478,000 per biennium to the state highway fund. Mr. Schulz said the Highway Patrol and the Department of Transportation have believed for several years that these fees were discriminatory against out-of-state carriers and that this change should be made. He said he was not involved in the discussion of these issues, but he believes the change was made in anticipation that a challenge to these fees would eventually be made. Representative Byerly said he questions the substantial impact of these fees on the state highway fund being made through a rules change. He said he believes it would have been more appropriate to make these changes legislatively and to include the impact of these revenue losses during the budget process of the legislative session.

Senator Stenehjem said he also questions the effect of the revenue loss from these fee changes on the budget and whether these revenue losses were reflected in the budget for the state highway fund as considered in the 1999 legislative session.

It was moved by Senator Stenehjem, seconded by Representative Keiser, and carried on a voice vote that the committee carry over consideration of the Highway Patrol rules affecting fees to the next committee meeting. Senator Stenehjem said the purpose of the motion is to obtain further information from the Highway Patrol and the Department of

Transportation regarding the effect of these fee changes on the state highway fund and budget for the Department of Transportation. He said another issue that should be addressed is whether rule changes that affect revenues or expenditures would require consideration of the Budget Section.

Representative Nelson said he does not believe the statutory grounds for voiding rules would give the committee authority to void these rules relating to fees of the Highway Patrol. Senator Stenehjem said he agrees that the committee probably lacks authority to void these rules but he believes the committee has the right to question these issues and obtain information.

DEPARTMENT OF TRANSPORTATION

Chairman Devlin said no one is present from the Department of Transportation with regard to Department of Transportation March and May 1999 rules. He asked whether Mr. Schulz is familiar with the reasons for these rules changes. Mr. Schulz said he cannot speak for the department but he believes a 1987 legislative change addresses brakes and safety chains on trucks hauling two trailers, so the language being eliminated was unnecessary in the rules. He said the other changes relate to a reference to an A-train and a "long load" sign that must be displayed on the last trailer in any three- or four-unit combination. He said these changes were made to clean up references in the Administrative Code.

Chairman Devlin said it appears Mr. Schulz is correct in describing the reasons for the Department of Transportation amendments. He said despite the absence of Department of Transportation representatives, these rules would not be carried over unless the committee wishes to obtain further information. No comments were made by committee members.

INSURANCE COMMISSIONER

Chairman Devlin called on Ms. Susan J. Anderson, Legal Counsel, Insurance Department, for comments on December 1998 and February and May 1999 rules of the Insurance Commissioner. A copy of Ms. Anderson's prepared testimony is attached as Appendix I. She said the December 1998 rules allowed filing of annual statements of insurers with the National Association of Insurance Commissioners through media acceptable to the Insurance Commissioner, including diskette and Internet filings. She said the February 1999 rules strengthen the rights of beneficiaries who are involuntarily terminated from a managed care plan to obtain Medicare supplement coverage. She said the May 1999 rules relate to annuity tables to be used in determining the minimum standard of valuation for individual and group annuity contracts.

COMMITTEE DISCUSSION

Representative Ekstrom said she is concerned about the definition of farming operation which was included in the State Department of Health solid waste rules. She said her concern is that this definition might be applied in other areas of administrative rules or statutory provisions and might affect application of the corporate farming law, property tax provisions, and other areas in which farming is defined. She said a comparison should also be made of the rules adopted and the statutory authority under which the rules were established. Committee counsel said it appears that the definition is limited in application to the chapter in which the rules are contained but information could be presented on these issues. Chairman Devlin requested information on these topics for the next committee meeting.

MILK MARKETING BOARD

Chairman Devlin called on Mr. Bruce Bair, Special Assistant Attorney General for the Milk Marketing Board, for comments on April 1999 rules of the board. A copy of Mr. Bair's prepared testimony is attached as Appendix J. Mr. Bair said the rule change of primary importance is to allow third-party contract haulers to haul milk products directly to retail outlets under minimum dock pickup pricing provisions in all market areas and retailers purchasing a minimum order of 45 full cases of milk products receiving a discount of 23 percent off the wholesale price. He said the rule changes were intended to allow North Dakota milk producers to avoid lost income from out-of-state competition and would reduce retailer milk costs but transfer the responsibility for hauling and handling to the retailer. He said the rules were adopted as emergency rules effective August 31, 1998.

Mr. Bair said the rules as adopted have not been popular and have been particularly unpopular with smaller retailers who cannot buy milk in enough volume to qualify for the discount. He said the Milk Marketing Board intends to set up another public hearing to reconsider this issue.

Representative Gulleason said there are statutory requirements for determination of what constitutes an emergency for the purpose of adopting emergency rules and asked what factor made these rules an emergency. Mr. Bair said every change seems to be an emergency to the dairy industry.

Representative Byerly said it does not appear to him that this rulemaking action meets the statutory requirements as to emergency rulemaking. He said there does not appear to be any threat to public health, safety, or welfare which would justify emergency rulemaking.

Representative Bernstein said one of the things that bothers him about these rules is that the 23 percent discount for purchases of 45 cases of milk discriminates against small retailers. He said this is particularly true because it applies only to a single

retailer. He asked why the rules would not allow small retailers to join together to buy enough milk to qualify for the discount. Mr. Bair said a statutory provision allows the discount for only a single retail location.

Representative Bernstein said North Dakota Administrative Code Sections 51-03-02-06, 51-03-03-06, and 51-03-04-06 are not printed in the Administrative Code and copies must be requested from the Milk Marketing Board. He requested Mr. Bair to send copies of these sections to him.

Representative Bernstein said milk producer prices dropped from \$17 to \$13 per hundredweight during the early part of this year, and he does not think retail prices dropped to reflect this decrease.

Senator Klein said there was a 40 cent per gallon price decline at the retail level in one month early this year, so he believes the producer price decrease was reflected at the retail level.

Chairman Devlin said the written testimony prepared by the Milk Marketing Board does not adequately address question No. 4, relating to comments of persons at the public hearings on the rules. He said the response only lists the number of persons offering comments but gives no indication of the nature of the comments. He asked that the Milk Marketing Board provide sufficient detail on comments at the public hearing and during the comment period to allow more insight into the nature of the comments offered.

Representative Nelson asked for citation of the statutory provision that allows only a single retail outlet to qualify for the discount on milk purchases. Mr. Bair said NDCC Section 4-18.1-07(5) provides that a retailer who operates two or more places of business is subject to price determination based on only a single location. Representative Nelson asked why a milk wholesaler would care if retailers joined together to make purchases to qualify for the discount and asked what interest is served by this limitation. Mr. Bair said the rationale is unknown to him because it relates to a 1969 legislative change, but the thinking probably was that a single delivery of a large quantity of dairy products results in savings for the wholesaler.

Representative Bernstein said it appears that comments on the rules were about evenly divided between those opposing the rules and those in support. He said the rules have been very unfair to small retailers and he believes it was inappropriate to adopt these rules on an emergency basis.

It was moved by Representative Bernstein and seconded by Representative Byerly that the rules of the Milk Marketing Board as effective August 31, 1998, be found void by the Administrative Rules Committee on the grounds that the rules as adopted are arbitrary and capricious.

Senator Klein said he would oppose the motion because voiding these rules would give larger communities an upper hand in milk pricing.

Representative Gulleon said she disagrees with the Milk Marketing Board finding of an emergency in adoption of these rules but believes voiding the rules is too intrusive on Milk Marketing Board authority.

Committee counsel said voiding the rules of the Milk Marketing Board would have the effect of eliminating the rules going back to the original effective date of August 31, 1998. He said the effect of this is uncertain but may upset wholesale transactions that have already occurred.

It was moved by Representative Bernstein and seconded by Representative Byerly that the motion be amended to void the rules effective August 1, 1999.

Representative Sandvig said she would not support voiding the rules but agrees the emergency declaration for these rules was not proper.

Representative Keiser said he also disagrees with the declaration of an emergency regarding these rules but does not believe that is sufficient grounds to void the rules.

The question was called and **the motion was defeated**. Voting in favor of the motion were Representatives Bernstein, Byerly, and Grande and Senator Fischer. Voting in opposition to the motion were Representatives Devlin, DeKrey, Ekstrom, Gulleon, Keiser, Koppelman, Mickelson, Nelson, Nottestad, Sandvig, and Thoreson and Senators Mathern and Stenehjem.

It was moved by Representative Nelson, seconded by Representative Koppelman, and carried on a voice vote that the Administrative Rules Committee carry over consideration of the Milk Marketing Board rules to the next committee meeting. Representative Nelson said it is necessary to address the issues that have been raised in discussion of these rules. Representative Keiser said he would like to see documentation as described by the chairman regarding the comments received during the public hearing and comment period and with regard to what were the statutory grounds for use of emergency rulemaking authority.

Representative Devlin asked whether the review of administrative rules by the Attorney General's office includes a determination by the Attorney General's office of whether an emergency status for rulemaking as declared by an agency was appropriate. Committee counsel said the review by the Attorney General's office is for approval of rules as to legality and that the adopting agency has not exceeded statutory authority, which presumably should include a review of the time rules are declared to be effective. Chairman Devlin asked that the Attorney General be invited to the next meeting of the committee to address what constitutes grounds for emergency rulemaking and whether the rules adopted by the Milk Marketing Board qualify on those grounds.

BOARD OF EXAMINERS FOR NURSING HOME ADMINISTRATORS

Chairman Devlin called on Ms. Bev Herman, Board of Examiners for Nursing Home Administrators, for testimony relating to December 1998 rules of the board. A copy of Ms. Herman's prepared testimony is attached as Appendix K.

In response to a question from Senator Fischer, Ms. Herman said approximately 10 individuals have completed the administrator in training program since it was implemented by the board. Senator Fischer asked how many nursing homes are without an administrator in North Dakota. Ms. Herman said there is no home without a nursing home administrator because it is a licensing rule that there must be a licensed nursing home administrator for each facility. In response to another question from Senator Fischer, Ms. Herman said there is no nursing home in the state administered by an administrator who is a nonresident.

EDUCATION STANDARDS AND PRACTICES BOARD

Chairman Devlin called on Ms. Janet L. Placek, Executive Director, Education Standards and Practices Board, for testimony relating to June 1999 rules of the board. A copy of Ms. Placek's prepared testimony is attached as Appendix L.

SUPERINTENDENT OF PUBLIC INSTRUCTION

Chairman Devlin called on Mr. Joe Linnertz, Department of Public Instruction, for testimony on pending rulemaking action of the Superintendent of Public Instruction and the May 1999 rules of the superintendent. Mr. Linnertz said he is not prepared to address the May 1999 rules and will address those rules later in the meeting. He distributed copies of chapter titles for pending rulemaking activity. He said this rulemaking will be completed by the deadline at the end of October.

STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

Chairman Devlin called on Mr. Clifford E. Keller, Executive Secretary, State Board of Registration for Professional Engineers and Land Surveyors, for testimony relating to November 1998 and April 1999 rules of the board. A copy of Mr. Keller's prepared testimony is attached as Appendix M.

PUBLIC SERVICE COMMISSION

Chairman Devlin called on Mr. Jim Deutsch, Director, Reclamation Division, Public Service Commission, for testimony relating to May 1999 rules

of the commission. A copy of Mr. Deutsch's prepared testimony is attached as Appendix N.

Representative DeKrey said he questions the rule on replacement water systems for reclaimed land and said a bill on this topic was defeated in the 1999 legislative session. He asked whether the rule is the same as the bill. Mr. Deutsch said the rule differs in coverage from the bill. He said the bill would have been mandatory and the rule requires the Public Service Commission to consider the need for a replacement water system before the bond is released on the reclamation project.

Representative Nelson asked what is the policy on replacement of abandoned wells after reclamation. Mr. Deutsch said there is no requirement to replace a well that was unused at the time mining commenced on the property. He said coal companies must survey the area before mining and obtain statements from landowners about wells and usage.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Mr. Blaine Nordwall, Legal Advisory Unit Director, Department of Human Services, for testimony relating to five sets of rules adopted by the department effective January, March, and April 1999. A copy of prepared reports presented by Mr. Nordwall is attached as Appendix O.

SUPERINTENDENT OF PUBLIC INSTRUCTION

Chairman Devlin called on Mr. Linnertz for testimony on May 1999 rules of the Superintendent of Public Instruction. A copy of Mr. Linnertz's testimony is attached as Appendix P.

Mr. Linnertz said the Superintendent of Public Instruction is in the process of developing and adopting rules pursuant to 1997 amendments to NDCC Section 15-21-22. He said the final group of rules that must be implemented will be the subject of public hearings scheduled for August 2, 1999, at the State Capitol. He distributed copies of the notice of rulemaking with regard to these rules as distributed by the Superintendent of Public Instruction.

COMMITTEE DISCUSSION

Chairman Devlin said agencies appearing before the committee should be encouraged to summarize their written testimony rather than reading it verbatim. He said it appears the most significant issues are the rulemaking procedure, concerns and complaints at public hearings and comments, and reasons for adopting the rules as described in questions 3, 4, and 7 of the letter addressed to agencies in preparation for the meeting. He said the letter sent to agencies should be revised to encourage them to summarize testimony and try to limit oral presentations to the most significant aspects of the rulemaking. He said this would assist the committee in completing its substantial workload. He said

information on the cost of rulemaking should be limited to publication costs, since the cost of staff time is seldom of interest.

BOARD OF VETERINARY MEDICAL EXAMINERS

Chairman Devlin called on Dr. John R. Boyce, Executive Secretary, Board of Medical Examiners, for testimony relating to January 1999 rules of the board. A copy of Dr. Boyce's prepared testimony is attached as Appendix Q.

ATMOSPHERIC RESOURCE BOARD

Chairman Devlin called on Mr. Bruce Boe, Director, Atmospheric Resource Board, for testimony relating to February 1999 rules of the Atmospheric Resource Board, a division of the Water Commission. A copy of Mr. Boe's prepared testimony is attached as Appendix R.

AGRICULTURAL PRODUCTS UTILIZATION COMMISSION

Chairman Devlin called on Mr. Russ Hanson, Executive Director, Agricultural Products Utilization Commission, for testimony relating to November 1998 rules of the commission. A copy of Mr. Hanson's prepared testimony is attached as Appendix S.

STATE BOARD OF MEDICAL EXAMINERS

Chairman Devlin called on Mr. Rolf P. Sletten, Executive Secretary and Treasurer, State Board of Medical Examiners, for testimony relating to November 1998 and April 1999 rules of the board. A copy of Mr. Sletten's prepared testimony is attached as Appendix T.

Representative Byerly asked why 60 hours of continuing medical education was chosen as the minimum for each three-year cycle. Mr. Sletten said the board decided on this level of continuing education after examining requirements of other states. Representative Byerly said he has heard complaints from licensees about the number of hours of continuing education required. Mr. Sletten said members of the board are familiar with their own levels of continuing education required by hospitals and the medical association was supportive of this requirement.

BOARD OF HEARING INSTRUMENT DISPENSERS

Chairman Devlin called on Mr. James C. Flemming, Assistant Attorney General and Counsel, Board of Hearing Instrument Dispensers, for testimony relating to April 1999 rules of the board. A copy of Mr. Flemming's prepared testimony is attached as Appendix U.

COMMITTEE DISCUSSION

Chairman Devlin invited committee discussion on topics of interest to committee members for study during this interim. He said one change that should be made by the Legislative Council staff is the change previously discussed relating to the contents of the letter to administrative agencies regarding appearances before the committee. He said another item for change in the letter is with regard to the cost of staff time in rulemaking proceedings. He said there appears little value in requiring agencies to compute the amount of staff time devoted to a rulemaking project.

Committee counsel said the Administrative Agencies Practice Act has not been the subject of a comprehensive review since its enactment. Chairman Devlin asked how the committee could proceed with a review of these statutory provisions. Committee counsel said copies of the statutory provisions could be reviewed at the next committee meeting to see whether committee members perceive a need to revise the provisions on administrative rulemaking.

Representative Byerly said many agencies are excluded from the definition of administrative agency and are not subject to the formal rulemaking procedures. He said an examination should be made of the reasons why each of these agencies is excluded. Committee counsel said most of these exclusions date to the original adoption of the Administrative Agencies Practice Act, and there may be limited legislative history but available information could be gathered for the committee.

Chairman Devlin said it appears the next meeting of the committee will be held in the last half of October.

Representative Koppelman said an issue of interest is the legal effect of rules adopted by agencies that are not administrative agencies under the Administrative Agencies Practice Act. He said testimony presented by the Department of Human Services indicates that the North Dakota Supreme Court has determined that any policy not adopted in the manner provided in NDCC Chapter 28-32 not only lacks the force and effect of law but is an invalid rule entitled to no consideration.

Committee counsel asked whether each committee member should be mailed a copy of each attachment to the minutes of the meeting. After committee discussion, Chairman Devlin said minutes with attached testimony should be sent to each committee member who was absent from a meeting. He said other committee members should receive only printed or electronic committee minutes. Committee members asked whether attached testimony of agencies is available on the legislative branch web site. Committee counsel said the minutes are available on the legislative branch web site but attachments are not available because they are not available in an electronic format at this time.

Chairman Devlin asked committee counsel to investigate the feasibility of asking agencies to provide testimony by electronic mail so that it could be available on the legislative branch web site.

The meeting was adjourned subject to the call of the chairman at 11:50 a.m., Thursday, July 15.

John Walstad
Code Revisor

ATTACH:21