

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Monday, July 26, 2004
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, Jeff Delzer, Rod Froelich, Matthew M. Klein, Kim Koppelman, Jon O. Nelson, Dan J. Ruby, Sally M. Sandvig, Alon Wieland, Dwight Wrangham; Senators John M. Andrist, Dennis Bercier, April Fairfield, Tom Fischer, Layton Freborg, Jerry Klein, Gary A. Lee, Rich Wardner

Members absent: Representatives Duane DeKrey, Blair Thoreson

Others present: See Appendix A

It was moved by Representative Nelson, seconded by Representative Klein, and carried on a voice vote that the minutes of the March 24, 2004, committee meeting be approved as distributed.

OFFICE OF MANAGEMENT AND BUDGET - HUMAN RESOURCE MANAGEMENT SERVICES

Chairman Devlin called on Ms. Laurie Steriotti Hammeren, Human Resource Management Services Director, for testimony relating to rules adopted by the division under North Dakota Administrative Code (NDAC) Article 4-07 and Title 59.5. Copies of Ms. Hammeren's prepared testimony are attached as Appendices B and C.

Representative Klein inquired about the equity increase amendment in NDAC Section 4-07-02-15 allowing an increase of 20 percent per biennium for an employee. Ms. Hammeren said agencies have sometimes had recruitment problems and the market for employment in certain fields requires more flexibility for an agency to retain or recruit employees.

Representative Klein inquired about the rule on grandfathering of prior employees in NDAC Section 4-07-03-12. He asked whether this is a new provision to allow employees to continue in positions in which they do not meet new or revised qualifications. Ms. Hammeren said this has been the practice in employment but was not clearly set out in the rules so this section was added.

Representative Klein inquired about the holiday hours and benefits accrual provisions in NDAC Chapter 4-07-07, and Ms. Hammeren said leave and

fringe benefits still do not apply for temporary employees.

Representative Koppelman inquired why the change was made in NDAC Section 4-07-02-08 to increase the hiring rate for new employees from the first quartile to the first half of the salary range. Ms. Hammeren said the change was made to reflect the reality of the hiring market and to address recruitment problems in some positions.

Representative Delzer asked how many employees have received equity salary increases exceeding 10 percent and up to 20 percent as allowed by NDAC Section 4-07-02-15. Ms. Hammeren said she does not have statistics available immediately but can do research and furnish information to the committee.

Representative Delzer asked whether these equity increases come to the attention of the Legislative Assembly. Ms. Hammeren said equity increases are funded through agencies' salary line items so the agency must have funds available to provide increases. Representative Delzer said he is not comfortable with increases of up to 20 percent.

INSURANCE COMMISSIONER

Chairman Devlin called on Mr. Charles E. Johnson, General Counsel, Insurance Department, for comments on rules for the anhydrous ammonia nurse tank and storage container lock pilot program. A copy of Mr. Johnson's prepared testimony is attached as Appendix D.

Representative Klein asked why the rules require removal of the anhydrous ammonia tank locking device during transit. Mr. Bob Reetz, Insurance Department, said the locking device may damage the tank valve from bouncing on the road if the locking device is not integral to the valve. Representative Klein asked why the rules require locking tanks overnight but not during the daytime. Mr. Reetz said thefts of anhydrous ammonia during the night have been the problem and requiring locking valves during the day would interfere with operation by the legitimate user.

Representative Delzer said NDAC Section 7-12-02-05 allows imposition of civil penalties. He said he does not believe penalties should be set by administrative rule unless statutory provisions exist imposing those penalties. Mr. Johnson said North

Dakota Century Code (NDCC) Section 19-20.2-10 allows imposition of a civil penalty of up to \$5,000 and the penalty set by rule is within that limitation.

Representative Klein asked whether there is any evidence that the anhydrous ammonia container lock pilot program is working. Mr. Johnson said the Attorney General's office is monitoring activity in Williams and McKenzie Counties and it appears thefts have not occurred since locks were installed on containers.

Representative Nelson said he understands an additive is being tested to prevent use of anhydrous ammonia for making methamphetamine. Mr. Johnson said use of this additive looks promising in testing being done in Iowa, and he hopes North Dakota will get results of that study soon.

DEPARTMENT OF FINANCIAL INSTITUTIONS

Chairman Devlin called on Mr. Timothy Karsky, Commissioner, Department of Financial Institutions, for testimony relating to rules adopted by the department relating to disclosure of customer information. A copy of Mr. Karsky's prepared testimony is attached as Appendix E.

Representative Koppelman asked whether these rules exceed statutory law or are implementing federal law provisions. Mr. Karsky said the rules are intended to clarify how federal law fits state enforcement efforts. He said he does not believe the rules extend beyond state statutory authority.

STATE BOARD OF DENTAL EXAMINERS

Chairman Devlin called on Mr. Jerry Kettleson, State Board of Dental Examiners, for testimony relating to rules adopted by the board regarding administration of anesthesia. A copy of Mr. Kettleson's prepared testimony is attached as Appendix F.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on representatives of the State Department of Health to review rules recently adopted by the department.

Mr. Larry Shireley, State Epidemiologist, State Department of Health, provided written testimony relating to reportable conditions rules amendments. He said the rules changes were made to ensure reporting of instances of West Nile virus, severe acute respiratory syndrome, and CD4 test results for HIV/AIDS infections. A copy of Mr. Shireley's prepared testimony is attached as Appendix G.

Mr. Roger Unger, State Department of Health, provided written testimony regarding hospital licensing rules amendments. A copy of Mr. Unger's prepared testimony is attached as Appendix H. He said the primary purpose of the rules was to eliminate the requirement for health care practitioners'

signatures or initials within 48 hours for telephone or verbal orders.

Mr. Bruce Pritschet, Division of Health Facilities Director, State Department of Health, provided written testimony relating to paid feeding assistant rules. A copy of Mr. Pritschet's prepared testimony is attached as Appendix I. He said the rules were adopted to implement a federal law option to allow trained assistants to help residents of skilled nursing facilities with meals. He said the rules were adopted as emergency rules.

Representative Delzer asked whether these licensing changes will affect volunteers. Mr. Pritschet said volunteers are not covered by the rules changes and may still volunteer to assist in feeding without training.

In response to a question from Representative Nelson, Mr. Pritschet said a long-term care facility establishes a training program for employees, subject to approval by the Department of Human Services. He said there are currently 26 approved programs in place and an additional program is being reviewed.

Mr. Kenan Bullinger, State Department of Health, provided written testimony relating to mobile home and trailer park spacing requirements. A copy of Mr. Bullinger's prepared testimony is attached as Appendix J. He said the rules amendments were adopted to bring state rules into uniformity with the recently amended spacing requirements of the National Fire Protection Association.

Representative Klein asked whether these rules changes would affect any existing facilities. Mr. Bullinger said the rules lessen spacing requirements because mobile homes are now built with better fire-resistant materials. He said these rules should not require any changes for existing facilities.

Mr. Bullinger provided written testimony relating to environmental health practitioner licensure rules. A copy of Mr. Bullinger's prepared testimony is attached as Appendix K. He said the rules changes allow specialty credentials for practitioners and licensees to reflect national credential changes allowing specialization.

INDUSTRIAL COMMISSION - GEOLOGICAL SURVEY AND OIL AND GAS DIVISION

Chairman Devlin called on Ms. Karlene Fine, Executive Director and Secretary, Industrial Commission, for presentation of testimony relating to rules of the commission. Ms. Fine said Mr. Edward C. Murphy, State Geologist, would present rules of the Geological Survey and Mr. Bruce Hicks, Assistant Director, Oil and Gas Division, would present rules of the Oil and Gas Division.

Mr. Murphy presented written testimony relating to rules for subsurface minerals, coal exploration, and geothermal production. A copy of Mr. Murphy's prepared testimony is attached as Appendix L.

Mr. Hicks presented written testimony concerning Oil and Gas Division rules. A copy of Mr. Hicks' prepared testimony is attached as Appendix M. Copies of written comments submitted by the Dakota Resource Council relating to the rules are attached as Appendix N.

Mr. Hicks said the comments submitted by the Dakota Resource Council provide examples of problems that existed from 12 to 20 years ago. He said the Oil and Gas Division received jurisdiction over seismic activities in 1997. He said under prior law counties were in charge of regulating seismic exploration. Mr. Hicks said he reviewed the files of the Oil and Gas Division and only three complaints regarding seismic exploration have been received since 1997. He said in two of the complaints activity was stopped before charges were detonated and only in one instance was there detonation of charges. He said in that instance the seismic company compensated the owner of the well because the company violated the distance limitation in existing rules.

In response to a question from Senator Wardner, Mr. Hicks said a seismic exploration company must file and obtain a permit from the Oil and Gas Division. He said seismic contractors must have approval of the surface owner to enter land for seismic operations. He said the Oil and Gas Division field representatives also assure that seismic exploration companies comply with distance limitations in exploration.

Representative Klein asked about the authority under the rules for the director to shut in wells. Mr. Hicks said this authority allows stopping well activity while a hearing on an issue is considered. He said the authority to shut in wells extends for 40 days to allow scheduling hearings as appropriate.

In response to a question from Representative Klein, Mr. Hicks said an application for seismic exploration must include information on the size of a charge to be detonated in exploration.

Representative Froelich asked whether scientific studies provide evidence that the reduced distance from water wells for seismic exploration will improve the results of seismic testing. Mr. Hicks said there has not been specific study of that issue but allowing an expanded area for seismic testing should improve the results of the tests.

Representative Nelson said it appears there is nothing in the rules to limit the size of seismic charges. Mr. Hicks said that is correct and the seismic exploration company must notify the division of the size of charge to be used. He said the division has not seen use of any charges over 10 pounds in recent exploration.

Representative Nelson said the rules reduce the distance for seismic charges from water wells from 1,320 to 660 feet. He asked why the rules did not retain a 1,320-foot limitation but allow seismic companies to seek approval for a lower distance. Mr. Hicks

said in Montana rules establish a 1,320-foot limitation with an allowable waiver for testing in a closer distance. He said the North Dakota Industrial Commission has indicated a desire to promote development of oil and gas resources. He said the division believes waiver applications would be unnecessary requirements in view of scientific studies obtained showing a safe distance for seismic charges is much less than 660 feet from water wells.

Representative Nelson questioned the time available for well owners to obtain certified testing and requested Mr. Hicks to provide information on the cost of certified testing of water wells prior to seismic exploration.

Chairman Devlin called on Mr. Donald Nelson, farmer-rancher from Keene and representing the Dakota Resource Council. Mr. Nelson said he testified during Oil and Gas Division hearings on these rules, and he has remaining concerns about the rules. He said it appears property owners will have notice of seismic operations as little as three business days before charges are detonated. He said this would not allow testing water wells before detonation. He said the Dakota Resource Council does not agree with the reduced distance requirement from water wells for seismic testing. He said on his property it took two full days just to show the water well tester all the wells and springs that might be affected on the property. He said that does not include the time for testing, which would take substantially more than two full days. He said the Dakota Resource Council does agree with some of the rules changes adopted by the Industrial Commission but there will be increased seismic activity in the state and landowners are concerned about protection of ground water supplies. He said another issue that should be covered by the rules is the setback distance for seismic testing from stock dams.

Chairman Devlin called on Mr. Tom Irgens, farmer-rancher from Springbrook and representing the Dakota Resource Council, for comments on the Oil and Gas Division rules. Mr. Irgens said there was damage in the 1980s to wells on his property which were never rectified. He said he lost two water wells and a stock dam from seismic operations at that time. He said he believes the rule in place before this amendment provided good protection for underground water. He said he believes the rules should protect interests of rural residents concerning property and water quality.

Chairman Devlin called on Mr. Ron Ness, Executive Director, North Dakota Petroleum Council, for comments on the Industrial Commission rules. Mr. Ness said since 1997 we have come a long way in protecting property owners. He said there is now a state regulatory agency and field inspectors for seismic operations. He said he believes the problems cited by the Dakota Resource Council are problems that developed before state regulation. He said he

believes the reduced distance from water wells for seismic exploration is appropriate. He said there will be an annual review and report to the Industrial Commission on this rule which will point out any complaints or problems.

Representative Nelson asked whether the Petroleum Council would have a problem with requiring seismic companies to pay for water well testing before exploration. Mr. Ness said the council has not taken a position on that issue but probably would oppose paying for testing. He said complaints and problems will surface if they exist.

Representative Froelich asked whether the Petroleum Council would support limits on the distance from water wells based on the size of charge used for seismic exploration. Mr. Ness said the Petroleum Council believes even large charges are deemed safe to water wells at a distance of 660 feet. He said the Petroleum Council believes it is safe at a distance of 330 feet and the council suggested this lower distance limitation.

PESTICIDE CONTROL BOARD

Chairman Devlin called on Mr. Jeff Olson, Pesticide Control Board, for testimony relating to Pesticide Board rules. A copy of Mr. Olson's prepared testimony is attached as Appendix O.

Representative Devlin said the definition of "under the direct supervision" requires that a certified applicator must be able to arrive at the location of a supervised applicator within 30 minutes. He asked whether this is a feasible requirement in all parts of the state. Mr. Olson said there was substantial discussion of this time requirement. He said it was concluded that the limit is appropriate to remediate human health and environmental concerns. He said this time limit should not be a problem in ordinary circumstances.

STATE EXAMINING COMMITTEE FOR PHYSICAL THERAPISTS

Chairman Devlin called on Ms. Jeanne DeKrey, State Examining Committee for Physical Therapists, for testimony relating to rules of the committee. A copy of Ms. DeKrey's prepared testimony is attached as Appendix P.

Representative Klein said the rules changes increase the application fee from \$35 to \$150. He asked why the substantial increase is required. Mr. Jack McDonald, legal counsel for the committee, said the primary reason for the increase is a substantial increase in the cost of the examination from the national organization.

Representative Froelich asked why the provisions relating to temporary registration were eliminated. Ms. DeKrey said there used to be a six-week to eight-week delay in receiving test results and now the test results are available in less than one week so the temporary license is not needed.

EDUCATION STANDARDS AND PRACTICES BOARD

Chairman Devlin called on Ms. Janet Placek Welk, Executive Director, Education Standards and Practices Board, for testimony relating to rules of the board. A copy of Ms. Welk's prepared testimony is attached as Appendix Q. She said the rules provide for a \$5 per year license fee increase and increase board member compensation to \$62.50 per day to be comparable with similar boards and commissions.

In response to questions from Representative Koppelman, Ms. Welk said the board has always imposed review fees for determining adequacy of equivalencies for teachers. She said fees are also necessary to cover computer programming costs associated with these reviews.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chairman Devlin called on Mr. Sparb Collins, Executive Director, Public Employees Retirement System, for comments on Public Employees Retirement System rules. A copy of Mr. Collins' prepared testimony is attached as Appendix R.

OFFICE OF MANAGEMENT AND BUDGET EXTENSION OF TIME

Chairman Devlin reviewed correspondence received from Ms. Pam Sharp, Director, Office of Management and Budget, requesting an extension of time for adoption of rules relating to state purchasing practices. A copy of Ms. Sharp's request is attached as Appendix S. **It was moved by Representative Koppelman, seconded by Representative Klein, and carried on a voice vote that the Administrative Rules Committee approve an extension of time for adoption of state purchasing practices rules by the Office of Management and Budget.**

DEPARTMENT OF FINANCIAL INSTITUTIONS

Representative Koppelman said the rules adopted by the Department of Financial Institutions leave him with a question of whether the rules adopted mesh with legislative intent from 2003 deliberations.

Representative Ruby said he participated in legislative consideration of 2003 legislation on this topic, and he believes the rules do what the department told legislators would be done through the rules process.

Representative Koppelman said he would like to carry over consideration of the rules of the Department of Financial Institutions to give further consideration to whether legislative intent is implemented by the rules. He said carrying the rules over for consideration will not affect the status of the rules. **It was moved by Representative Koppelman, seconded by Senator Fairfield, and carried on a voice vote that the rules of the Department of Financial**

Institutions be carried over for consideration until the next meeting of the Administrative Rules Committee.

TEACHERS' FUND FOR RETIREMENT

Chairman Devlin called on Ms. Fay Kopp, Deputy Executive Director, Retirement and Investment Office, for testimony relating to Teachers' Fund for Retirement rules. A copy of Ms. Kopp's prepared testimony is attached as Appendix T.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Ms. Krista Andrews, Department of Human Services legal counsel, for testimony relating to ratesetting for providers of services to foster children - group homes and residential child care facilities. A copy of Ms. Andrews' prepared testimony is attached as Appendix U.

Chairman Devlin called on Mr. Curtis Volesky, Department of Human Services, for comments on the number of individuals affected by Medicaid rules changes carried over from the previous committee meeting. Mr. Volesky said approximately 630 people will be ineligible each year due to the rules changes and 700 people will be eligible but will have to pay for a portion of services.

Chairman Devlin called on Ms. Melissa Hauer, Department of Human Services legal counsel, for testimony relating to three sets of rules. A copy of Ms. Hauer's prepared testimony relating to programs and services for individuals with developmental disabilities is attached as Appendix V. A copy of Ms. Hauer's prepared testimony relating to eligibility for Medicaid rules is attached as Appendix W. A copy of Ms. Hauer's prepared testimony relating to medical services rules is attached as Appendix X.

Ms. Hauer said the Department of Human Services would like to propose an amendment to subsection 7 of NDAC Section 75-02-02-27. She said the department believes the proposed amendment will address substantial concerns raised regarding prior authorization for prescription drugs. A copy of the proposed amendment is attached as Appendix Y.

Representative Devlin said the final language contained in the proposed amendment should be changed to read "other alternatives and has determined that continuing current therapy is in the best interests for successful medical management of the patient." Ms. Hauer said this language would be acceptable to the department. Representative Devlin said there was legislative defeat of the requirement of prior authorization for prescription drugs in 2001. He said the proposed amendment would require a medical reason for rejecting lower-cost drug options.

Chairman Devlin called on Mr. John Savageau, a registered pharmacist, who expressed concern that the proposed rules say that a prescriber "may" inform the department of a drug. He believes the language should require that a prescriber "shall" inform the

department of a drug. Representative Koppelman said he does not believe the use of the word "may" creates a problem because the department is required by the amendment to develop a form that prescribers may use for informing the department of drugs for continued use.

It was moved by Representative Klein, seconded by Senator Fischer, and carried on a roll call vote that the Administrative Rules Committee agrees with the Department of Human Services for adoption of an additional amendment to subsection 7 of NDAC Section 75-02-02-27 as contained in Appendix Y, as modified. Voting in favor of the motion were Representatives Devlin, Bernstein, Delzer, Froelich, Klein, Koppelman, Nelson, Ruby, Sandvig, Wieland, and Wrangham and Senators Andrist, Bercier, Fairfield, Fischer, Freborg, Klein, Lee, and Wardner. No negative votes were cast.

WORKFORCE SAFETY AND INSURANCE

Chairman Devlin called on Ms. Anne Jorgenson Green, Workforce Safety and Insurance legal counsel, for testimony relating to Workforce Safety and Insurance rules. A copy of Ms. Green's prepared testimony is attached as Appendix Z. Ms. Green introduced the new executive director and chief executive officer of Workforce Safety and Insurance Mr. Sandy Blunt. Mr. Blunt said Workforce Safety and Insurance and he are available to assist committee members and other legislators with issues relating to Workforce Safety and Insurance.

Representative Ruby asked whether the increase in attorney's fees will have a financial impact on the fund. Ms. Green said there is potential for increased costs due to attorney's fees being increased but the rules also remove the possibility of exceeding caps on attorney's fees so there is some give and take in costs to the program.

Representative Ruby asked why the rules remove the 180-day cap for review of palliative care cases. Ms. Green said there are palliative care cases in which there is no need for review at 180 days. She said this change allows Workforce Safety and Insurance the flexibility to determine the appropriate review period or to designate cases when no review is necessary on a regular basis.

GAMING COMMISSION

Chairman Devlin called on Mr. Keith Lauer, Gaming Division Director, for comments on rules adopted by the Gaming Commission governing games of chance operation. A copy of Mr. Lauer's prepared testimony is attached as Appendix AA.

OIL AND GAS DIVISION

Chairman Devlin called on Mr. Hicks for further comments relating to the Oil and Gas Division rules.

Mr. Hicks said he reviewed the statutory provisions and NDCC Section 38-08.1-04.1 requires the permit holder to notify the operator of the land at least three days prior to commencement of any geophysical exploration activity unless waived by mutual agreement of both parties. He said he does not believe the Industrial Commission could alter that provision by rule.

Mr. Hicks said it might be possible for the Oil and Gas Division to provide by policy that use of charges of 20 pounds would not be permissible within 1,320 feet of a water well. He said it might also be possible to provide, through policy, for sufficient notice to property owners to allow water well testing prior to seismic exploration. He said these policies could be used until statutory changes can be considered during the legislative session.

Representative Froelich said he would not have a problem with the 660-foot distance limit for seismic exploration if there is a reasonable limit on the allowable size of a charge that may be used at that distance.

It was moved by Representative Nelson and seconded by Representative Froelich that the Administrative Rules Committee hold over consideration of the geophysical exploration rules. The question was called on a voice vote and the chairman was unable to determine the outcome and requested a recorded roll call vote. The question was called and **the motion failed.** Voting in favor of the motion were Representatives Devlin, Bernstein, Froelich, Koppelman, Nelson, and Sandvig and Senators

Bercier, Fairfield, and Fischer. Voting in opposition to the motion were Representatives Delzer, Klein, Ruby, Wieland, and Wrangham and Senators Andrist, Freborg, Klein, Lee, and Wardner.

OFFICE OF MANAGEMENT AND BUDGET - HUMAN RESOURCE MANAGEMENT SERVICES

Representative Klein said he is concerned about the Human Resource Management Services rule allowing 20 percent salary increases in some circumstances. He said he would like more information on application of this provision. **It was moved by Representative Klein, seconded by Representative Delzer, and carried on a voice vote that the committee hold over consideration of the Human Resource Management Services rule in NDAC Section 4-07-02-15 allowing equity increases of up to 20 percent per biennium for an employee.** Representative Delzer said he would like to know the extent to which this increase might be used in this budget cycle.

The meeting was adjourned at 4:10 p.m.

John Walstad
Code Revisor

ATTACH:27