

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday, July 19, 2005
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, Randy Boehning, Duane DeKrey, Mary Ekstrom, Rod Froelich, Pat Galvin, Ronald A. Iverson, Kim Koppelman, Sally M. Sandvig, Margaret Sitte, Blair Thoreson, Dwight Wrangham; Senators Richard L. Brown, April Fairfield, Tom Fischer, Jerry Klein, Gary A. Lee, Constance Triplett

Members absent: Representative Jon O. Nelson; Senators John M. Andrist, Dennis Bercier, Layton W. Freborg

Others present: See Appendix A

Chairman Devlin welcomed committee members and thanked them for serving on the Administrative Rules Committee. He said the committee membership includes a substantial amount of experience in administrative rules review and the full range of experience from legislative standing committees. He said 2005 legislation becomes effective during this interim which will make changes in administrative rules review processes, the most significant of which is that rules will not become effective until after they have been reviewed by the Administrative Rules Committee.

Chairman Devlin called on Mr. John D. Olsrud, Director, Legislative Council, who reviewed the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Council](#).

BACKGROUND MEMORANDUM

Chairman Devlin called on committee counsel for presentation of a memorandum entitled [Administrative Rules Review - Background Memorandum](#). Committee counsel reviewed statistics on the history of Administrative Code rules review during previous interims and the statutory provisions for rules review under North Dakota Century Code (NDCC) Chapter 28-32, the Administrative Agencies Practice Act.

Committee counsel said the Administrative Rules Committee is established by statute and is not discharged upon making its report to the Legislative Council at the end of the interim. He said the committee could be called to meet at any time, including during a legislative session. He said 2005 House Bill No. 1421 provides that rules, except

emergency rules, will become effective after they have been reviewed by the Administrative Rules Committee. He said the bill changes effective dates for administrative rules to a calendar quarterly basis and will make it necessary for the committee to meet during March 2007.

Committee counsel said NDCC Section 28-32-18 allows the committee to find that all or any portion of a rule is void if the committee makes a specific finding that one or more of six specific reasons exists to find the rule void.

Committee counsel reviewed the 2005 legislative changes to the rules review process. He said House Bill No. 1337 imposes a responsibility on an agency to provide a copy of notice of rulemaking to each member of the Legislative Assembly who was a sponsor or cosponsor of legislation in the most recent legislative session which is being implemented by the proposed rules.

Committee counsel said 2005 House Bill No. 1421 makes a number of changes in rulemaking and rules review processes so that rules, except emergency rules, will become effective after they have been reviewed by the Administrative Rules Committee. He said the bill reduces from 30 to 20 days the time that must elapse after publication of notice of rulemaking before the public hearing may be held. He said the bill will require two monthly mailings of rulemaking notices by the Legislative Council rather than the previous schedule of one monthly mailing of notices. He said the bill reduces the comment period after a rulemaking hearing from 30 to 10 days. He said the bill establishes a calendar quarterly schedule of effective dates for administrative rules to replace the current schedule of rules becoming effective on the first day of the month following the month of publication. He said the bill will require the Administrative Rules Committee to meet and consider rules not later than the 15th day of the month before the rules are scheduled to become effective. If a rule is held for consideration by the Administrative Rules Committee, that rule is delayed in becoming effective until the first day of the calendar quarter after the meeting at which the rule is reconsidered. The following table illustrates the rule filing dates, deadlines for committee meetings, and effective dates of rules under the new procedures established by House Bill No. 1421:

Filing Date	Committee Meeting Deadline	Effective Date
August 16-November 15	December 15	January 1
November 16-February 15	March 15	April 1
February 16-May 15	June 15	July 1
May 16-August 15	September 15	October 1

Representative DeKrey asked for a review of the provisions allowing agency appeal of voiding of rules by the Administrative Rules Committee. Committee counsel said the first avenue of appeal for an agency aggrieved by voiding of a rule would be to file a petition for reconsideration with the chairman of the Legislative Council. He said the statutory provisions allow the chairman of the Legislative Council to call a Legislative Council meeting to consider overturning the decision of the Administrative Rules Committee. He said if the chairman of the Legislative Council does not call a meeting or a meeting is called and the decision is not overturned, the next avenue of appeal for the agency would be to appeal the decision to the district court.

State Board of Accountancy

Chairman Devlin called on Ms. Carol Mielke, State Board of Accountancy, for testimony relating to July 2005 rules of the board. A copy of Ms. Mielke's prepared testimony is attached as Appendix B. Ms. Mielke said the Board of Accountancy increased the maximum charge for CPA examination testing fees. She said the change allows for vendor price changes by raising the ceiling fee from \$150 to \$250 per part.

Senator Klein asked how much a candidate would spend to take the examination. Ms. Mielke said beginning in 2007, the vendor cost would be \$162 per section. Senator Klein said the \$250 per part cost allowance under the rule change is well in excess of the vendor cost to take examinations. Ms. Mielke said the Board of Accountancy does not intend to charge anything for examinations above the vendor price for examinations. She said she believes the board set the ceiling for these fees at more than the current examination price to avoid the necessity of changing administrative rules every time vendors increase examination costs.

Department of Agriculture

Chairman Devlin invited Representative Chet Pollert, Legislative Council member, to join the committee for its consideration of anhydrous ammonia handling rules of the Department of Agriculture.

Chairman Devlin called on Mr. Jeff Olson, Program Manager, Plant Industries Division, Department of Agriculture, for presentation of testimony relating to June 2005 rules of the Department of Agriculture. A copy of Mr. Olson's prepared testimony is attached as Appendix C.

Mr. Olson said the administrative rules changes were completed in cooperation with the Insurance Department, which has responsibility for inspecting anhydrous ammonia facilities. He said the rules changes were necessary to bring state rules to the level accepted by the industry and federal regulatory agencies.

Representative Pollert asked Mr. Olson how many anhydrous ammonia dealers do not currently have the excess flow valve required by the rules for nurse tank filling station risers. Mr. Olson said he cannot answer that question, but the Insurance Department inspects these tanks and would have the information. He said he will contact the Insurance Department to find out the answer and relay the information to Representative Pollert. Representative Pollert said the state provided authority 12 to 15 years ago to allow anhydrous ammonia transfer from bulk delivery tanks, and he asked whether there have been major problems with those kinds of transfers. Mr. Olson said there have been no reports of major injuries, but there have been minor incidents.

Representative Pollert said dealers have been required to have their anhydrous ammonia handling equipment up to date but farmers have been allowed to get by at a lower standard. He asked whether we are now penalizing farmers because the state has been too lax in safety requirements. Mr. Olson said he can understand this concern, but the department is not aware of concerns from farmers because no comments were received on these rules.

Representative Ekstrom asked what the Department of Agriculture is doing to advise users of these rules changes. Mr. Olson said the department is using all means it can find to let users know about these new requirements.

In response to questions from Senator Klein, Mr. Olson said the excess flow valve protection requirement was recommended by the Insurance Department for safety reasons as required by the Occupational Safety and Health Administration. He said the Insurance Department has only three inspectors for anhydrous ammonia handling facilities, and they are also boiler inspectors, so it is not possible to find and inspect all of the tanks, but the staff is trying to inspect as many as possible.

Representative Froelich said it appears that North Dakota Administrative Code (NDAC) Section 7-12-01-08(6) requires all transfers from bulk delivery vehicles to be made to nurse tanks. Mr. Olson said that is correct and all nurse tanks are inspected.

Representative Pollert said the rules appear to require anhydrous ammonia dealers to obtain permission to operate, and he asked whether every dealer will have to obtain permission each season. Mr. Olson said he does not believe that was the intent of the rules, and he will have to check with Mr. Reitz from the Insurance Department for his interpretation.

Representative Pollert said it would be cheaper and just as effective to buy a lock cap rather than a dome cap for anhydrous tanks, and he asked whether that option is available under the rules. Mr. Olson said he is not sure of the view of the Insurance Department and Attorney General on that question, and he will check with those agencies.

Representative Pollert said he believes excess flow valves have been an ongoing project, and he said he would be surprised if there are anhydrous ammonia dealers who are not already in compliance with this requirement. Mr. Olson said there is a rotating instruction cycle so he is not sure, but he would think that very few anhydrous ammonia dealers do not comply.

Representative Pollert said the rules may work a hardship on farmers in western North Dakota and perhaps the department could give farmers in western North Dakota an option to have the anhydrous ammonia tanks inspected rather than force compliance with the rules.

Representative DeKrey said he also believes producers, especially in western North Dakota, should have the option for tank inspection rather than compliance with the rules requirements. **It was moved by Representative DeKrey, seconded by Representative Koppelman, and carried on a voice vote that the committee carry over consideration of the anhydrous ammonia handling rules until the next committee meeting.**

State Board of Architecture

Chairman Devlin called on Mr. David Reich, Legal Counsel, State Board of Architecture, for presentation of testimony relating to February 2005 rules of the board. A copy of Mr. Reich's prepared testimony is attached as Appendix D.

Representative Ekstrom asked how many landscape architects have applied for registration with the board. Mr. Warren Tvenge, member of the Board of Architecture, said three landscape architects are registered, and he believes there are two more in the process of registration.

Representative Wrangham said provisions in the board's rules provide that registered architects may not violate criminal laws and require compliance with statutory provisions governing architecture practice. He asked whether these rules are necessary because it appears they only require compliance with statutory laws. Mr. Tvenge said the board would like to update and clean up its rules in the next few years. He said many of these rules have been in place for many years. Mr. Reich said rules such as those cited by Representative Wrangham are necessary to give the Board of Architecture authority for disciplinary action against registered architects. He said statutory provisions may impose criminal penalties for violations, but it is these rules that would allow the board to take action against a license.

Representative Koppelman said there are several provisions in the rules that appear to limit the kind of corporate or partnership structure and employment that may be used by landscape architects and to limit advertising of landscape architecture services if a landscape architect is employed by a firm. He said he questions the reasons and authority for these limitations.

State Department of Health

Chairman Devlin called on Mr. Larry Thelen, State Department of Health, for testimony relating to public water supply system rules of the department. A copy of Mr. Thelen's prepared testimony is attached as Appendix E. Mr. Thelen said the department's rule revisions were made to conform state rules to federal rules of the Environmental Protection Agency under the federal Safe Drinking Water Act. He said the state rules as amended are no more stringent than the federal rules.

In response to a question from Senator Lee, Mr. Thelen said 27 communities in North Dakota currently would not meet the arsenic limits in the rules. He said the department is working with these communities to get them into compliance. He said there is authority for an exemption for communities for a maximum of nine years. He said most communities should be able to comply with these rules within two to three years.

Chairman Devlin asked whether the Environmental Protection Agency would have to grant approval for these exemptions. Mr. Thelen said it would be necessary to obtain Environmental Protection Agency approval of exemptions.

Chairman Devlin called on Mr. Terry O'Clair, Division of Air Quality, State Department of Health, for testimony relating to air pollution control rules adopted by the department. A copy of Mr. O'Clair's prepared testimony is attached as Appendix F. Mr. O'Clair said the department adopted the rules amendments to bring state rules into compliance with recent Environmental Protection Agency changes to federal regulations under the federal Clean Air Act.

Mr. O'Clair said NDCC Section 23-25-03.3 prevents the department from adopting rules that are more stringent than federal requirements unless more stringent rules will have significant impacts to health or property and a cost-benefit analysis shows that benefits exceed costs.

Representative Ekstrom asked whether not adopting visibility rules will put North Dakota in conflict with the Environmental Protection Agency. Mr. O'Clair said North Dakota will not be in conflict and the department has checked this issue with the Environmental Protection Agency. Representative Ekstrom asked whether North Dakota would have future compliance problems on visibility standards. Mr. O'Clair said it is likely that North Dakota will be

looking at requirements for tighter visibility standards in the future.

State Board of Massage

Chairman Devlin called on Mr. Edward E. Erickson, Special Assistant Attorney General, State Board of Massage, for testimony relating to January 2005 rules of the board. A copy of Mr. Erickson's prepared testimony is attached as Appendix G.

Mr. Erickson said some time after the rulemaking was completed and the Attorney General had reviewed and approved the rules, the board was contacted with suggestions for additional changes to the rules. The board agreed that these additional changes are appropriate but did not submit the additional changes to the Attorney General for consideration. He said these changes are presented to the Administrative Rules Committee for approval under NDCC Section 28-32-02, 28-32-16, or 28-32-18.

In response to a question from Representative Devlin as to whether it appears appropriate under statutory provisions for the committee to approve the additional amendments, committee counsel said NDCC Section 28-32-18 allows the committee to agree with an agency on further amendments to rules if those amendments are necessary to address any of the reasons for which the committee might find rules to be void under that section. He said in this case there is no suggestion that the committee might void the rules of the Board of Massage either with or without these amendments. He said NDCC Section 28-32-16 allows an agency to reconsider rules that have already been adopted but, as Mr. Erickson pointed out, the statute does not provide any guidance as to how agency amendments in response to the request for reconsideration are to be accomplished. He said it appears this is a situation in which the statutory provisions do not make provision for how the amendments are to be properly adopted. He said the amendments were proposed after the public hearing and after closure of the period for public comments on the rules, so there may not have been any meaningful opportunity for interested parties to weigh in on the additional amendments.

Representative DeKrey said he is concerned about the possibility that affected parties may not have had an opportunity to review and comment on these rules. He asked whether it would be appropriate for the committee to hold over the additional amendments for consideration to allow the Board of Massage to gather letters of support from affected schools before adoption of the additional amendments. Mr. Erickson said that would be agreeable to the Board of Massage. **It was moved by Representative DeKrey, seconded by Representative Boehning, and carried on a voice vote that the Administrative Rules Committee carry over consideration of the January 2005 rules of the Board of Massage.**

Board of Medical Examiners

Chairman Devlin called on Mr. Rolf Sletten, Executive Secretary and Treasurer, State Board of Medical Examiners, for testimony relating to June 2005 rules of the board. A copy of Mr. Sletten's prepared testimony is attached as Appendix H.

Board of Nursing

Chairman Devlin called on Ms. Constance Kalanek, Executive Director, Board of Nursing, for testimony relating to August 2005 rules of the board. A copy of Ms. Kalanek's prepared testimony is attached as Appendix I.

In response to a question from Representative Devlin, Ms. Kalanek said all 317 comments received at the hearing were in support of the rules changes.

Board of Pharmacy

Chairman Devlin called on Mr. Howard Anderson, Executive Director, Board of Pharmacy, for testimony relating to January 2005 rules of the board. A copy of Mr. Anderson's prepared testimony is attached as Appendix J.

Public Service Commission

Chairman Devlin called on Mr. Kevin Hanson, Testing and Safety Division, Public Service Commission, for testimony relating to May 2005 rules of the commission. A copy of Mr. Hanson's prepared testimony is attached as Appendix K.

State Seed Department

Chairman Devlin called on Mr. Ken Bertsch, State Seed Commissioner, for testimony relating to January 2005 rules of the State Seed Department. A copy of Mr. Bertsch's prepared testimony is attached as Appendix L.

Department of Human Services

Chairman Devlin called on Ms. Melissa Hauer, Director, Legal Advisory Unit, Department of Human Services, for testimony relating to substance abuse treatment program rules of the department. A copy of Ms. Hauer's prepared testimony is attached as Appendix M.

Ms. Hauer said providers governed by these rules expressed concerns that the rules as created prohibited treatment of adolescents in a group with adults. She said the department suggests an amendment to the rules to allay those concerns. She said the department proposes the amendment to NDAC Section 75-09.1-01-16 on page 5 of her testimony. **It was moved by Senator Brown, seconded by Representative Ekstrom, and carried on a roll call vote that the committee agree with the Department of Human Services on the proposed additional amendment to NDAC Section 75-09.1-01-16**

as proposed by the department. Voting in favor of the motion were Representatives Devlin, Bernstein, Boehning, DeKrey, Ekstrom, Galvin, Iverson, Koppelman, Sitte, Thoreson, and Wrangham and Senators Brown, Fairfield, Fischer, Klein, Lee, and Triplett. No negative votes were cast.

Chairman Devlin called on Ms. Andi Johnson, ShareHouse, for comments on the rules governing substance abuse treatment programs. Ms. Johnson said she wants to thank the committee and the Department of Human Services for adoption of the proposed amendment to address concerns of providers and allow treatment of adolescents in adult treatment programs under appropriate circumstances. She said several providers were concerned with this issue and they appreciate the change made to accommodate these concerns.

Chairman Devlin called on Ms. Krista Andrews, Legal Advisory Unit attorney, Department of Human Services, for testimony relating to temporary assistance for needy families rules of the department. A copy of Ms. Andrews' prepared testimony is attached as Appendix N.

Representative Iverson expressed concern with the first sentence of NDAC Section 75-02-01.2-02.1, which states the program will provide "cash assistance to qualified families to promote job retention." Representative Iverson said this statement implies that the state is providing cash payments to individuals to keep working. Mr. John Hougen, Department of Human Services, said diversion assistance is a time-limited program and is intended to encourage eligible individuals to keep working rather than relying only on assistance benefits. Representative Iverson said he is not comfortable with the language used in the rule and believes the wording could be improved to make the intention of the program more clear.

Chairman Devlin called on Ms. Andrews for presentation of a request by the Department of Human Services for committee approval under NDCC Section 28-32-18.1 for repeal of obsolete administrative rules contained in NDAC Chapter 75-01-01. A copy of Ms. Andrews' prepared testimony is attached as Appendix O.

It was moved by Representative Koppelman, seconded by Representative DeKrey, and carried on a roll call vote that the committee approve repeal of NDAC Chapter 75-01-01 as obsolete rules under NDCC Section 28-32-18.1. Voting in favor of the motion were Representatives Devlin, Bernstein, Boehning, DeKrey, Ekstrom, Galvin, Iverson, Koppelman, Sitte, Thoreson, and Wrangham and Senators Brown, Fairfield, Fischer, Klein, Lee, and Triplett. No negative votes were cast.

Chairman Devlin called on Ms. Andrews for testimony relating to an Administrative Code review project being conducted by the Department of Human Services. Ms. Andrews said the department initiated a complete review of all Administrative Code

provisions of the Department of Human Services. She said under this review, 59 chapters have been reviewed by the department out of 69 total chapters that have been adopted. She said the remaining 10 chapters will be reviewed. She said the results of the review thus far are that 30 chapters have been amended or are being amended, 6 chapters have been repealed or are in the process of being repealed, 9 chapters have been repealed and replaced with other chapters, and 14 chapters have been unchanged.

Chairman Devlin said he and the committee appreciate the efforts of the Department of Human Services to keep its administrative rules current. He said the review project has resulted in improvements and clarifications to the department's rules, and he hopes that other agencies will follow the lead of the Department of Human Services in this respect.

It was moved by Senator Brown, seconded by Representative Thoreson, and carried on a voice vote that the committee hold over consideration of NDAC Section 75-02-01.2-02.1 of the Department of Human Services temporary assistance for needy families rules to clarify the language and intention of the provisions regarding providing cash assistance to promote job retention.

Private Investigative and Security Board

Chairman Devlin called on Mr. Edward E. Erickson, Special Assistant Attorney General, Private Investigative and Security Board, for testimony relating to May 2005 rules of the board. A copy of Mr. Erickson's prepared testimony is attached as Appendix P.

Chairman Devlin called on Mr. Hal Simons for comments on the rules of the Private Investigative and Security Board. Mr. Simons said he works as a private investigator in Bismarck. He said he objects to the requirement of errors and omissions insurance coverage, which amounts to a requirement of malpractice insurance for private investigators. He said he does not understand why malpractice insurance coverage would be necessary. He said he works for attorneys, carries a pen and pad, and asks questions and gathers information. He said he does not carry a gun or provide security services. He said attorneys he works for also do not understand why he should be required to carry malpractice insurance. He said you can get a license to practice law or medicine in North Dakota without proof of malpractice insurance coverage. He asked why it should be required to hold private investigators to a higher standard than lawyers or doctors. He said the lowest cost he has been able to find for insurance coverage is approximately \$980 per year compared to his current bond cost of less than \$100 per year.

Representative Wrangham said it appears that the errors and omissions insurance coverage requirement of the rules adopted by the board is particularly hard

on sole practitioners as private investigators. He said he hopes the board would reconsider the requirement or consider creating an exception for small businesses. **It was moved by Representative Wrangham, seconded by Representative Sitte, and carried on a voice vote that the committee carry over consideration of the rules of the Private Investigative and Security Board with respect to the requirement of errors and omissions insurance coverage.**

State Board of Architecture

Representative Koppelman said it appears from what he has been able to determine that there is no requirement or specific authority in state law for the State Board of Architecture to establish restrictions on the corporate structure or other form of doing business for landscape architects. **It was moved by Representative Koppelman, seconded by Senator Triplett, and carried on a voice vote that the committee carry over consideration of the State Board of Architecture rules.**

State Board of Funeral Service

Representative DeKrey said no representative appeared before the committee to represent the State Board of Funeral Service regarding April 2005 rules adopted by the board. He said the rules should not be allowed to pass through the committee's jurisdiction without appearance by a representative of the board with regard to the rules. **It was moved by Representative DeKrey, seconded by**

Representative Ekstrom, and carried on a voice vote that the committee carry over consideration of the April 2005 rules of the State Board of Funeral Service.

State Department of Health

Representative DeKrey said committee members had raised questions about why the air pollution control rules of the State Department of Health contain references to standards for nitric acid plants, sulfuric acid plants, copper smelters, zinc smelters, and other facilities that do not exist in North Dakota. He said NDCC Section 28-32-04 provides that an agency may not adopt rules from federal guidelines which are not relevant to state regulatory programs. He said the State Department of Health should address the committee with regard to reasons for including in rules provisions that do not appear to apply to any facility in North Dakota. **It was moved by Representative DeKrey, seconded by Representative Koppelman, and carried on a voice vote that the committee carry over consideration of the air pollution control rules of the State Department of Health.**

The meeting was adjourned at 3:15 p.m.

John Walstad
Code Revisor

[ATTACH:16](#)