

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### ADMINISTRATIVE RULES COMMITTEE

Thursday, June 14, 2007  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Senator Tom Fischer, Chairman, called the meeting to order at 1:00 p.m.

**Members present:** Senators Tom Fischer, John M. Andrist, Layton W. Freborg, Jerry Klein, Tracy Potter; Representatives Duane L. DeKrey, Randy Boehning, Chuck Damschen, David Drovdal, Rodney J. Froelich, Chris Griffin, Jon Nelson, Louise Potter, Blair Thoreson, Dwight Wrangham

**Members absent:** Representatives Mary Ekstrom, Kim Koppelman

**Others present:** See Appendix A

**It was moved by Senator Klein, seconded by Representative DeKrey, and carried on a voice vote that the minutes of the March 8, 2007, committee meeting be approved as distributed.**

Chairman Fischer called on committee counsel, who reviewed the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Council](#).

#### STATE BOARD OF PHARMACY

Chairman Fischer called on Mr. Howard Anderson, Executive Director, State Board of Pharmacy, for testimony relating to July 2007 rules of the board. A copy of Mr. Anderson's prepared testimony is attached as Appendix B. Mr. Anderson said the rules were adopted to establish a prescription drug monitoring program to implement North Dakota Century Code Chapter 19-03.5. He said the rules were adopted as emergency rules and approved as emergency rules by the Governor. He said the rules have an emergency effective date of December 1, 2006.

#### PUBLIC SERVICE COMMISSION

Chairman Fischer called on Mr. Tony Clark, Public Service Commissioner, for testimony relating to July 2007 rules of the Public Service Commission. A copy of Mr. Clark's prepared testimony is attached as Appendix C. Mr. Clark said the rules relate to the responsibility of the Public Service Commission to determine eligibility for universal service support for telecommunications carriers.

Mr. Clark said the Federal Communications Commission has established rules to designate eligible telecommunications carriers for universal service support purposes. He said states have been

encouraged to adopt similar rules to improve the long-term sustainability of universal service funding.

Representative Froelich asked Mr. David Crothers, North Dakota Association of Telecommunications Cooperatives, for association comments on the rules. Mr. Crothers said Mr. Clark described very well the purpose of the universal service fund and the need to preserve the fund for intended purposes. He said a somewhat higher standard for eligible telecommunications carriers should help preserve the universal service fund, which is very important for rural telecommunications service in North Dakota.

Mr. Clark said the Public Service Commission has tried to adopt its rules to piggyback federal regulations as much as possible to avoid duplication of paperwork for carriers.

Representative Drovdal asked whether efforts to preserve the universal service fund by limiting eligibility might make it more difficult for new companies to enter a market. Mr. Clark said he does not think that will be the case and there probably are not many carriers looking to enter the market in North Dakota.

#### STATE SEED DEPARTMENT

Chairman Fischer called on Mr. Ken Bertsch, State Seed Commissioner, for testimony relating to July 2007 rules of the State Seed Department. A copy of Mr. Bertsch's prepared testimony is attached as Appendix D. Mr. Bertsch said the rules were adopted upon the advice of the Attorney General's office that seed variety certification and warranty language in administrative rules should be clarified with regard to limits of technical capacity regarding certification of varieties, strains, and clones and limits to which the public can rely on certification of these factors.

#### DEPARTMENT OF HUMAN SERVICES

Chairman Fischer called on Ms. Julie Leer, Department of Human Services, for testimony relating to July 2007 rules of the department. A copy of Ms. Leer's prepared testimony is attached as Appendix E.

Ms. Leer said the rules were amended to assist licensed basic care facilities with licensed capacity of fewer than 17 individuals with mental diseases. The amendments allow an increase in the rate paid when

an entity serves individuals with mental diseases, to recognize the fact that additional resources are required to meet the needs of these individuals.

Ms. Leer said the Department of Human Services had requested an opportunity to present a request for repeal of obsolete rules. She said the department would not present that request at this time.

### **WORKFORCE SAFETY AND INSURANCE**

Chairman Fischer called on Ms. Anne Green, Workforce Safety and Insurance, for testimony relating to July 2007 rules of Workforce Safety and Insurance. A copy of Ms. Green's prepared testimony is attached as Appendix F.

Ms. Green said the rules changes relate to definitions and eligibility for grant programs. She said the existing rule provides that a North Dakota employer is not eligible for a Workforce Safety and Insurance grant if that employer's premium has not been paid after a second billing notice. She said the organization has learned from processing grant applications that this requirement is too strict and disproportionate to the consequence. She said the change links the definition of good standing with the statutory definition of default which provides greater flexibility for grant determinations. She said the other change expands and balances factors used to analyze employers' applications. The change removes the requirement that an account be in good standing for two premium periods and substitutes an evaluation of all criteria, including current status of an employer's account.

### **PRIVATE INVESTIGATIVE AND SECURITY BOARD**

Chairman Fischer called on Mr. Bill Butcher, Private Investigative and Security Board, for testimony regarding July 2007 rules of the board. A copy of Mr. Butcher's prepared testimony is attached as Appendix G.

Mr. Butcher said the rules changes deal with disciplinary action the board may take against licensees for violation of a code of ethics. He said the purpose of the rules was to implement a code of ethics for licensees of the board.

Senator Andrist and Representative Froelich each expressed concern about the code of ethics requirement that licensees refrain from excessive or grandiose advertising claims. They said it will be difficult to determine when advertising is "excessive or grandiose."

### **BOARD OF COUNSELOR EXAMINERS**

Chairman Fischer called on Mr. Timothy Austin, Board of Counselor Examiners, for presentation of testimony regarding July 2007 rules of the board. A copy of Mr. Austin's prepared testimony is attached as Appendix H.

Mr. Austin said the American Counseling Association recently adopted updates to its code of ethics. He said the purpose of the proposed rules is to adopt the most current code of ethics from the American Counseling Association.

### **DEPARTMENT OF LABOR**

Chairman Fischer called on Ms. Lisa Fair McEvers, Labor Commissioner, for presentation of a request for elimination of an obsolete rules provision. A copy of the request presented by Ms. Fair McEvers is attached as Appendix I.

Ms. Fair McEvers said 2007 House Bill No. 1454 increased the state minimum wage contingent upon an effective date triggered by the taking effect of federal minimum wage changes. She said the effective date of 2007 House Bill No. 1454 has been certified to be July 24, 2007, which raises the state minimum wage to \$5.85 per hour on that date. She said the new statutory minimum wage rate will supersede the current administrative rule providing a minimum wage of \$5.15 per hour under North Dakota Administrative Code Section 46-02-07-02. She said the Department of Labor requests elimination of the minimum wage statement in the rule because it will be in conflict with the statutory minimum wage rate on July 24, 2007.

**It was moved by Representative Froelich, seconded by Representative DeKrey, and carried on a recorded roll call vote that the Administrative Rules Committee agree with the proposed rules change suggested by the Department of Labor to eliminate the obsolete minimum wage statement effective July 24, 2007.** Voting in favor of the motion were Senators Fischer, Andrist, Freborg, Klein, and Potter and Representatives DeKrey, Boehning, Damschen, Drovdal, Ekstrom, Froelich, Griffin, Koppelman, Nelson, Potter, Thoreson, and Wrangham. No negative votes were cast.

### **BACKGROUND MEMORANDUMS**

Chairman Fischer called on committee counsel for presentation of background memorandums on committee activities and assigned studies.

Committee counsel reviewed a memorandum entitled [Administrative Rules Review - Background Memorandum](#). He said the background memorandum reviews the timetables for rules review and the statutory provisions governing review by the Administrative Rules Committee of rules adopted by agencies.

Committee counsel reviewed a memorandum entitled [Agencies Exempted From the Administrative Agencies Practice Act - Background Memorandum](#). He said 2007 House Bill No. 1479 was amended to require Legislative Council study of the appropriateness of each agency exemption from the Administrative Agencies Practice Act. He said the bill provides that the study should include discussion and

analysis of each exemption and a presentation by each agency entitled to an exemption. He said the current definition of administrative agency contains 23 exclusions, some of which apply to more than one entity under the jurisdiction of an agency. He said receiving input from each listed agency will involve a significant amount of committee time. He said it must also be remembered that the Administrative Agencies Practice Act covers rulemaking and adjudicative proceedings and some agencies may require an exemption from one part of the chapter but not from the other part.

After general discussion of exemptions for administrative agencies, Chairman Fischer said questions should be sent to agencies before meetings so the responses may be forwarded to committee members for review before the meeting at which the agency will appear.

Committee counsel reviewed a memorandum entitled [Occupational and Professional Law and Rules Violation Penalties - Background Memorandum](#). He said 2007 Senate Bill No. 2060 was introduced to increase penalties for violation of plumbing laws or rules adopted by the board and the State Plumbing Code. The bill also would have increased the penalty for violations. He said standing committee members considering the bill expressed concern about increased penalties and the authority to adopt rules that would be subject to criminal penalties. He said during discussion of committee concerns, a study directive was added to the bill calling for review of similar provisions affecting other occupations and professions. He said the memorandum contains the text of statutory provisions in occupational and professional laws. He said there are several concerns with the variety of statutory approaches to imposing penalties for violations. He said one concern is that culpability standards do not exist in many violation provisions which means the intent of the individual is probably not relevant to the offense. He said another concern is that violations are usually stated as an offense that applies for any violation of a chapter of law. He said the chapter of law contains provisions that are probably not intended to have been subject to a criminal penalty for violation. He said another area of concern is that many statutory provisions provide that a violation of rules adopted by a licensing board or commission is also a criminal offense. He said the concern expressed by standing committee members during the legislative session is whether a board or

commission should be allowed to make a rule that is punishable as a criminal offense or whether only statutory provisions should be subject to criminal penalties. He said another concern is that varying levels of penalties apply for violations of occupational and professional laws and rules. He said consideration should be given to whether various penalties should be uniform among occupations and professions. He said another area of concern is whether imposition of criminal penalties for violation of occupational and professional laws is appropriate. He said in many instances the appropriate action for violation of laws or rules would be action by the board or the commission against the license of a violator rather than seeking imposition of a criminal penalty through the state's attorney.

Senator Andrist asked whether it would be possible to draft a proposal for uniform application to all occupations and professions. Committee counsel said that would be very difficult because the circumstances are considerably different among professions and the impact to the public of some violations may be more severe in some professions than others. He said the Attorney General's office might be requested to provide suggestions for how to approach this study. He said the Attorney General is the chief law enforcement officer of the state and the Attorney General's office provides legal services to many of the occupational and professional boards and commissions subject to the study. Senator Andrist said he believes it would be useful to hear from the Attorney General on this study. Chairman Fischer requested that committee counsel invite the Attorney General to address the committee with regard to this study.

**It was moved by Senator Klein, seconded by Representative Damschen, and carried on a voice vote that the meeting be adjourned subject to the call of the chairman.**

No further business appearing, Chairman Fischer adjourned the meeting at 3:30 p.m.

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John Walstad  
Code Revisor

ATTACH:9