

# NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

## ADMINISTRATIVE RULES COMMITTEE

Thursday, September 13, 2007  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Senator Tom Fischer, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Senators Tom Fischer, John M. Andrist, Layton W. Freborg, Jerry Klein, Tracy Potter; Representatives Randy Boehning, Chuck Damschen, Duane L. DeKrey, David Drovdal, Mary Ekstrom, Kim Koppelman, Blair Thoreson, Dwight Wrangham

**Members absent:** Representatives Rodney J. Froelich, Chris Griffin, Jon Nelson, Louise Potter

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

**It was moved by Senator Klein, seconded by Representative Damschen, and carried on a voice vote that the minutes of the June 14, 2007, committee meeting be approved as distributed.**

### ADMINISTRATIVE AGENCIES PRACTICE ACT STUDY

In response to a question from Senator Klein, committee counsel said the committee will hear presentations from several agencies that are exempt under the Administrative Agencies Practice Act (AAPA), North Dakota Century Code (NDCC) Chapter 28-32. Committee counsel said discussion of these issues comes under the study assigned to the committee which requires examination of each agency exemption from the AAPA. He said the AAPA has two aspects--rulemaking provisions and administrative hearings or adjudicative proceedings provisions. He said each agency was requested to address four questions with regard to its exemption under the AAPA, relating to the activities of the agency, whether the exemption continues to be appropriate for the agency, and whether the agency believes changes should be made in the statutory provision providing the exemption.

#### **Council on the Arts**

Chairman Fischer called on Ms. Jan Webb, Executive Director, Council on the Arts, for presentation of information relating to the AAPA exemption for the Council on the Arts. A copy of the response presented by Ms. Webb is attached as [Appendix B](#).

#### **State Auditor**

Chairman Fischer called on Mr. Gordy Smith, State Auditor's office, for presentation of information relating to the exemption from the AAPA for the State Auditor.

Mr. Smith reviewed the written response prepared by Mr. Robert Peterson, State Auditor. A copy of the written response is attached as [Appendix C](#). Senator Fischer said his understanding of the response by the State Auditor is that the State Auditor establishes rules or policies only for internal management of the office staff. Mr. Smith said that is correct and only within the office are policies established, such as policies to avoid assigning staff to audit entities employing a relative of the staff person.

Representative Koppelman said the State Board of Accountancy is subject to the AAPA and asked how the function of the State Board of Accountancy differs from the State Auditor's office. Mr. Smith said the State Board of Accountancy is involved more in enforcement of professional standards regarding licensing, continuing education, and similar requirements. He said the State Board of Accountancy makes policy through rules for those purposes. He said the State Auditor's office does not have a policymaking function and performs duties set by law to apply standards set by state law, national organizations, or federal requirements.

#### **Department of Commerce**

Chairman Fischer called on Mr. Paul Lucy, Department of Commerce, for presentation of information relating to the AAPA exemption for the Department of Commerce. A copy of a memorandum from Mr. Shane C. Goettle, Commissioner, Department of Commerce, is attached as [Appendix D](#). Mr. Lucy reviewed the memorandum.

Mr. Lucy said the Department of Commerce has four divisions. He said the Division of Economic Development and Finance is exempt under the AAPA. He said the Divisions of Community Services, Tourism, and Workforce Development are subject to the AAPA. He said of the three divisions with rulemaking authority, only the Division of Community Services has established rules with statewide application. He said the Division of Community Services rules adopted relate to the State Building Code, third-party inspection for modular housing, and manufactured home installation.

Mr. Lucy said the Division of Economic Development and Finance provides services that could be impacted by changing the AAPA exemption. He said the programs and services include the Development Fund, Agricultural Products Utilization

Commission, primary sector business certification, research and development company certification, microbusiness certification, seed capital tax credit certification, and agricultural tax credit certification. He said clients of these programs and services are satisfied with the management and delivery of services. He said removing the exempt status for these services could hinder the ability to effectively respond to changes in the marketplace and business community. He said the division is able to respond quickly to events, such as the tornado damage to the city of Northwood. He said the Department of Commerce recommends no change to the exempt status for the Division of Economic Development and Finance.

Senator Fischer asked how many major programs within the Department of Commerce have their own boards. Mr. Lucy said the Development Fund and the Agricultural Products Utilization Commission have their own policy boards.

Senator Potter asked whether there are appeals procedures within divisions of the department. Mr. Lucy said there are appeals procedures within some divisions.

Mr. Goettle said there is no formal appeals process within the Department of Commerce, but under some programs, entities are given the option to reapply if an application is determined inadequate. Mr. Goettle said the flexibility the Department of Commerce has under current law is important and appropriate to the functions of the divisions.

### **Committee Discussion**

Senator Andrist said he cannot remember a time when there was a controversy about the status of an exempt agency under the AAPA. He said the committee should assume statutory exemptions are appropriate unless reasons are brought forward why an exemption is inappropriate. Representative Koppelman said the history from exemptions from the AAPA is that exemptions were granted based on agency functions as they existed several years ago. He said agency authority should be reviewed as conditions change.

### **North Dakota Dairy Promotion Commission**

Chairman Fischer called on Ms. Char Heer, North Dakota Dairy Promotion Commission, for testimony relating to the AAPA exemption of the commission. A copy of a letter from the commission staff is attached as [Appendix E](#).

In response to questions from Representative Drowdal, Ms. Heer said the National Dairy Board is composed of 14 producer members. She said the state board has nine members, who are all producers and two of whom are appointed by the Governor.

Ms. Heer said the North Dakota Dairy Promotion Commission contracts with the Midwest Dairy Association of St. Paul, Minnesota, for staff services.

Representative Koppelman asked whether the North Dakota Dairy Promotion Commission is a state agency or a private entity. Ms. Heer said the commission has aspects of both private and state entities.

### **Department of Emergency Services**

Chairman Fischer called on Major General David Sprynczynatyk, Adjutant General, for a presentation of information relating to the AAPA exemption for the Department of Emergency Services. A copy of Major General Sprynczynatyk's prepared testimony is attached as [Appendix F](#). At the conclusion of his presentation, Major General Sprynczynatyk said he would suggest the Adjutant General's office be added to the agencies exempt from the AAPA.

Senator Fischer said as he understands the process, Federal Emergency Management Agency decisions are made in Denver, Colorado, but work in North Dakota is performed by the staff of the Department of Emergency Services. Major General Sprynczynatyk said that is correct and the department is able to use its own people for damage assessments. He said if North Dakota were not designated as a managing state by the Federal Emergency Management Agency, federal staff would have to be brought in to conduct damage assessments in North Dakota. He said the current status makes disaster management processes more efficient in North Dakota.

Representative Koppelman asked why the Department of Emergency Services functions primarily on federal requirements. Major General Sprynczynatyk said the federal government provides the funds and makes the rules that apply to use of those funds. He said state programs have limited flexibility within the federal funding framework.

In response to a question from Senator Potter, Major General Sprynczynatyk said all states follow federal guidelines for emergency management programs using federal funding and the only significant difference is the amount of money available within each state.

### **Industrial Commission**

Chairman Fischer called on Ms. Karlene Fine, Executive Director and Secretary, Industrial Commission, for presentation of information on behalf of the Industrial Commission relating to the Industrial Commission exemption from the AAPA. A copy of the memorandum presented by Ms. Fine is attached as [Appendix G](#).

Ms. Fine said several entities are subject to management on behalf of the state by the Industrial Commission. She said of the many entities under Industrial Commission jurisdiction, only the Department of Mineral Resources performs any regulatory duties. She said the Department of Mineral Resources is not exempt from the AAPA and follows rulemaking provisions of NDCC Chapter 28-32 and the adjudicative proceedings of Chapter 28-32.

### **Indian Affairs Commission**

Chairman Fischer called on Ms. Cheryl Kulas, Executive Director, Indian Affairs Commission, for testimony regarding the commission's exemption under the AAPA. A copy of the information provided by Ms. Kulas is attached as [Appendix H](#). Ms. Kulas said the Indian Affairs Commission primarily functions as a liaison agency between the five tribal entities and state government. She said the commission is not a regulatory agency.

### **Office of Management and Budget**

Chairman Fischer called on Ms. Pam Sharp, Director, Office of Management and Budget, for presentation of information relating to the AAPA exemption for the Office of Management and Budget. A copy of the information provided by Ms. Sharp is attached as [Appendix I](#).

Ms. Sharp said there are four applications that require the Office of Management and Budget to adopt rules under the AAPA. She said the Risk Management Accident Review Board, Risk Management Workers' Compensation program, Procurement Office, and Human Resource Management Services are rulemaking entities. She said the other activities of the Office of Management and Budget are exempt from the rulemaking process and are limited in authority to within state government or within the Capitol complex.

### **Education Factfinding Commission**

Chairman Fischer called on Dr. Kermit Lidstrom, Chairman, Education Factfinding Commission, for a presentation of information relating to the AAPA exemption for the Education Factfinding Commission. A copy of written information provided by Dr. Lidstrom is attached as [Appendix J](#).

In response to a question from Senator Potter, Dr. Lidstrom said the Education Factfinding Commission becomes involved in a negotiation impasse only by invitation of either or both parties during negotiations between teachers and school boards.

### **State Board of Equalization**

Chairman Fischer called on Mr. Cory Fong, Tax Commissioner and Secretary of the State Board of Equalization, for presentation of information relating to the AAPA exemption for the State Board of Equalization. A copy of the written information presented by Mr. Fong is attached as [Appendix K](#).

### **Board of Higher Education**

Chairman Fischer called on Mr. Pat Seaworth, General Counsel, North Dakota University System, for presentation of information relating to the AAPA exemption for the Board of Higher Education. A copy of the written information provided by Mr. Seaworth is attached as [Appendix L](#).

Representative Koppelman said the information provided indicates that subjecting the Board of Higher Education to rulemaking requirements might infringe on constitutional authority of the Board of Higher Education. He asked what the authority under the constitution is for the Board of Higher Education. Mr. Seaworth said the Board of Higher Education has self-executing powers provided in the Constitution of North Dakota. He said under the constitutional enumeration of powers of the Board of Higher Education, the Legislative Assembly has limited authority over issues, such as educational content and similar matters, and the authority is basically limited to funding issues regarding higher education institutions.

Committee counsel asked about meeting notices, public input, and procedures when policy changes are considered by the Board of Higher Education. Mr. Seaworth said meetings of the Board of Higher Education are public meetings subject to open meeting provisions of state law. He said the board files notice of upcoming meetings and agendas and allows public comment on matters under consideration. He said changes to policies of the Board of Higher Education must be introduced and given a first reading at one meeting and may not be adopted as final policies until a subsequent meeting.

### **OCCUPATIONAL AND PROFESSIONAL BOARDS CRIMINAL PENALTIES STUDY**

Chairman Fischer called on Mr. Edward Erickson, Attorney General's office, for a presentation of information relating to the committee study of criminal penalties that apply to occupational and professional licensing laws and rules. A copy of his testimony is attached as [Appendix M](#).

Mr. Erickson said the Attorney General's office sought comments from occupational and professional licensing boards regarding the committee's study of criminal penalties. He said there is general agreement that criminal penalty language may be overbroad in some circumstances. He said the office is not aware of any unjust prosecutions because of broad penalty language but opinions should be obtained from individual boards relative to the laws and rules they administer.

Mr. Erickson said licensing boards would like to have input in any bill draft that addresses criminal penalty issues under laws and rules they administer. He said the boards would like an opportunity to review applicable rules and laws with their attorneys and would then be able to offer specific advice on any changes being considered.

Chairman Fischer said committee counsel should work with the Attorney General's office and occupational and professional licensing board representatives to allow participation for each occupational and professional licensing board.

### Board of Pharmacy

Chairman Fischer called on Mr. Howard Anderson, Executive Director, Board of Pharmacy, for testimony relating to October rules of the board. A copy of Mr. Anderson's prepared testimony is attached as [Appendix N](#). Mr. Anderson said the rules regarding pharmacy closings are based on the premise that notice should be provided of the intended closure of a pharmacy to the Board of Pharmacy, patients of the pharmacy, and the Drug Enforcement Administration (DEA).

Mr. Anderson said use of automated dispensing systems is allowed by DEA rules. He said the state rule was adopted to provide a potential benefit to patients. He said patients cannot transfer unused controlled substances back to a pharmacist for credit or refund. He said DEA rules will not allow transfer from a patient to a pharmacist of controlled substances. He said the purpose of the automated dispensing system rules is that the system could dispense one dose of medication at a time in nursing homes. He said this would avoid the potential waste of money if the patient is required to purchase a number of doses of medication that may not be needed. In reality, he said, automated dispensing systems are extremely expensive and each pharmacy dispensing controlled substances must have its own separate system. He said there probably will not be many automated dispensing systems in North Dakota because of the cost of the equipment.

In response to a question from Representative Koppelman, Mr. Anderson distributed copies of the DEA rule allowing retail pharmacies to install and operate automated dispensing systems at long-term care facilities.

### Board of Dental Examiners

Chairman Fischer called on Mr. Jerry Kettleon, Counsel, Board of Dental Examiners, for presentation of written testimony relating to October rules of the board. A copy of Mr. Kettleon's prepared testimony is attached as [Appendix O](#).

Representative Koppelman asked the difference between a certified or qualified dental assistant. Mr. Kettleon said the national board has a certification test and some dental assistants have successfully completed the test and are certified. He said a qualified dental assistant has the same training but has not taken the certification test.

Representative Boehning said he is concerned about the substantial fee increases under the rules. He asked why such substantial increases are necessary. Mr. Kettleon said the budget of the Board of Dental Examiners has increased significantly. He said most of the reason for the increase in the budget relates to disciplinary proceedings and the resulting cost to the board in the past year. Representative Boehning asked if the board is running a deficit. Mr. Kettleon said the board has not been in a deficit situation but expenditures have risen substantially and the board

believed fee increases were appropriate in light of increased costs.

Representative Boehning said he believes the committee should look into why occupational and professional licensing boards and commissions increase fees so substantially in some circumstances. He asked whether it is appropriate for the committee to request the Board of Pharmacy to provide additional information on why these fee increases are required. Committee counsel said the committee may request the board to provide additional information. He said a further question would be whether to simply request additional information or carry over consideration of the rules pending receiving the additional information. He said if the rules are carried over, the committee should consider whether there are adequate statutory grounds to void the rules because carrying the rules over for consideration would delay the time the rules take effect.

Senator Klein said it appears no comments were received from any licensees regarding the fee increases. He asked Mr. Kettleon whether that is correct. Mr. Kettleon said no comments were received regarding the fee increases and the board provided notice of the fee increases to all licensees.

**It was moved by Representative Boehning, seconded by Representative Wrangham, and carried on a roll call vote that the committee carry over consideration of the portion of the rules of the Board of Dental Examiners providing fee increases.**

Senator Andrist said he believes the committee should examine the financial need for the fee increases.

Committee counsel asked Mr. Kettleon whether carrying over these rules changes and delaying the effective date of the rules until at least January would affect the license renewal cycle of the board. Mr. Kettleon said the delay would affect the licensing cycle because the next licensing year begins January 1, 2008. He said it would be necessary to send out renewal notices before the end of the 2007 calendar year.

Representative DeKrey said the committee has limited grounds to void rules. Committee counsel reviewed the grounds to void rules and said it appears a finding that a rule is arbitrary and capricious would be the only basis in these circumstances for finding the fee increases to be void. Senator Andrist said he believes arbitrary means there is an inadequate justification for the rule change and he thinks that situation may exist in this case so he believes it would be appropriate to carry over the rules to find out the reasons to justify the fee increases.

Representative Ekstrom said no comments or concerns or opposition from licensees was communicated to the board and she has heard no complaints from constituents about the fee changes. She said she believes the committee should allow the rules to become effective. Representative Wrangham said in prior cases when boards or commissions are

increasing fees, they have usually provided the committee more information on the necessity of a fee increase.

**The question was called and the motion carried.** Voting in favor of the motion were Senators Fischer, Andrist, and Freborg and Representatives Boehning, Damschen, Drovdal, Koppelman, Thoreson, and Wrangham. Voting in opposition to the motion were Senator Klein and Representatives DeKrey and Ekstrom.

### **EDUCATIONAL TECHNOLOGY COUNCIL**

Chairman Fischer called on Mr. Dan Pullen, Director, Educational Technology Council, for a presentation relating to the AAPA exemption for the Educational Technology Council. A copy of written information provided by Mr. Pullen is attached as [Appendix P](#).

### **COMMITTEE DISCUSSION**

Committee counsel said he would discuss with the Attorney General's office how to proceed on the study of criminal penalties under occupational and professional licensing laws and rules. Representative

Ekstrom said penalties are not uniform among occupations and professions but it is not appropriate that the same penalties should apply for all occupations and professions. She said an example is that a professional whose practice could cause physical harm or death should be subject to a greater penalty than one who does not practice a profession that could cause that kind of harm.

Chairman Fischer said the tentative date for the next meeting of the committee is Thursday, December 13, 2007.

**It was moved by Representative Drovdal, seconded by Senator Klein, and carried on a voice vote that the meeting be adjourned subject to the call of the chairman.** Chairman Fischer adjourned the meeting at 2:20 p.m.

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John Walstad  
Code Revisor

ATTACH:16