

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

LEGISLATIVE COUNCIL

Wednesday, June 6, 2007
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Al Carlson, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Al Carlson, Rick Berg, Merle Boucher, Lee Kaldor, Shirley Meyer, Phillip Mueller, Chet Pollert, Bob Skarphol; Senators Dick Dever, Tim Flakoll, Joel C. Heitkamp, Ray Holmberg, David O'Connell, Larry J. Robinson, Bob Stenehjem, Rich Wardner

Member absent: Representative Jeff Delzer

Others present: Jay E. Buringrud, Jim W. Smith, Maryann F. Trauger; Legislative Council, Bismarck
See Appendix A for additional persons present.

It was moved by Senator Stenehjem, seconded by Senator Robinson, and carried on a voice vote to dispense with the reading of the minutes of the May 15, 2007, meeting and to approve the minutes as distributed.

Chairman Carlson said copies of a proposed committee structure would be distributed as soon as they were ready. He said he had been working on the schedule and it was now being prepared by the Legislative Council staff.

APPOINTMENTS

Chairman Carlson said the Legislative Council would take up consideration of appointments to be made by the Council. He announced that Senator Judy Lee was not eligible for reappointment to the Committee on Protection and Advocacy because of term limits but Representative Gerry Uglen was eligible to be reappointed. He said Representative Uglen and Senator Robert S. Erbele have been suggested for appointment to the Committee on Protection and Advocacy.

Chairman Carlson said the next appointment is to the Information Technology Advisory Committee, and North Dakota Century Code Section 54-59-07 provides that the membership of that committee is to include two members of the Legislative Assembly appointed by the Legislative Council. He said the current appointees are Representative Skarphol and Senator Wardner. Representative Boucher said he believes the appointments to be made by the Legislative Council should have a balance between the two political parties. In response to a question, Representative Skarphol said the Information Technology Advisory Committee meets quarterly. Representative Boucher said he would suggest that Representative Kaldor serve on this committee.

Chairman Carlson said another appointment to be made is one legislator to serve on the State Hospital Governing Body, and Representative Pollert is the current appointee. He asked Representative Pollert if he would be interested in continuing and Representative Pollert answered that he would accept another appointment.

Chairman Carlson said the Legislative Council is to appoint four members to the Veterinary Medical Education Program Admissions Committee. He said the law provides a criteria for each appointee, and Senator Bill Bowman is the current appointee who is a member of the Legislative Assembly, Dr. Neal Dyer is the faculty member on the North Dakota State University Department of Veterinary and Microbiological Sciences, Dr. Daniel Borchill is the appointee who is a veterinarian practicing in North Dakota, and Mr. Melvin Leland is the current appointee who is a livestock producer. Representative Meyer said there is a veterinarian in Dickinson who is a graduate of Kansas State University who she believes would be excellent as the veterinarian on this board. In response to a question from Representative Mueller, the director said two years ago the Legislative Council received a list of nominees from the State Board of Higher Education. Senator Flakoll said he believes the appointee from the North Dakota State University Department of Veterinary and Microbiological Sciences should be the head of the department or his designee. Chairman Carlson said the nominees to this admissions committee would be delayed until more information was received from the State Board of Higher Education.

Chairman Carlson announced that the next appointments would be for the Uniform Laws Commission, and the law requires that there be one appointee from each house and the appointees must be attorneys. He said the current commission members are Representative Lawrence R. Klemin and Senator Dave Nething. Senator O'Connell said he believes Senator Constance Triplett should be considered for the Uniform Laws Commission.

Chairman Carlson said the Legislative Council is to appoint one member of the House Transportation Committee and one member of the Senate Transportation Committee or their designees as legislative members representing North Dakota on the Multistate Highway Transportation Agreement Cooperating Committee. He said this is a new law

enacted in 2007 so there are no current appointees. He suggested that the chairmen of the two standing Transportation Committees--Representative Robin Weisz and Senator Gary A. Lee--be appointed to this committee.

Chairman Carlson announced that the Legislative Council is to appoint one member from each political party to serve on the Advisory Commission on Faith-Based and Community Initiatives. He said the current appointees are Representative Bette Grande and Senator Tim Mathern.

Chairman Carlson announced that the copies of the proposed committee structure had been delivered, so the Council would return to a discussion of the appointments later in the meeting. He said the Council would be in recess while each of the caucuses met to be followed by a meeting of the majority and minority leaders.

The Council was in recess until 3:00 p.m. when Chairman Carlson reconvened the meeting. He said revised committee lists were being prepared so the Council would return to its consideration of appointments.

Chairman Carlson said he would entertain one motion for appointments to those entities for which there were no alternatives suggested. **It was moved by Representative Berg, seconded by Senator Stenehjem, and carried on a roll call vote that Representative Gerry Uglem and Senator Robert S. Erbele be appointed to the Committee on Protection and Advocacy, Representative Chet Pollert be appointed to the State Hospital Governing Body, Representative Bette Grande and Senator Tim Mathern be appointed to the Advisory Commission on Faith-Based and Community Initiatives, Senator Bill Bowman be appointed as the member of the Legislative Assembly on the Veterinary Medical Education Program Admissions Committee at Kansas State University, and Representative Robin Weisz and Senator Gary A. Lee be appointed to the Multistate Highway Transportation Agreement Cooperating Committee.** Voting in favor of the motion were Representatives Carlson, Berg, Boucher, Kaldor, Meyer, Mueller, Pollert, and Skarphol and Senators Dever, Flakoll, Heitkamp, Holmberg, O'Connell, Stenehjem, and Wardner. There were no negative votes.

It was moved by Representative Berg and seconded by Senator Dever that Representative Skarphol and Senator Wardner be appointed to the Information Technology Advisory Committee. It was moved by Representative Boucher, seconded by Representative Mueller, and defeated on a roll call vote that the motion be amended to replace Representative Skarphol with Representative Kaldor. Voting in favor of the motion were Representatives Boucher, Kaldor, Meyer, and Mueller and Senators Heitkamp and O'Connell. Voting against the motion were Representatives Carlson, Berg, Pollert, and Skarphol and Senators

Dever, Flakoll, Holmberg, Stenehjem, and Wardner. Chairman Carlson then called for a roll call vote on the motion to appoint Representative Skarphol and Senator Wardner to this committee, and **the motion carried.** Voting in favor of the motion were Representatives Carlson, Berg, Boucher, Kaldor, Meyer, Mueller, Pollert, and Skarphol and Senators Dever, Flakoll, Heitkamp, Holmberg, O'Connell, Stenehjem, and Wardner. There were no negative votes.

It was moved by Representative Berg and seconded by Senator Dever that Representative Lawrence R. Klemin and Senator Dave Nething be appointed to the Uniform Laws Commission. It was moved by Senator O'Connell, seconded by Representative Kaldor, and defeated on a roll call vote to amend the motion to replace Senator Nething with Senator Triplett. In the discussion that followed, Representative Berg said the majority party should represent the state when there is only one appointment from each chamber. Senator Heitkamp questioned whether the idea of proportionate representation is consistently followed. Representative Boucher said he understands that when there is only one appointment, the appointee will be from the majority party, but he said when there are several legislators on a committee, the representation should be proportionate. Senator Stenehjem said there is more interest in some committees than in others, and because legislators' choices are recognized when making committee appointments, the proportions on the different committees will differ. Senator Dever noted that Senator Nething is Chairman of the Senate Judiciary Committee, and he said that position should be given recognition when making appointments to the Uniform Laws Commission. Chairman Carlson called for a roll call vote on the motion to amend, and voting in favor of the motion were Representatives Boucher, Kaldor, Meyer, and Mueller and Senators Heitkamp and O'Connell. Voting against the motion were Representatives Carlson, Berg, Pollert, and Skarphol and Senators Dever, Flakoll, Holmberg, Stenehjem, and Wardner. Chairman Carlson then called for a roll call vote on the motion to appoint Representative Klemin and Senator Nething to the Uniform Laws Commission, and voting in favor of the motion were Representatives Carlson, Berg, Boucher, Kaldor, Meyer, Mueller, Pollert, and Skarphol and Senators Dever, Flakoll, Heitkamp, Holmberg, O'Connell, Stenehjem, and Wardner.

ATTORNEY GENERAL'S OPINION

Chairman Carlson announced that the Council would discuss the Attorney General's opinion regarding the constitutionality of Section 10 of House Bill No. 1015, which provided the Budget Section of the Legislative Council has authority to approve or reject a plan to construct or remodel state correctional facilities. He said he believes the Correctional Facility Review Committee should continue with its study. In

response to a question from Representative Kaldor as to whether the result of the study would be a recommendation to the next legislative session, Representative Carlson said there are several options that are open, and a decision will have to be made after consultation with the Attorney General and the Legislative Council staff.

In response to a question from Representative Kaldor, the director said there is a presumption of constitutionality that follows all legislative enactments and it takes four of the five Supreme Court justices to declare an Act of the Legislative Assembly unconstitutional. He said an Attorney General's opinion does not have the force of law to declare an Act unconstitutional, and the Attorney General was very careful in his opinion to state that he believes that if a court were to rule on this matter it would determine that subsection 8 of Section 10 of House Bill No. 1015 is unconstitutional. Therefore, the law is still in effect, and an Attorney General's opinion does not strike down the statute.

In response to a question from Senator Heitkamp, the director said although an opinion of the Attorney General does not have the force and effect of law, there is a 1946 Supreme Court decision that says that people who follow an Attorney General's opinion are protected and cannot be held personally liable if they are following the advice of the Attorney General.

In response to a question from Senator Flakoll, the director said a decision by the Supreme Court is final and would supersede the Attorney General's opinion on the same subject.

In response to a question from Representative Kaldor, the director said the relevance of the 1946 Supreme Court decision in this situation is complicated by the fact that legislators have immunity when acting in their legislative capacities.

In response to a further question from Representative Kaldor, Representative Carlson said one result of this decision could be a special session to make a final decision regarding correctional facilities.

In response to a question from Representative Mueller, the director said the only timeline in the law is June 1, 2008, when the Correctional Facility Review Committee is required to forward three concepts, along with a recommendation for one of the three concepts, to the Emergency Commission. Representative Boucher said the Legislative Council represents the Legislative Assembly during the interim, and he believes the Legislative Council should act in a responsible manner in this matter. Representative Berg said legislators are pledged to uphold the constitution, and he believes it is necessary to support the position of the Attorney General. He said the portion of the law that is the focus of the Attorney General's opinion is the language that provides for approval by the Budget Section of one of the concepts for construction of new correctional facilities.

It was moved by Representative Berg and seconded by Senator Heitkamp that any recommendation from the Emergency Commission regarding correctional facility concepts be received by the Budget Section for informational purposes only rather than for approval or rejection under subsection 8 of Section 10 of 2007 House Bill No. 1015. In response to a question from Representative Meyer, Representative Pollert said plans are to proceed with the study assigned to the Correctional Facility Review Committee. In response to a question from Representative Mueller, Representative Carlson said the Budget Section does not have to take action as the law is permissive and does not require action. Representative Berg said consideration might be given at some time in the future to amend the constitution to allow more flexibility during the interim but until then he believes there is a need to support the spirit of the Attorney General's opinion. In response to a question from Senator Dever, Representative Carlson said he believes it would be a mistake to ignore the Attorney General's opinion. He said it is unknown what will happen at the end of this study. Chairman Carlson called for a roll call vote on the motion, and **the motion carried**. Voting in favor of the motion were Representatives Carlson, Berg, Boucher, Kaldor, Meyer, Mueller, Pollert, and Skarphol and Senators Dever, Flakoll, Heitkamp, Holmberg, O'Connell, Stenehjelm, and Wardner. There were no negative votes.

LEGISLATIVE BRANCH APPLICATIONS PROJECT

Chairman Carlson recognized Mr. Jim Gienger, Enterprise Solutions, Inc., the project manager of the legislative applications replacement project. Mr. Gienger introduced Mr. Christopher Clark and Ms. JoAnn Toporski, PTC, the contractor for the legislative applications replacement project.

Mr. Gienger reviewed the progress on the Statement of Work since the Legislative Council meeting in May. He said in his opinion the revised Statement of Work addresses the issues raised and discussed at that meeting. He said the principal issues were the scope of the project, which has been defined to address the issues concerning fiscal notes, monitors, digital recordings, and the training plan. He said the timeline is spread out over the next 16 months and additional details have been added. He said the review cycle has been clarified and feature function sessions have been added at the beginning of the delivery process which will allow further refinements of the features and functions, revision of the deliverable, a second session for review, and then a third review is available before reaching the acceptance stage. He said he is very confident the vendor can deliver this project on time and within budget.

Representative Skarphol said Stage 2 of Phase II provides for 25 modules to be developed over the same time period and Stage 3 provides for integrating the modules. He said he is concerned over whether PTC has allocated sufficient staff for producing so much within the limited time period. Representative Carlson said he has three concerns--whether the solution will give us what we want, whether it will be on time, and whether it will be within budget.

Mr. Clark said PTC is an \$860 million company with over 5,000 employees. He said PTC has implemented much larger projects and developed solutions around the world. He said PTC has evaluated the requirements of the North Dakota legislative branch, has evaluated the fixed fee project, and has determined that this project can be completed on time and within budget. He said PTC would not have agreed to enter a contract if PTC did not think it could deliver the solution on time and within budget.

Representative Skarphol said his concern about this project is that it may fail. He inquired whether PTC would be willing to develop three to five modules, with the integration, to show that PTC has the ability to provide the interfaces before proceeding with the rest of the project. Mr. Clark said PTC has been successful on projects since 1982.

Representative Skarphol said his suggestion is that PTC develop three to five modules (deliverables), develop the message cues and event triggers, and demonstrate the success of the deliverables by September 30, 2007, before being authorized to proceed with the remainder of Phase II. Mr. Clark said PTC demonstrated what it could do during the Proof of Concept whereby it demonstrated different programs and their links in September 2006. He said to introduce another type of Proof of Concept could affect the timeline and the cost for the entire project.

Mr. Gienger said two Proof of Concepts were delivered by PTC. One was the demonstration of products and their interrelationships in September 2006 and the other was the conference committee system during the 2007 legislative session. He said the Proof of Concept PTC delivered in September demonstrated three to five items related to bill drafting and that cost about \$200,000.

Representative Skarphol emphasized this is the opportunity to ensure that the project is successful. He said all that is being asked is that PTC develop three to five modules and show that they can work together. Mr. Clark said PTC will look at the cost of providing this Proof of Concept, the impact on the timeline for the remainder of Phase II, and the impact on Phase II.

Senator Heitkamp inquired as to the insurance that protects the legislative branch if the project does not work. Representative Skarphol said 85 percent of the cost of a deliverable is paid when the deliverable is delivered, and the remaining 15 percent is paid when the deliverable is accepted. Mr. Clark said the Global Services Agreement between PTC and the state of North Dakota approved by the North Dakota Attorney

General and North Dakota Risk Management office provides that PTC is responsible if the project does not work as a result of material defects. Representative Berg said Representative Skarphol has proposed that 75 percent be paid upon delivery of a module, then 10 percent upon acceptance, and the remaining 15 percent at the end of successful completion of the contract. Mr. Clark said PTC is open to discussing the terms of the contract, even though the 85 percent-15 percent payment method was initially agreed-upon and that was used to develop the contract price.

Representative Kaldor asked about the difference between a material defect versus lack of acceptance. Mr. Clark said the difference basically is what does not work versus what does not meet the buyer's criteria.

Representative Carlson inquired whether PTC can deliver this project within budget and on time. Mr. Clark said PTC will deliver this project on budget and to the state's satisfaction.

Mr. Mark Molesworth, Enterprise Project Manager, Information Technology Department, responded to a question from Representative Skarphol concerning whether the state has the ability to end the contract with PTC if the state decides to stop the project. Mr. Molesworth said the Global Services Agreement between PTC and the state of North Dakota provides that PTC is entitled to receive payment for deliverable items furnished and any subsequent deliverable items for which PTC has already commenced work. He said he would recommend inclusion of liquidated damages such as the cost to operate the existing system on the mainframe.

Mr. Clark said he understands that the suggestions are (1) to develop three to five modules along with their message cues and event triggers and demonstrate this by the end of September and (2) to revise the pricing structure to a 7.5 percent, 10 percent, and 15 percent retainage. He said these items would need to be reviewed by PTC executives to determine the impact on meeting timelines and on cost.

Representative Boucher inquired what would be acceptable. The director said the Legislative Council controls the payment of the 85 percent upon delivery and controls the determination of acceptance. He said a situation occurred during Phase I when a deliverable provided by PTC was not acceptable on delivery. PTC was requested to revise that deliverable, PTC revised the deliverable, the deliverable was then determined "delivered," and PTC was paid for 85 percent of the price, and after revisions between delivery and acceptance PTC was paid the remaining 15 percent of the price. He said Mr. Gienger, the project manager, made the determination that what was "delivered" was not acceptable and returned that product to PTC for revisions, determined when the revised product was "delivered," and determined the point at which the

product was accepted. The director said he is very concerned if this project is delayed any further.

Representative Carlson inquired as to the decision that needs to be made at this meeting. Mr. Gienger said the Legislative Council should authorize the chairman to sign the Statement of Work so work can start today.

It was moved by Representative Skarphol, seconded by Senator Stenehjem, and carried on a roll call vote that the Legislative Council move forward with the legislative applications replacement project, that the Legislative Council chairman sign the Statement of Work with the understanding that PTC is to involve the Information Technology Department personnel with Legislative Council staff. Representative Carlson emphasized that what is wanted is a successful project to be delivered within budget and on time. Mr. Gienger said he will take responsibility for involving the Information Technology Department personnel with the project. Voting in favor of the motion were Representatives Carlson, Berg, Boucher, Kaldor, Meyer, Mueller, Pollert, and Skarphol and Senators Dever, Heitkamp, Holmberg, O'Connell, Stenehjem, and Wardner. Voting against the motion was Senator Flakoll.

COMMITTEE STRUCTURE

Chairman Carlson announced that the Council would return to its consideration of a proposed interim committee structure. A copy of that proposed committee structure is attached as Appendix B. Chairman Carlson reviewed the proposed committee structure, committee by committee, and announced the chairman and vice chairman of each committee.

Representative Boucher said some of the committees are very critical and he believes the membership should be more balanced between the two political parties. He said he understands with 10 majority members and seven minority members on the Legislative Council, the majority party is going to have more chairmanships than the minority party. However, he said, the minority party does not have any chairmen who are not members of the Legislative Council and all of the legislators who are not on the Council who are chairmen of interim committees are members of the majority party. Representative Boucher said the Taxation Committee and the Education Committee both have disproportionately small memberships representing the minority party. Senator Flakoll said committee preferences play a part in these assignments, and seniority is also considered. Senator Heitkamp noted that most of the legislators who are not on the Council who are named committee chairmen are from Fargo or Mandan. Chairman Carlson said the criteria for selection of chairmen was based on experience and expertise. He said Senator Tony Grindberg is one of the few

experts in the Legislative Assembly when it comes to workforce issues and Representative Bette Grande has considerable experience in the area of employee benefits. He said the choice of a Mandan legislator to head the Education Committee was because the interim Education Committee has not been chaired by a member of the House of Representatives for many years. Representative Boucher expressed concern and disappointment that some members of the minority party were not selected as he believes they have more expertise than the legislators selected to chair committees. Chairman Carlson noted that several of the interim committees, including the Judicial Process Committee, the Long-Term Care Committee, the Public Safety Committee, and the Transportation Committee all have more minority members than their proportion in the Legislative Assembly. **It was moved by Representative Berg, seconded by Representative Skarphol, and carried on a roll call vote to approve the interim committee structure as presented.** Voting in favor of the motion were Representatives Carlson, Berg, Pollert, and Skarphol and Senators Dever, Flakoll, Holmberg, Stenehjem, and Wardner. Voting against the motion were Representatives Boucher, Kaldor, Meyer, and Mueller and Senators Heitkamp and O'Connell.

OTHER BENEFITS

Chairman Carlson announced that he plans to call a meeting of all interim committee chairmen within the next month. He suggested the meeting be held on Tuesday, July 10, 2007, beginning at 1:00 p.m.

It was moved by Senator O'Connell, seconded by Representative Meyer, and carried on a voice vote that the Legislative Council continue to use the St. Alexius employee assistance program for members of the Legislative Assembly.

It was moved by Senator Flakoll, seconded by Senator Stenehjem, and carried on a roll call vote that the Council approve the *Supplementary Rules of Operation and Procedure of the North Dakota Legislative Council*. Voting in favor of the motion were Representatives Carlson, Berg, Boucher, Kaldor, Meyer, Mueller, Pollert, and Skarphol and Senators Dever, Flakoll, Heitkamp, Holmberg, O'Connell, Stenehjem, and Wardner. There were no negative votes. **It was moved by Senator Stenehjem, seconded by Representative Mueller, and carried on a voice vote that the meeting be adjourned.** Chairman Carlson adjourned the meeting at 5:20 p.m.

John D. Olsrud
Director

[ATTACH:2](#)