

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday, September 1, 2009
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Jerry Klein, Chairman, called the meeting to order at 1:00 p.m.

Members present: Senators Jerry Klein, John M. Andrist, Tom Fischer, Layton W. Freborg, Joan Heckaman, Tracy Potter; Representatives Stacey Dahl, Chuck Damschen, Jim Kasper, George J. Keiser, Kim Koppelman, Blair Thoreson, Francis J. Wald, Lonny Winrich

Members absent: Representatives Wesley R. Belter, Randy Boehning, Duane DeKrey, Mary Ekstrom, Joe Kroeber, Jon Nelson, Dwight Wrangham

Others present: Lawrence R. Klemin, State Representative, Bismarck

See [Appendix A](#) for additional persons present.

It was moved by Senator Fischer, seconded by Senator Potter, and carried on a voice vote that the minutes of the previous meeting be approved as distributed.

Committee counsel reviewed the [Supplementary Rules of Operation and Procedure of the North Dakota Legislative Management](#) for the 2009-10 interim.

AGRICULTURE COMMISSIONER

Chairman Klein called on Mr. Douglas Goehring, Agriculture Commissioner, for testimony ([Appendix B](#)) relating to dairy rules adopted by the Agriculture Commissioner and carried over for consideration from the June committee meeting.

Mr. Goehring said one of the concerns from the previous committee meeting related to authority of the Agriculture Commissioner to license dairy farms. He said producers of raw milk are required to have a permit under the Pasteurized Milk Ordinance in North Dakota Century Code Section 4-30-36. He said updating the rules was requested by the federal Food and Drug Administration (FDA) because many of them were outdated. He said without updating these rules, the state may be jeopardizing North Dakota producers' ability to ship Grade A milk across state lines.

Representative Wald asked when federal regulators asked North Dakota to update the dairy rules. Mr. Wayne Carlson, Program Manager, Livestock Services, Department of Agriculture, said the FDA reviews state dairy rules approximately every three years. He said about three years ago, the FDA requested an update to North Dakota dairy rules. He said the Dairy Division began working on the rules

update at that time and the rules presented at the June meeting were the result of those efforts.

Senator Klein said he believes North Dakota considers legislation every session to update references to the Pasteurized Milk Ordinance issued by the FDA and to update statutory provisions. Mr. Carlson said that is correct and the FDA allows time for states to make these updates and recognizes that the North Dakota Legislative Assembly only meets every two years.

Representative Koppelman inquired about how interstate commerce issues affect dairy regulation. Mr. Carlson said states are required to be in compliance with FDA requirements to allow interstate shipment. He said very little of the milk produced in North Dakota is not involved in interstate commerce.

Representative Kasper asked whether the department received concerns about the rules updates from milk producers. Mr. Carlson said the department made the rules available and notified producers and received no comments from producers or processors.

Senator Andrist asked whether there is an overlap of inspection functions between the State Department of Health and the Department of Agriculture on dairies. Mr. Carlson said the Department of Agriculture is the inspection authority for dairy producers, and he is not aware of the State Department of Health inspecting dairy farms.

Senator Potter asked whether the rules would prohibit small producers from engaging in local activities such as producing yogurt for sale to a local cooperative. Mr. Carlson said small producers are not prohibited from local operations under the rules.

SUPERINTENDENT OF PUBLIC INSTRUCTION

Chairman Klein called on Mr. Bob Rutten, Director of Special Education, Department of Public Instruction, for testimony ([Appendix C](#)) relating to a rule adopted by the Superintendent of Public Instruction. He said the rule adopted allows schools exceptions to the requirement that initial evaluations of eligibility for special education services must be completed within 60 days of the request for evaluation. He said one exception allows an extension of the evaluation time for extreme weather conditions and the other exception allows an

extension when evaluators are not available to conduct the evaluation within the 60-day period.

Mr. Rutten said under a 2006 rule of the United States Department of Education (34 CFR 300.301) under the Assistance to States for the Education of Children With Disabilities Act, when a request has been made for an initial evaluation to determine if a child is a child with a disability, the initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation. He said the federal rule allows states the option to adopt exceptions to the rule relating to particular state circumstances. He said the department discussed appropriate exceptions with concerned parties and reviewed several possibilities for exceptions. He said the department concluded that extreme weather is an appropriate exception for North Dakota, with the likelihood of harsh winter conditions or flooding. He said in some smaller school districts adequate staff availability to conduct evaluations can be a problem and an exception based on unavailability of evaluators was deemed appropriate.

Representative Koppelman asked whether the determination of when extreme weather exists is a local decision similar to calling off school in bad weather conditions. Mr. Rutten said he believes the Department of Public Instruction would treat extreme weather under the exception in the same fashion as calling off school in extreme weather conditions and that school districts are now required to notify the department of school closings due to weather conditions.

Committee counsel said it is foreseeable that arguments may develop about whether flooding is included in the exception for "extreme weather" and it may be useful to include in the committee minutes a statement of whether the Department of Public Instruction believes "extreme weather" includes flooding. Mr. Rutten said the Department of Public Instruction believes flooding is included in "extreme weather" under the rule because flooding is a direct consequence of extreme weather.

ADMINISTRATIVE RULES COMMITTEE - BACKGROUND MEMORANDUM

Chairman Klein called on committee counsel for presentation of a memorandum entitled [Administrative Rules Review - Background Memorandum](#).

In discussion of the portion of the memorandum relating to publication and distribution of the North Dakota Administrative Code, committee counsel said the state spends approximately \$45,000 per biennium in printing and mailing costs for the Administrative Code. He said there are 78 free subscriptions provided to county auditors, Supreme Court justices, district court judges, and certain state agencies. He said the number of paid subscribers has declined to 23. He said it may be worth investigating the feasibility of eliminating publication of the paper copies of the Administrative Code and providing

subscribers a quarterly CD-ROM containing the entire updated Administrative Code plus the quarterly Administrative Rules Committee supplements showing the changes to rules with overstrike and underscore. He said he believes the CD-ROM would be a better product for users and that it could be produced at a much lower cost to the state. He said if the committee would like to investigate that possibility, he could survey subscribers to determine whether they would be agreeable to a CD-ROM version instead of the paper copy version. Senator Andrist said if a substantial savings to the state could be achieved, it would be appropriate to just make the change. Committee counsel said he has not discussed this idea with information technology staff, and it would be necessary to get further information, including when the change would be feasible, what the potential cost-savings might be, and the effect on subscription costs. He said he would obtain information and provide it to the committee at the next committee meeting.

AGENCY STANDARDS NOT ADOPTED AS RULES STUDY

Chairman Klein called on committee counsel for presentation of a background memorandum entitled [Legal Status of Agency Application of Standards That Have Not Been Adopted as Administrative Rules - Background Memorandum](#). Committee counsel said the North Dakota Supreme Court on numerous occasions has found rules to be invalid if not adopted in accordance with the Administrative Agencies Practice Act. He said Representative Lawrence R. Klemin introduced the bill that resulted in the study directive and Representative Klemin could explain the concerns that led him to introduce the bill.

Chairman Klein called on Representative Klemin for comments ([Appendix D](#)) relating to the committee study. He said he introduced 2009 House Bill No. 1280 to provide that an administrative agency could not apply standards from other than state or federal law to the regulated community unless the agency had adopted those standards as administrative rules. He said the fiscal note prepared for the bill as introduced estimated a cost of \$1 million per biennium for the next two bienniums in legal staff costs to write administrative rules and review current rules. He said the estimated costs in the fiscal note were the primary reason the bill was changed to a study directive, and this is one of the issues the study should address.

Representative Klemin said he introduced the bill after he was contacted by stockbrokers and other licensees of the Securities Commissioner with concerns that they are required to comply with certain standards for licensing and registration which are not contained in North Dakota law or administrative rules. He said a review of the North Dakota Administrative Code reveals that the Securities Commissioner has adopted very few administrative rules. He said it

appears the Securities Commissioner applies the standards of the North American Securities Administrators Association, but those standards have not been adopted as statutory law or administrative rules in North Dakota. He said it appears clear from decisions of the North Dakota Supreme Court that such standards are invalid and it would be inappropriate to expect an individual licensee to incur the cost of a court challenge to the validity of the standards. He said it appears appropriate for the Legislative Assembly to study and take appropriate action on this issue.

Representative Kasper said he agrees this is an important issue to study. He said there is a current issue with regard to indexed annuities and whether they are subject to insurance or securities regulation.

Representative Keiser said the National Conference of Insurance Commissioners has huge resources and power in the regulator arena. He said it is important for the legislature to understand how the association dictates policy and rulemaking to states. He said these are good reasons to understand and investigate this issue.

Senator Potter said he had an issue during the recent legislative session with standards applied by the State Fire Marshal which are not in law or rules.

Representative Koppelman said it should be determined how many instances exist in which standards from other sources have been adopted by reference in statute or rules. Representative Klemin said he believes the State Building Code has incorporated the provisions of the Uniform Building Code by reference. Chairman Klein requested committee counsel to seek information on this issue.

Representative Koppelman said another issue with regard to adoption of standards by reference is the incorporation of future changes. He said he believes there is a legal issue with adopting future changes of another entity. Committee counsel said adoption of future changes by statute or by rule would be an unconstitutional delegation of legislative authority. He said when known standards are adopted the delegation issue is not a problem. He said if it is attempted to adopt future changes, then the legislature or agency is giving its authority to make law or rules to another entity. Committee counsel said adoption of future changes by reference also would violate a provision of the Constitution of North Dakota

which specifically allows incorporation by reference of future federal income tax law changes but does not allow adoption of future changes to any other laws, rules, or standards.

Committee counsel said it will be necessary to identify agencies that apply standards that have not been adopted as administrative rules. He said because such standards are not published in the statute or rules, it will be necessary to survey agencies to determine whether such standards exist. He said when agencies that may be in this situation are identified, they will be scheduled to address the committee on a rotation basis.

IMPOSITION OF CRIMINAL AND CIVIL SANCTIONS BY ADMINISTRATIVE RULES STUDY

Chairman Klein called on committee counsel for presentation of a memorandum entitled [Imposition of Criminal and Civil Penalties, Fines, Fees, and Forfeitures by Administrative Rules - Background Memorandum](#). Committee counsel said the most significant principle regarding administrative rules is that legislative power to make laws cannot be delegated except in controlled circumstances. He said because of this standard, imposition of criminal or civil sanctions by rule would be subject to challenge as an unlawful delegation of legislative authority unless the Legislative Assembly has provided by statute sufficient guidelines for an agency to apply sanctions by rule. He reviewed several rules provisions and said it appears consideration of statute and rules provisions will be necessary, but not all agencies would be affected. He said as agencies are identified, they will be contacted and scheduled to address the committee regarding these issues on a rotation basis.

No further business appearing, Chairman Klein adjourned the meeting at 3:05 p.m.

John Walstad
Code Revisor

ATTACH:4