

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

## ADMINISTRATIVE RULES COMMITTEE

Thursday, September 13, 2012  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Representative Kim Koppelman, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives Kim Koppelman, Bill Amerman, Randy Boehning, Bill Devlin, Robert Frantsvog, Joe Kroeber, David Monson, Mike Schatz, Blair Thoreson, Dwight Wrangham; Senators John M. Andrist, Layton Freborg, Joan Heckaman, Jerry Klein, Margaret Sitte

**Members absent:** Representatives Tracy Boe, Duane DeKrey

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

**It was moved by Representative Devlin, seconded by Representative Kroeber, and carried on a voice vote that the minutes of the June 14, 2012, meeting be approved as distributed.**

### STATE PROCUREMENT OFFICE

Chairman Koppelman called on Ms. Christy Smith, Procurement Officer II, State Procurement Office, Office of Management and Budget, for testimony ([Appendix B](#)) relating to rules adopted by the State Procurement Office. Ms. Smith distributed copies of prepared testimony, including [Exhibits A](#) and [B](#). Senator Heckaman and Representative Koppelman raised questions regarding creation of an exemption from competitive bidding requirements for insurance contracts through an independent broker. Ms. Smith said she would obtain and provide to the committee further information on this rules provision.

In response to a question from Senator Klein regarding work activity center contracts, Ms. Smith said an open house will be held on October 10, 2012, to initiate the process of work activity center contract awards. She said the Office of Management and Budget (OMB) was awaiting the effective date of these rules before holding this event.

In response to a question from Senator Sitte, Ms. Smith said a work activity center is defined in North Dakota Century Code (NDCC) Section 25-16.2-01 to be a facility licensed by the Department of Human Services which is located in the state and operated by a nonprofit corporation organized for the primary purpose of employing and providing rehabilitative activities for individuals with physical disabilities, developmental disabilities, or chronic mental illnesses.

### LABOR COMMISSIONER

Chairman Koppelman called on Mr. Tony J. Weiler, Commissioner, Labor Department, for testimony ([Appendix C](#)) relating to rules adopted by the Labor Commissioner.

Mr. Weiler said no objections were received by oral or written comment regarding these rules. He said rules of the Labor Commissioner are required by law to be provided to a broader range of entities than other agency administrative rulemaking notices. He said NDCC Section 34-06-04 requires notice of proposed rules to associations with statewide membership primarily focused on representing business or labor interests.

Representative Frantsvog said it appears an interpretation could be changed on the use of the salary or fee basis determinations under the federal Fair Labor Standards Act and asked how anyone would know if that has occurred. Mr. Weiler said federal agencies do a good job of defining salary or fee basis and disseminating information.

Representative Kroeber asked if the banking industry mortgage professionals affected by the rule are paid on an hourly basis. Mr. Weiler said these employees are not paid on an hourly basis and are generally paid a salary plus a commission. He said under existing provisions, employers would have made these individuals stop working at 40 hours per week to avoid the requirement to pay overtime. He said these employees are highly motivated to generate commissions and would prefer to work the additional hours without the overtime requirement in order to earn additional commissions.

Representative Devlin said there is a question of what happens if at the end of the year these individuals treated as highly compensated individuals end up earning less than \$100,000. He asked if the employer has to go back and pay overtime because the individual did not qualify as a highly compensated individual. Mr. Weiler said that would be his interpretation and that there would be circumstances in which the employer has to go back to pay overtime because the employee does not reach the level for the definition of a highly compensated individual.

Representative Koppelman asked why these changes were done by rules rather than introducing legislation for consideration. Mr. Weiler said he considered the options and ultimately believed the

overtime exemptions would fit better in rules provisions.

## BOARD OF NURSING

Chairman Koppelman called on Dr. Constance Kalanek, Executive Director, Board of Nursing, for testimony ([Appendix D](#)) regarding rules of the board.

Dr. Kalanek said the fee change is the basic reason for these rules. She said the Board of Nursing has not had a fee increase since 2003.

Senator Heckaman asked if the Board of Nursing has a budget carryover each year. Dr. Kalanek said the board is not running in the red. She said as fees come in, some are designated for current use and some are deferred for use later in the budget cycle.

Representative Schatz inquired about the frequency of final payment of nursing student loans. Dr. Kalanek said completion of repayment for students varies from about 30 to 50 per year.

## STATE BOARD OF PHARMACY

Chairman Koppelman called on Dr. Mark Hardy, Assistant Executive Director, State Board of Pharmacy, for testimony ([Appendix E](#)) regarding rules of the board. Representative Kroeber asked if he is correct in understanding there were no negative comments from practitioners on the first dose review and telepharmacy rules provisions. Dr. Hardy said that is correct, and no negative comments were received.

Senator Heckaman said North Dakota Administrative Code (NDAC) Section 61-09-01-01(6) provides for replenishment of prescription drugs for an ambulance service upon the request of a responsible individual. She asked for the definition of a responsible individual. Dr. Hardy said that would be an individual known to be in a responsible position with the ambulance service.

Senator Heckaman said it appears we are becoming less stringent with ambulance services and prescription drug acquisitions.

Representative Amerman said he is uncomfortable with an ambulance service buying drugs, including from a wholesaler. Dr. Hardy said the reason for existence of the rules provision is that an ambulance service may use up its supply of a prescription during an ambulance run. He said the director or medical director is usually a medical doctor who orders and stores prescription drugs for dispensing to ambulance services as needed.

Mr. Howard Anderson, Executive Director, State Board of Pharmacy, said ambulance services wanted authority to use either the medical director or a pharmacy to resupply prescription drugs. He said previously only a pharmacy was allowed to refill prescriptions for ambulance services. He said the change provides more flexibility for the ambulance service. He said if an ambulance makes a run to a Bismarck hospital and has used up its supply of a prescription drug, it makes sense for the ambulance to

resupply that drug before returning to its home base. He said if the ambulance returns home at a late hour and on a weekend, it may be unable to refill the prescription supply for several days and may lack a drug needed on another ambulance run to Bismarck or wherever the call takes the ambulance.

Mr. Anderson said it is important to recognize that North Dakota has the most robust telepharmacy program in the country. He said the program has developed to a point that allows hospitals to have a pharmacist available on a 24-hour-a-day basis, which allows the hospital pharmacy to refill prescription orders for ambulance services.

Mr. Hardy said he inadvertently omitted two changes made by the board as described in his testimony. He said the changes are in NDAC Section 61-07-01-14(3), where the word "physician" should be replaced with the word "practitioner" and in subsection 4 of the same section, where the year "2013" should be replaced with the year "2015".

**It was moved by Representative Monson, seconded by Senator Klein, and carried on a roll call vote that the Administrative Rules Committee approve the amendment proposed by the State Board of Pharmacy to NDAC Section 61-07-01-14.** Representatives Koppelman, Amerman, Boehning, Devlin, Frantsvog, Kroeber, Monson, Schatz, Thoreson, and Wrangham and Senators Andrist, Freborg, Heckaman, Klein, and Sitte voted "aye." No negative votes were cast.

## NORTH DAKOTA RACING COMMISSION

Chairman Koppelman called on Mr. Winston Satran, Director, North Dakota Racing Commission, for testimony ([Appendix F](#)) relating to rules adopted by the commission.

## SECURITIES COMMISSIONER

Chairman Koppelman called on Mr. Michael F. Daley, Deputy Commissioner, Securities Commission, for a presentation of testimony ([Appendix G](#)) relating to rules adopted by the commission.

Mr. Daley said the Securities Commissioner has had regulatory authority since 1959. He said North Dakota Securities Commissioners have used the North American Securities Administrators Association (NASAA) policies as guidelines in reviewing securities offerings for four decades or more. He said under this rulemaking process these policies are being adopted as formal administrative rules in North Dakota because concerns have been expressed from some quarters that the use of the policies is not of the same legal status as formal rules in North Dakota.

Mr. Daley said no individual at the hearing submitted comments on these rules. He said there is no anticipated impact to the regulated community. He said the adoption of these rules on a formal basis does not result in a change in policies.

Representative Koppelman thanked the Securities Commissioner for taking this action. He said by adopting these rules, they now have the force and effect of law in North Dakota.

Chairman Koppelman asked the Code Revisor if the rules are properly adopted when specific dates are included in the rule. The Code Revisor said it is proper to adopt policies by reference and to specify an effective date. He said if no effective date is included in an adoption by reference, that could be interpreted as an unlawful delegation of rulemaking authority to the entity that makes those policies. He said when a date certain is adopted, it clarifies exactly what version of the policy is being adopted. He said if future policy changes are made, the Securities Commissioner would have to amend the rules to update the references to include those future changes.

Chairman Koppelman called on Mr. Garry Pierce for comments ([Appendix H](#)) regarding the proposed rules of the Securities Commissioner. Mr. Pierce said he suggests the rules of the Securities Commissioner be amended to provide that the Commissioner may recommend but not require investors to comply with suitability standards.

Representative Koppelman asked if Mr. Pierce attended the public hearing on the rules. Mr. Pierce said he did not attend the hearing or submit comments because he did not become aware the hearing was held until after it was too late to attend or submit comments.

Mr. Daley said the Securities Commissioner continues to have concerns that suitability standards should apply for investors in nonpublicly traded real estate investment trusts (REITs). He said over the last six months or so, several media articles have appeared regarding potential dangers to investors from nonpublicly traded REITs as investment vehicles. He said it is significant to recognize that nonpublicly traded REITs based in North Dakota are not the only cause for concern. He said the Securities Commissioner regulates all such entities in the United States when they make offerings in North Dakota. He said all states have some form of registration for these investments.

Representative Koppelman asked what level of regulation all 50 states apply. Mr. Daley said all 50 states require registration. He said some states have more stringent requirements than others. He said the North Dakota Securities Commissioner can deviate from the guidelines adopted and has agreed to do so on certain REITs. He said the Commissioner could agree to alter guidelines in the future if so requested.

### STATE SEED DEPARTMENT

Chairman Koppelman called on Mr. Ken Bertsch, Seed Commissioner, State Seed Department, for testimony ([Appendix I](#)) relating to rules adopted by the Seed Commission.

Mr. Bertsch pointed out an error in NDAC Section 74-04-01-02, appearing on page 142, in which the phrase "not grade" appears but should appear as "no grade". The Code Revisor said the mistake is an error in transcription by the Legislative Council, and the correction will be made without the need for a motion and vote by the committee.

### DEPARTMENT OF HUMAN SERVICES

Chairman Koppelman called on Ms. Julie Leer, Legal Advisory Unit, Department of Human Services, for testimony ([Appendix J](#) and [K](#)) on medical services rules and licensing of family foster homes for adults.

Representative Frantsvog said in the medical services rules relating to the scope of medical assistance in NDAC Section 75-02-02-08, coverage is extended by amendment for physical therapy and occupational therapy services provided by a practitioner of the "healing arts." He asked if healing arts would include acupuncture. Ms. Leer said she is not certain but does not think acupuncturists would prescribe physical therapy. She said she will check into that question and provide information.

Senator Sitte said she questions whether these rules can result in overregulation of home care providers. Ms. Leer said she does not think that is the case. She said the Department of Human Services tries to be specific in terminology in rules to distinguish between a "facility" or "home" setting.

Senator Sitte said the rules are amended to exclude coverage under the medical assistance program for any service provided to increase fertility or to evaluate and treat infertility. She questioned whether that exclusion is appropriate in all circumstances. Ms. Cindy Sheldon, Medical Services Division, Department of Human Services, said the department has never covered these services. She said the language is being added to the rules to incorporate that policy.

### BOARD OF PSYCHOLOGIST EXAMINERS

Chairman Koppelman called on Dr. Margo Adams Larsen, President, State Board of Psychologist Examiners, for comments on rules of the State Board of Psychologist Examiners carried over from the June 14, 2012, committee meeting. Dr. Adams Larsen said correspondence ([Appendix L](#)) from Mr. Bill Peterson, Assistant Attorney General for the State Board of Psychologist Examiners, provides a proposed rule revision of NDAC Section 66-02-01-15 and information on some of the background discussions of interested parties leading to the rules revision. She described the discussions among interested parties since the June 14 committee meeting.

Dr. Adams Larsen said Dr. Anne Dilenschneider expressed several concerns at the June 14 committee meeting. Dr. Adams Larsen said she has had discussions with Dr. Dilenschneider. She said one result of those discussions is that the website of the

State Board of Psychologist Examiners has been updated to include information Dr. Dilenschneider suggested should be provided there.

Chairman Koppelman said he has received notice from Senator Judy Lee that she is satisfied with the rules revision offered by the State Board of Psychologist Examiners.

In response to a question from Representative Koppelman, Dr. Adams Larsen said the revised NDAC Section 66-02-01-15 is intended as a substitute for that section as it appeared in the rules originally proposed. She said the remainder of the rules as originally proposed would be unaffected and are intended for adoption without further changes.

In response to a question from Chairman Koppelman, Mr. Alex Schweitzer, Department of Human Services, said the department finds the proposed rules revision offered for committee consideration to be acceptable and workable.

**It was moved by Senator Heckaman, seconded by Representative Monson, and carried on a roll call vote that the Administrative Rules Committee approve the revised version of NDAC Section 66-02-01-15 offered by the State Board of Psychologist Examiners and that the rules as adopted by the board be amended accordingly and approved.** Representatives Koppelman, Amerman, Boehning, Devlin, Frantsvog, Kroeber, Monson, Schatz, Thoreson, and Wrangham and Senators Andrist, Freborg, Heckaman, Klein, and Sitte voted "aye." No negative votes were cast.

## **NEWSPAPER NOTICE PUBLICATION COSTS**

Chairman Koppelman called on Mr. Roger Bailey, Executive Director, North Dakota Newspaper Association, for information ([Appendix M](#)) relating to publication of legal notices in North Dakota newspapers. He said public notice rates for North Dakota newspapers are established by OMB. He reviewed the costs for notice in 52 official county newspapers. He said the cost increases approved in July 2012 were modest.

Mr. Bailey pointed out that NDCC Section 28-32-10 provides for administrative rulemaking notices to be printed in one column with a depth of from three inches to four inches. He said it has become difficult to fit the necessary notice information in a four-inch column.

Chairman Koppelman called on the Code Revisor for presentation of a bill draft [[13.0168.01000](#)] relating to the newspaper column depth for notice of administrative rulemaking. The Code Revisor said the bill draft was prepared after Mr. Bailey pointed out the difficulty of fitting a notice within the four-inch maximum depth provided by statute. The Code Revisor said it appears there is no significant reason to limit the maximum depth of a newspaper notice, and it is more important to assure that the agency is able to provide enough information to give the public

adequate notification. He said the bill draft was prepared to provide that the newspaper notice must be one column wide and with a minimum depth of three inches and that no maximum depth is provided.

**It was moved by Senator Andrist, seconded by Representative Devlin, and carried on a roll call vote that the bill draft removing the depth of a newspaper notice of administrative rulemaking be approved and recommended to the Legislative Management.** Representatives Koppelman, Amerman, Boehning, Devlin, Frantsvog, Kroeber, Monson, Schatz, Thoreson, and Wrangham and Senators Andrist, Freborg, Heckaman, Klein, and Sitte voted "aye." No negative votes were cast.

Chairman Koppelman said for several years it has been required, for agency rulemaking implementing recent legislation, that the agency provide notice of rulemaking to each legislator whose name appeared as a sponsor or cosponsor of the legislation being implemented. He said it would be useful for members of the committee to receive notice that rules are being proposed to implement recent legislation. He asked the Code Revisor to prepare a bill draft for consideration at the next committee meeting. The Code Revisor said members of the committee already receive notice of all rulemaking activity. He said it may be less burdensome for agencies to require the rulemaking notice to identify any recent legislation being implemented by rules rather than requiring a separate notice to committee members. He said he can work with the Chairman on developing a bill draft for committee consideration at the December meeting. Chairman Koppelman requested the Code Revisor to proceed accordingly.

## **DEPARTMENT OF HUMAN SERVICES**

Chairman Koppelman called on Ms. Leer who said she has further information on the question raised by the committee on fertility treatment under the medical services plan. Ms. Leer said after further investigation, she determined that the North Dakota state plan prohibits funding for fertility services. She said the state plan would have to be amended for funding to be prohibited for the services. She said fertility treatments are quite expensive. She said in most of the states in the country, it appears that fertility treatments are a noncovered expense.

Senator Andrist said he is aware that fertility treatments can be a bottomless pit of expense. He said he is glad the rules prohibit funding for these treatments.

## **RULEMAKING STATISTICS**

Chairman Koppelman called on the Code Revisor for presentation of a memorandum entitled [Administrative Rulemaking Statistics 2011-12](#). The Code Revisor said at the end of each interim, statistics are examined to determine the volume of administrative rules made by agencies. He said for this interim, the statistics are unusual. He said the

number of sections of rules amended, created, or repealed has declined substantially, but the number of pages of those rules has increased.

### **BOARD AND COMMISSION MEMBER COMPENSATION**

Chairman Koppelman called on the Code Revisor for presentation of a memorandum entitled [Board and Commission Member Compensation](#). The Code Revisor said determining a uniform policy for compensation for board and commission members has been a difficult issue of legislative consideration for many years. He said studies of the issue have been undertaken and have not reached a workable result. He said the memorandum is intended to provide the current daily compensation rate for members of various boards and commissions for which compensation is set by law.

The Code Revisor said for many years compensation for members of boards and commissions was linked by a statutory cross-reference to statutory legislator interim committee meeting compensation. He said as a result of these statutory links, it became very difficult for the Legislative Assembly to increase legislator compensation for interim committee meetings. He said the problem was that changing that amount would have also increased a very large number of board and commission members' compensation. He said the Legislative Assembly in 1997 removed 37 board and commission compensation statutory links to the rate for legislator interim committee compensation. He said since that time, legislator interim committee meeting compensation has been increased in several stages, and some board and commission member compensation rates have been increased to similar levels at various times. He said the memorandum reviews the rates provided by statute for boards and commissions, by rules for boards and commissions, and identifies boards and commissions receiving a rate set by that board or commission without rulemaking.

Senator Sitte requested fiscal analysis be obtained for changes to compensation rates that would affect all boards and commissions.

Representative Schatz said he believes boards and commissions should not receive a higher daily compensation than the amount legislators receive for interim committee meetings.

Senator Andrisc agreed and said perhaps the way to make these provisions uniform is to allow boards and commissions to set their own compensation rates, which cannot exceed the rate for legislator attendance for interim committees.

Representative Wrangham said it may be useful to require a minimum level of compensation for public appointees, such as individuals appointed to boards and commissions by the Governor.

Senator Klein said the decision on board and commission member compensation must be flexible

for each board's circumstances. He said he would favor making each board or commission come to the Legislative Assembly for statutory authority and be required to show justification for increases.

Chairman Koppelman requested the Code Revisor to prepare a bill draft for committee consideration to establish a maximum compensation rate for board and commission members. The Code Revisor said he will work with the Chairman to develop a bill draft for committee consideration.

Representative Devlin said he believes board and commission member compensation is acceptable the way it has developed under statutory and rules provisions.

Senator Heckaman said she also thinks it is acceptable that compensation rates are established in the manner they have been approved by legislation.

Senator Andrisc asked if state employees serving on a board or commission are allowed to collect salary and per diem for service. The Code Revisor said he will seek information on that question.

### **COMMITTEE DISCUSSION**

Representative Devlin asked the Chairman to try to tie the December meeting in with organizational session activities.

Senator Heckaman said she hoped information would come back to the committee relating to procurement of insurance, heating fuels, and other products or services exempted from competitive bidding requirements under the rules of the State Procurement Office. She said she does not want these rules provisions to be a disadvantage to North Dakota businesses. She said the rules should be held until it can be determined that would not occur.

**It was moved by Representative Monson, seconded by Senator Heckaman, and carried on a roll call vote that the committee carry over consideration of NDAC Section 4-12-09-01(3)(o) and (p), relating to waiver of competitive bidding for purchase of heating fuels, cement, sand, gravel, road oil, and bituminous mix and contracts for insurance through an independent broker, agent, or contractor.** Representatives Koppelman, Amerman, Boehning, Devlin, Frantsvog, Kroeber, Monson, Schatz, Thoreson, and Wrangham and Senators Andrisc, Freborg, Heckaman, Klein, and Sitte voted "aye." No negative votes were cast.

Senator Andrisc said he continues to be concerned about the lack of skilled appraisers in the state. He said the committee reviewed rules adopted by the Board of Appraisers. He asked if there was any way the committee could communicate to the Board of Appraisers and the Real Estate Commission that the process should be improved. He said in the current process, an individual is required to train under a person who will be a competitor when the training is completed.

Representative Frantsvog said it would make sense for appraisers to go to Bismarck State College to be trained. He said the Industry, Business and

Labor Committee made that suggestion, but he does not know if any action was taken to follow through on the suggestion.

Chairman Koppelman asked the Code Revisor to forward a letter on behalf of the committee asking if any action is being taken to improve training for appraisers and to get more skilled appraisers into the field.

Representative Amerman said he is still concerned that ambulance services are able to purchase drugs directly from the wholesaler. Representative Koppelman said he does not believe the rule allows ambulance services to purchase from the wholesaler.

**It was moved by Senator Andrist, seconded by Representative Devlin, and carried on a roll call vote that the Chairman and staff of the Legislative Council be requested to prepare a report and to present the report to the Legislative Management.**

Representatives Koppelman, Amerman, Boehning, Devlin, Frantsvog, Kroeber, Monson, Schatz, Thoreson, and Wrangham and Senators Andrist, Freborg, Heckaman, Klein, and Sitte voted "aye." No negative votes were cast.

No further business appearing, Chairman Koppelman adjourned the meeting at 2:30 p.m.

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John Walstad  
Code Revisor

ATTACH:13