

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Thursday, December 15, 2011
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Kim Koppelman, Chairman, called the meeting to order at 10:00 a.m.

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

Member absent: Representative Bill Devlin

Others present: RaeAnn G. Kelsch, State Representative, Mandan

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

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

OFFICE OF MANAGEMENT AND BUDGET

Human Resource Management Services

Chairman Koppelman called on Ms. Laurie Sterioti Hammeren, Director, Human Resource Management Services, for testimony ([Appendix B](#)) relating to rules adopted by the division.

Senator Andrist said 2011 Senate Bill No. 2213 provided additional employee family sick leave for situations involving a serious health condition. He asked if serious health condition is defined in law. Ms. Hammeren said serious health condition is defined in North Dakota Century Code (NDCC) Section 54-52.4-01.

Senator Sitte said 2011 Senate Bill No. 2213 also allowed employees to take 10 percent of accrued sick leave for use as family sick leave. She asked if the accrued sick leave that may be used would include donated sick leave from other employees. Ms. Hammeren said an employee could use donated leave once the available 10 percent of personal accrued sick leave, under the family sick leave provision, is exhausted.

Representative DeKrey asked if the honor guard leave rule would allow employees to use less than a full day of honor guard leave. He said honor guard duty may require only an hour or two of leave. Ms. Hammeren said employers generally allow use of leave in one-half-hour increments.

Representative Koppelman said the portion of the rules providing for electronic filing of notice of appeal raises a question of whether there is a statewide policy on electronic filings. Ms. Hammeren said she is

not aware of a statewide electronic filings policy for notices. She said the rules address a situation involving Human Resource Management Services. Representative Koppelman suggested the Office of Management and Budget could encourage agencies to review and update provisions for electronic filing of documents and notices.

Risk Management Division

Chairman Koppelman called on Ms. Vicki Ableidinger, Claims Manager, Risk Management Division, for testimony ([Appendix C](#)) relating to motor vehicle accident review rules adopted by the division.

ATTORNEY GENERAL

Bureau of Criminal Investigation

Chairman Koppelman called on Mr. Phil Pfennig, Chief Agent, Bureau of Criminal Investigation, for testimony ([Appendix D](#)) relating to rules adopted by the bureau.

ADMINISTRATIVE RULEMAKING NOTICES

In discussion of notices of rulemaking provided by the Bureau of Criminal Investigation, Chairman Koppelman requested that the Legislative Council administrative rulemaking notices be provided by electronic mail to all members of the Legislative Assembly.

STATE DEPARTMENT OF HEALTH

Chairman Koppelman called on Mr. Bruce Pritschet, Long Term Care and CLIA Program Director, State Department of Health, for testimony ([Appendix E](#)) relating to nurse aide training, competency evaluation, and registry rules adopted by the department.

Mr. Pritschet said these rules were adopted as emergency rules effective July 1, 2011, to provide for no gap in administration after 2011 House Bill No. 1041 transferred the responsibility for nurse aide registry from the State Board of Nursing to the State Department of Health.

Senator Sitte said a nursing home resident she has spoken with complained that she could not understand the nursing home staff because of foreign accents and language of some staff members. She asked if there are any requirements for English proficiency for nursing home staff members.

Mr. Pritschet said the nursing home staff members must pass testing procedures that require a proficient English speaker. He said requests are received for waiver of the testing requirement for some foreign language speakers, but the waiver usually is not allowed.

Senator Sitte asked if North Dakota requires testing for hepatitis or other diseases for nursing home employees. Mr. Pritschet said no testing is required for hepatitis for nursing home staff.

Representative Koppelman said the rules provision on the hearing process for individuals on the nurse aide registry makes reference to the department's investigation process. He asked what is involved in gathering evidence. Mr. Pritschet said the department conducts an investigation of information from various sources before a hearing is held regarding registry status.

Representative Koppelman said North Dakota Administrative Code (NDAC) Section 33-43-01-23(5) has two sentences. He said the first sentence relates to conducting the hearing by an administrative law judge. He said the second sentence relates to information obtained in the investigation process. He said it appears the sentence relating to information obtained during the investigation should be placed earlier in the section, so it would not appear that the investigation is conducted after the hearing. Dr. Darleen Bartz, Section Chief, Health Resources Section, State Department of Health, said the investigation is conducted before the hearing. She said the language is included in the rule to require reporting evidence of abuse, neglect, or misappropriation of resident property to law enforcement as determined appropriate.

Representative Boehning said the rules refer to a required request for hearing. He asked what deadline applies to the request because it does not appear to be contained in the rules. Dr. Bartz said the deadline for a request for hearing is 30 days from the receipt of a letter from the department. She said the deadline is provided in the Administrative Code, and a notice of the deadline is included in the letter to the individual.

Representative Koppelman asked committee counsel if the rules could be carried over by the committee, in light of the limitation that emergency rules must become final rules within 180 days. Committee counsel said it may be questionable whether carrying over the rules would make them ineffective. He said NDCC Section 28-32-03 provides that an emergency rule is ineffective 180 days after its declared effective date unless first adopted as a final rule. He said he believes the statutory provision was written to require adoption by the agency as a final rule. However, he said, statutory changes that have been made after the statutory provision was adopted have delayed the effective date of rules until after review of rules by the Administrative Rules Committee. He said the meaning of the statutory provision may now be questionable.

Representative Koppelman said the State Department of Health could suggest additional amendments to the rules if the rules are not carried over by the committee. Committee counsel said that is correct if there are obsolete provisions or areas where statutory authority has changed. Representative Koppelman suggested that the State Department of Health consider requesting additional changes at the next meeting of the committee with regard to the 30-day deadline for hearing requests and moving the placement of language relating to investigation information reports to law enforcement.

STATE BOARD OF COSMETOLOGY

Chairman Koppelman called on Ms. Sue Meier, Board Administrator, State Board of Cosmetology, for testimony ([Appendix F](#)) relating to rules adopted by the board.

Senator Andrist said the curriculum for cosmetology in the rules requires study of several courses. He asked if it is possible to be licensed for just hairstyling. Ms. Meier said licensing is not allowed for only hairstyling, but it is possible to be licensed only for nail treatments or skin care. She said the board has discussed allowing licensing for only hairstyling, and she will let the board know that it may be worth looking at that possibility again. Senator Andrist said in western North Dakota there is a need for more licensed hairstylists and that might be possible if individuals could be licensed only for hairstyling.

Senator Sitte said it appears the rules are eliminating coursework on ethics. Ms. Meier said the board believes the classes on theory will include consideration of ethics issues.

Senator Klein said it appears the cosmetology course curriculum would have to be changed to allow licensing for only hairstyling. Ms. Meier said that is correct.

DEPARTMENT OF HUMAN SERVICES

Chairman Koppelman called on Ms. Julie Leer, Legal Services Division, Department of Human Services, for testimony ([Appendices G, H, I](#)) relating to three sets of rules adopted by the department.

Ms. Leer reviewed the prepared testimony on ratesetting for nursing home care.

Senator Sitte asked why the definition "depression" was changed in the rules. She said the revised definition seems more subjective. Ms. LeeAnn Thiel, Administrator of Medicaid Payment and Reimbursement Services, Department of Human Services, said the rules adopt a national assessment, and the definitions for the national assessment have been changed. Senator Sitte asked if the definition revisions are federally mandated, and Ms. Thiel said they are. Representative Koppelman asked what would happen if the state did not follow the federal requirements. Ms. Thiel said the state would have to design a new assessment methodology.

Representative Boehning said the rule appears to provide for a point system to determine depression levels. Ms. Thiel said there are scoring variables within categories based on severity.

In response to a question from Representative Koppelman, Ms. Thiel said the rules are intended to set up parameters for a payment system for basic care facilities. She said certification of facilities is a separate process through the State Department of Health.

Senator Sitte said it appears that payments to basic care facilities are higher if the resident is classed as depressed. She said it seems the subsidy method encourages classing residents as depressed. Ms. Thiel said the rules do not create incentives for classifying individuals as depressed.

Representative Frantsvog asked how often depression assessments are conducted. Ms. Thiel said depression assessments are made every three months for payment purposes.

Senator Sitte said it appears from the rules that rehabilitation payments are dropping. She said this seems to be the opposite of what we should do. Ms. Thiel said the point system is changed, but the changes would not reduce rehabilitation payments.

Ms. Leer reviewed the rules on ratesetting for basic care. She said the change to NDAC Section 75-02-07.1-14 was adopted as an emergency rule effective July 1, 2011.

Ms. Leer reviewed the prepared testimony relating to rules governing licensed child-placing agencies.

Representative Koppelman said a change was made in the child and family team meetings requirement in NDAC Section 75-03-36-37 which now requires quarterly meetings. Ms. Kelsey Bless, Independent Living and Licensing Administrator, Children and Family Services, Department of Human Services, said the change will require quarterly meetings for every child in foster care.

Representative Schatz said NDAC Section 75-03-36-16.1 is a new rule that would prohibit placing a child in an adoptive home if a person residing in the adoptive home has been the subject of a child abuse or neglect assessment. He asked if this means an individual cannot adopt a child if that individual has been accused of child abuse or neglect. Ms. Julie Hoffman, Children and Family Services, Department of Human Services, said the restriction would apply only if the child abuse or neglect assessment resulted in a decision of services required and, even in that case, the individual could complete therapy and qualify for adoption.

CARRYING OVER CONSIDERATION OF EMERGENCY RULES

During committee discussion of the possibility of carrying over consideration of rules adopted as emergency rules, committee counsel said the statutory provision on emergency rules provides that an emergency rule is ineffective 180 days after its

declared effective date unless first adopted as a final rule. He said this could create a problem, depending on how the phrase "first adopted as a final rule" is interpreted. He said if the phrase is interpreted to mean adopted by the agency, there would be no problem created by carrying over a rule. However, he said, if the phrase is interpreted to mean after approval by the Administrative Rules Committee, an emergency rule could be rendered ineffective during the time between meetings of the Administrative Rules Committee. Representative Koppelman requested committee counsel to prepare a bill draft for committee consideration to make clear that an emergency rule would not become ineffective during any time it is carried over for consideration by the Administrative Rules Committee.

EDUCATION STANDARDS AND PRACTICES BOARD

Chairman Koppelman called on Ms. Amy Martineck, West Fargo, to provide information on her experience with statutory and rules provisions governing out-of-state highly qualified teacher licensing. Ms. Martineck said she is employed as a special education teacher at West Fargo High School. She said this is her 12th year as a special education teacher.

Ms. Martineck said she graduated from the University of North Dakota and has been employed as a special education teacher at schools in Arizona and Colorado. She said in every state in which she has been employed as a teacher, she has found it very easy to find and complete teacher licensing requirements. She said that has not been the case in North Dakota.

Ms. Martineck said the Education Standards and Practices Board informed her she had to go back to school to complete additional coursework to receive a highly qualified status in special education. She said she just discovered this requirement in October and was informed that the deadline to complete the coursework is August 1, 2012.

Ms. Martineck said she completed a master's degree in special education this spring. She said the job she is doing at West Fargo High School is exactly the same job she has done for the last 12 years. She said completing a mathematics course for elementary education is a requirement she was told she had to meet. She said she sees nothing that an elementary education mathematics course would add to the skills she needs as a special education teacher. She said she took a reduction in pay of \$14,000 per year in moving from Colorado to North Dakota. She said to now have to pay more for additional education would be very discouraging and does not fit the family budget. She said she understood North Dakota would welcome returning young people but that has not been her experience.

Ms. Martineck said individual endorsements in separate fields of special education are required in

North Dakota. She said she does not know of any other state imposing that requirement. She said educational degrees from colleges and universities are not set up for individual endorsements. She said North Dakota seems to be discouraging qualified teachers from moving to the state.

Senator Heckaman asked whether, for purposes of obtaining a license in North Dakota, it is necessary to seek an endorsement in an individual area within special education. Ms. Martineck said North Dakota requires individual endorsements for intellectual, emotional, and learning disabilities.

Senator Andrist said North Dakota has approximately 50 state licensing agencies for professionals. He said most of these agencies have moved toward easing reciprocity requirements and providing credit for work experience. He asked if Ms. Martineck is allowed any credit for her work experience. Ms. Martineck said she was told her experience in special education teaching does not count for licensing purposes.

Chairman Koppelman called on Dr. Janet Welk, Executive Director, Education Standards and Practices Board, for information ([Appendix J](#)) on out-of-state highly qualified teacher licensing. Dr. Welk also distributed a copy of a letter from Mr. Ryan Sullivan ([Appendix K](#)) relating the difficulties he has experienced seeking his teaching license in Minnesota.

Dr. Welk said there is a separate issue regarding special education licensing which is that North Dakota has been a "categorical" state since 1976. She said in special education, categorical means the teacher has been prepared to work with children with disabilities in a specific area, such as intellectual disabilities, emotional disabilities, or learning disabilities. She said in states that are considered noncategorical, teachers are prepared in special education without a specific categorical background and allowed to work with all types of children with disabilities.

Dr. Welk said the issue of categorical requirements is more complex than originally thought. She said reporting requirements of the Department of Public Instruction will need to be changed, institutions of higher education special education programs may be altered, and current teachers with special education degrees will be affected. She said at the December 8, 2011, meeting, the Education Standards and Practices Board discussed the administrative rules process with the Attorney General's office. She said it was recommended that the board start the administrative rules process over because of changes that must be considered.

Representative Monson asked if Dr. Welk will recommend moving away from categorical licenses for special education in North Dakota. Dr. Welk said she would recommend that change. Representative Monson asked if this would allow an individual holding a bachelor's degree to teach the hearing disabled. Dr. Welk said that is an issue that has been discussed by the Education Standards and Practices Board.

Representative Monson asked about the August 1, 2012, education deadline Ms. Martineck was given. Dr. Welk said the federal rules allow three years to obtain additional education but require the state to monitor progress annually. She said the August 1 deadline requires demonstration of progress but is not the deadline completion of the requirements. She said she believes the two course requirements for Ms. Martineck will be waived.

Representative Koppelman said it appears federal requirements are involved in the additional education Ms. Martineck is to pursue. He said it does not appear she had to meet these requirements in other states where she has been employed as a special education teacher. Dr. Welk said the Education Standards and Practices Board is looking at why North Dakota has to meet these requirements. She said it appears these requirements apply in North Dakota because of categorical state status.

Senator Andrist said he is pleased Dr. Welk believes the requirements for Ms. Martineck will be waived. He said he hopes the Education Standards and Practices Board is working on rules that will incorporate more flexibility and provide credit for experience in other teaching settings.

Senator Heckaman asked if a special endorsement is required in North Dakota to teach individuals with autism. Dr. Welk said no special endorsement is required for autism, and under the national standards it is part of the special endorsement for intellectual or emotional disability.

Representative Koppelman said he was under the impression that 2011 House Bill No. 1270 made statutory changes to NDCC Section 15.1-13-20 which would make it easier for applicants licensed in other states to obtain licensing in North Dakota. He said he invited Representative RaeAnn G. Kelsch, Chairman, House Education Committee, to comment on the status of out-of-state teacher licensing after the 2011 legislation.

Representative Kelsch said she was a cosponsor of House Bill No. 1270. She said North Dakota has a need for additional teachers, and the 2011 legislation was intended to make licensing easier if applicants coming from another state are rated as highly qualified in another state. She said the bill was not intended to leave out special education teachers. She said the language of the bill applies to all teachers, including special education teachers. She said the statutory provision requires that the Education Standards and Practices Board shall grant a teaching license to an applicant who holds a regular teaching license or certificate from another state, subject to listed conditions. She said it has been her understanding that a statutory provision should supersede any conflicting rules provisions. She said the intent and statute are very clear, and licensing should proceed regardless of the provisions of the existing rules.

Representative Koppelman said it has been his understanding also that if there is a conflict between a

statute and rules provisions, the statutory provision would prevail. He asked committee counsel if that is a correct interpretation. Committee counsel said he cannot give an opinion on whether there is a conflict between the 2011 legislation and the existing administrative rules of the Education Standards and Practices Board. He said if there is a conflict between statutory provisions and administrative rules provisions, the statutory provisions are to be given effect, and the administrative rules are to be disregarded.

Representative Koppelman said if the Education Standards and Practices Board proceeds with a new rulemaking proceeding, it would probably be advisable to consider emergency rulemaking because of time concerns of licensees and applicants.

Chairman Koppelman called on Mr. Mike Bitz, Assistant Superintendent, Mandan Public School District, Mandan, for comments on the committee discussion. Mr. Bitz said he is an Education Standards and Practices Board member. He said the board thought the problem of licensing for out-of-state teachers was to conform the rules to the statutory provision. He said the board now has been advised that the rulemaking proceeding needs to be restarted. He said he is encouraged that perhaps the board can proceed with licensing without awaiting rules changes if the board can act under authority of the statutory provision.

Representative Koppelman asked Dr. Welk if she can revisit the issue on the current status of teacher licensing under the 2011 legislation and the existing and proposed rules with the Attorney General's office. She said she will do so, and it appears to her that the rule in the area of the two course requirements for Ms. Martineck is clearly in conflict with the statutory provision and could be waived.

Chairman Koppelman said he will request the Department of Public Instruction to address the Administrative Rules Committee at its next meeting regarding the rules it has on categorical licensing for special education teachers.

No further business appearing, Chairman Koppelman adjourned the meeting at 2:15 p.m.

John Walstad
Code Revisor

ATTACH:11