

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Thursday, December 12, 2013
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Bill Devlin, Chairman, called the meeting to order at 10:00 a.m.

Members present: Representatives Bill Devlin, Randy Boehning, Joshua A. Boschee, Robert Frantsvog, Brenda Heller, Ben Koppelman, Kim Koppelman, Mark S. Owens, Mike Schatz, Peter F. Silbernagel, Blair Thoreson, Nathan Toman, Robin Weisz; Senators John Andrist, Kelly M. Armstrong, Joan Heckaman, Jerry Klein, Connie Triplett

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

It was moved by Representative Thoreson, seconded by Representative Weisz, and carried on a voice vote that the minutes of the September 12, 2013, meeting be approved as distributed.

STATE BOARD OF ARCHITECTURE AND LANDSCAPE ARCHITECTURE

Chairman Devlin called on Ms. Bonnie Staiger, Executive Director, State Board of Architecture and Landscape Architecture, who provided prepared testimony ([Appendix B](#)) relating to rules adopted by the board.

In response to a question from Senator Andrist regarding licensing examinations, Ms. Staiger said licensing examinations are electronic and are not conducted by the board. She said applicants go to any center where the examination is offered to take the examination. She said an applicant may schedule the examination at any time. She said the board is notified if the applicant passes the examination.

Representative K. Koppelman asked why subdivision d is being removed from subsection 1 of North Dakota Administrative Code (NDAC) Section 8-01-01-01. Ms. Staiger said that provision related to a landscape architect advisory committee that was established before integration of landscape architects into the jurisdiction of the board. She said the advisory committee is not needed now that landscape architecture is under the board's authority.

Senator Triplett asked what the word "latter" in the last sentence of NDAC Section 8-02-01-01 refers to. Ms. Staiger said the word "latter" refers to the word "welfare" at the end of the preceding sentence.

Senator Triplett said the wording of the definition of "stamp" in subsection 21 of NDAC Section 8-02-01-02 seems to be missing a word. She said if the word "that" is inserted following the word "stamp", the sentence would be improved. Ms. Staiger said she would agree that the suggested change should be made. Committee Counsel said the change can be made as a grammatical correction.

Senator Triplett said in NDAC Section 8-06-01-02, below the images of stamps for architects and landscape architects there is a sentence that appears to be missing a word. She said if the word "and" is inserted following the word "designed", the sentence would be improved. Ms. Staiger said she agrees the change would improve the sentence. Committee Counsel said the change can be made as a grammatical correction.

Representative B. Koppelman inquired about the change in the rule regarding the number of meetings held during the year. Ms. Staiger said the change conforms to the statutory provision regarding meetings. She said in practice, the board normally meets four times per year, and there have been special meetings when the need arises.

Representative K. Koppelman asked why the licensing experience for board membership is increased from three years to five years by the rules. Ms. Staiger said the change reflects the belief of board members that a greater level of experience is required to be an effective board member.

Representative Weisz said the provision regarding a lapsed registration in NDAC Section 8-04-06-01 provides for reinstatement if application is made less than one year after the registration lapsed. He asked what happens if

a registrant has a lapsed registration for over one year. Ms. Staiger said that applicant would have to provide documentation of not practicing without a license during the lapsed period and submit the individual's national board records. Ms. Stacy Krumwiede, board staff, said a licensee is allowed one year to reinstate a lapsed registration. She said after one year, an applicant must resubmit an application and seek a new license number. She said it would also be required to provide disclosures of information and submit national board records.

Senator Triplett said the general authority and law implemented reference at the end of NDAC Section 8-01-01-01 refers to North Dakota Century Code (NDCC) Section 28-32-02.1, which does not exist. She said she believes the reference was intended to be subsection 1 of NDCC Section 28-32-02. Committee Counsel said the correction will be made.

GAME AND FISH DEPARTMENT

Chairman Devlin called on Mr. Kim Kary, Division Chief, Administrative Services Unit, Game and Fish Department, for testimony ([Appendix C](#)) relating to rules adopted by the department.

Representative Boehning inquired about display of a name of the owner for an ice castle fish house. Mr. Greg Power, Fisheries Division Chief, Game and Fish Department, said decals are acceptable to display the name of the owner, and it would not be necessary to paint the name on the structure.

NORTH DAKOTA LOTTERY

Chairman Devlin called on Mr. Randy Miller, Director, North Dakota Lottery, for testimony ([Appendix D](#)) relating to rules of the lottery.

Senator Klein said he understands these rules to be required to remain in compliance with membership status in the Multi-State Lottery Association. Mr. Miller said that is correct.

BUREAU OF CRIMINAL INVESTIGATION

Chairman Devlin called on Mr. Phil Pfennig, Chief Agent, Bureau of Criminal Investigation, Attorney General's office, for testimony ([Appendix E](#)) relating to rules of the bureau. In response to a question from Representative Devlin, Mr. Pfennig said it was necessary to create a fee for the concealed weapon license by emergency rule because a 2013 statutory change removed the cost of a concealed weapon license from statute and required the fee to be established by administrative rule. He said the law took effect on August 1, 2013, and the administrative rule for the fee needed to be changed by emergency rule effective August 1, 2013.

Senator Triplett said the law implemented reference for NDAC Section 10-12-01-09 refers to subsection 5 of NDCC Section 62.1-04-03, and she believes the correct reference would be subsection 10 of that section. Committee Counsel said that correction can be made as a technical correction.

In response to a question from Senator Triplett, Mr. Pfennig said that a person licensed to carry a concealed weapon in North Dakota who changes residence to a nonreciprocity state would be subject to invalidation of the North Dakota license.

Representative K. Koppelman asked if reciprocity has been achieved with the state of Minnesota for concealed weapons permitholders. Mr. Pfennig said the Attorney General's office continues to work on that issue, but it has not been resolved.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Ms. Arvy Smith, Deputy State Health Officer, State Department of Health, for testimony ([Appendix F](#)) relating to Food and Lodging Division license fee rules carried over from the September meeting of the Administrative Rules Committee.

Ms. Smith reviewed her prepared testimony and said at the previous committee meeting, the department discussed the suggestion from the House Appropriations Committee that the general fund appropriation authority for the new food and lodging licensing information data management system should instead be funded by fee increases. She said attached to her testimony is a copy of minutes from the House Appropriations Human Resources Division reflecting that discussion.

Representative B. Koppelman said it appears the system estimated costs have increased from \$110,000 to \$250,000, and it will be hard to approve the project when the cost has increased by this much since the last meeting. Ms. Smith said the department used the best estimate available during the planning for the 2013 legislative session. She said the most recent information the department has received is the system the estimate was based on has been a failure in some states and a better quality system may cost significantly more.

In response to a question from Senator Armstrong, Ms. Smith said recent news received by the department is that an upgrade may be needed in the original planning for the system. She said the department was made aware of possible shortcomings of systems in use in other states on which the estimate was based.

Mr. Kenan Bullinger, said the state of South Dakota spent a significant amount of money establishing a system and was very unhappy with the system after it was implemented. He said South Dakota gave up its system for a completely new system. He said the system now being instituted in South Dakota is in use in other states. He said the industry is happier with that new system, and consumers are able to access better information. He said the estimated cost of the new system being implemented in South Dakota is approximately \$280,000.

Senator Andrist asked if there is any assurance that the new system will work. Ms. Smith said software enhancements are always difficult, and it seems that costs rise as the project proceeds. Mr. Bullinger said his division is relatively small. He said the division recently was assigned to handle tanning facility and tattoo facility inspections. He said the software needed by his division would have to cover these facilities, but other states are more limited in function and do not cover these facilities. He said the system for his division needs to be more diverse than in other states.

Representative Owens said costs of the proposed upgrade are understandable. He asked if this system would be constructed by the staff of the State Department of Health. Mr. Bullinger said one of the department's information technology staff established the current program in 1995. He said the proposed new system would be an upgrade and probably would be done using an Information Technology Department project manager.

Representative Toman asked what would happen if the costs of the upgrade rise to exceed the anticipated fees from the rules changes. Ms. Smith said the department will have a point at which it cannot agree to enter a contract because the available funds would not be sufficient. She said there will be close scrutiny of the cost of an upgrade.

Representative B. Koppelman asked if the department finds that the revenue is not sufficient to do the upgrade project, would the department refund the fees collected. Ms. Smith said refunds would not be possible, and the collections would remain as operating funds for the 2015-17 biennium. She said the department would have to seek direction from the Legislative Assembly on how the funds would be used for that biennium.

Chairman Devlin called on Mr. Mike Rud, North Dakota Petroleum Marketing Association and North Dakota Retail Association, who said he and Mr. Rudie Martinson, Executive Director, North Dakota Hospitality Association, met with representatives of the State Department of Health regarding the proposal for fee increases. Mr. Rud said he thought the department could find the funding for the system upgrade within its budget. He said the organizations he represents do not support these fee increases to cover the cost of the project. He said the organizations he represents do support the system upgrade and would be happy to help seek general fund money for this project in 2015.

Senator Triplett asked how much additional money in fees the rules would impose for members of the organizations Mr. Rud represents. Mr. Rud said the cost would be approximately \$15 per year per retail establishment. Senator Triplett said that amount does not seem like enough cost to become concerned over considering the improvements with a new system. She said that would be a relatively minor cost to pass on to consumers.

Chairman Devlin called on Ms. Molly Howell, Immunization Program Manager, State Department of Health, for testimony ([Appendix G](#)) relating to release of immunization records to schools.

Chairman Devlin called on Mr. David Glatt, Chief, Environmental Health Section, State Department of Health, for testimony ([Appendix H](#)) relating to septage handling rules.

Representative Boehning asked why the state needs added revenue from the licensing fee increases for septic servicing companies. Mr. Glatt said assumption of the monitoring of this program will result in a large increase in new costs to the State Department of Health. Representative Boehning asked if there is a cost to owners and operators for training. Mr. Glatt said there will be no cost to owners and operators, and the department will provide training at no fee.

INSURANCE COMMISSIONER

Chairman Devlin called on Mr. Jeff Ubben, General Counsel, Insurance Department, for testimony ([Appendix I](#)) relating to boiler rules adopted by the Insurance Commissioner.

STATE BOARD OF PLUMBING

Chairman Devlin called on Mr. Brent Beechie, Chief Inspector and Secretary, State Board of Plumbing, for presentation of testimony ([Appendix J](#)) relating to rules of the board.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Ms. Julie Leer, Director, Legal Advisory Unit, Department of Human Services, for testimony relating to rules for the temporary assistance for needy families program ([Appendix K](#)), ratesetting for nursing home care ([Appendix L](#)), and family foster homes for children ([Appendix M](#)).

Senator Heckaman asked if an on-reservation foster care family moves outside of the reservation, would that family have to relicense with the state. Ms. Leer said that family would be required to relicense through the state.

Senator Andrist asked how long it would take to relicense a foster care family under the circumstances described by Senator Heckaman. Mr. Dean Sturn, Foster Care Services Division, Department of Human Services, said the time for relicensing would depend on the workload of the staff, but it should not take long. He said much of the information required for state licensing would be contained in the reservation licensing application.

Representative Weisz said in NDAC Section 75-03-14-05(7), there is a prohibition on cruel and unusual punishment. He said the provision prohibits physically strenuous work or exercise. He said strenuous work or exercise does not seem like cruel and unusual punishment. He said it is often considered good parenting to require young people to do strenuous work. Mr. Sturn said the provision prohibits strenuous work or exercise used solely as a means of punishment.

Representative Owens said NDAC Section 75-03-14-09 would allow a waiver from licensing if the proposed foster parents are relatives of a foster child. He said the provision provides that refusal to grant or revoke a waiver is not subject to appeal. He asked why no appeal would be allowed. Ms. Leer said if foster parents are not granted a waiver, they would have to seek a license, and in that case, there is a right to appeal.

Representative Schatz said he also questions the wisdom of the provision prohibiting strenuous work or exercise. Ms. Leer said crafting language to describe when strenuous work would constitute cruel and unusual punishment is difficult. She said the department would be amenable to suggestions to clarify the language. Representative Schatz said he would prefer to just eliminate the language about strenuous work or exercise.

Senator Heckaman suggested possibilities to reword the provision to eliminate the possibility for confusion regarding strenuous work or exercise.

Representative B. Koppelman said NDAC Section 75-03-14-04(7) eliminates a licensing condition providing that unmarried couples may not be eligible for licensure as foster parents. He asked why the provision is being eliminated. Mr. Sturn said the change is made to conform with a statutory change made about 10 years ago to eliminate the marriage requirement for foster parents, and this is the first update of rules since the statutory change was made.

It was moved by Representative B. Koppelman, seconded by Senator Andrist, and carried on a roll call vote that NDAC Section 75-03-14-05(7) be amended by removing language in subdivision b to eliminate paragraphs 1 and 2 and all language following "Cruel and unusual punishments are prohibited." Voting in favor of the motion were Representatives Devlin, Boehning, Frantsvog, Heller, B. Koppelman, K. Koppelman, Owens, Schatz, Silbernagel, Thoreson, Toman, and Weisz and Senators Andrist, Armstrong, Heckaman, Klein, and Triplett. No negative votes were cast.

Ms. Leer distributed copies ([Appendix N](#)) of a request by the Department of Human Services for an extension of time to create administrative rules regarding autism spectrum disorder waiver and the autism spectrum disorder voucher program regarding NDAC Article 75-03 and Chapter 75-04-06.

STATE BOARD OF VETERINARY MEDICAL EXAMINERS

Chairman Devlin called on Dr. John Boyce, Executive Secretary, State Board of Veterinary Medical Examiners, for testimony ([Appendix O](#)) relating to rules adopted by the board.

INFORMATION TECHNOLOGY DEPARTMENT

Chairman Devlin called on Mr. Sheldon Wolf, Director, North Dakota Health Information Technology, for testimony ([Appendix P](#)) relating to rules adopted by the North Dakota Health Information Network; attached to his testimony is a copy of a brochure prepared by the North Dakota Health Information Network to provide information to the public.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chairman Devlin called on Ms. Jan Murtha, Assistant Attorney General, representing the Public Employees Retirement System, for presentation ([Appendix Q](#)) of a request for suspension of rules. Ms. Murtha also provided a copy ([Appendix R](#)) of a notice of intent regarding the request to suspend the rules. She said 2013 House Bill No. 1452 suspended statutory provisions to which the rules are related. She said under the 2013 legislation, these rules would conflict with the statutory provisions during the period from October 1, 2013, through July 31, 2017.

It was moved by Representative Boehning, seconded by Representative Silbernagel, and carried on a roll call vote that the committee approve the suspension through July 31, 2017, of NDAC Sections 71-08-01-02, 71-08-01-03, 71-08-01-05, 71-08-02-01, and 71-08-02-02. Voting in favor of the motion were Representatives Devlin, Boehning, Frantsvog, Heller, B. Koppelman, K. Koppelman, Owens, Schatz, Silbernagel, Thoreson, Toman, and Weisz and Senators Andrist, Armstrong, Heckaman, Klein, and Triplett. No negative votes were cast.

STATE DEPARTMENT OF HEALTH

Chairman Devlin asked if there are any further discussion topics from committee members. There was a general discussion about concerns with the fees being imposed by the State Department of Health in the pending rules.

Chairman Devlin asked Committee Counsel to explain the authority of the Administrative Rules Committee to void administrative rules. Committee Counsel said the authority to void rules differs from the role of legislators to vote for approval or disapproval of legislative measures. He said for legislative measures, a legislator may vote for disapproval simply because the legislator does not like the provision. He said the Administrative Rules Committee was granted the authority to void rules in 1995, and the statutory provision makes clear that voiding of rules is only permitted for six specifically worded reasons under NDCC Section 28-32-18. He said of the six reasons, the only two that appear to have any applicability to the rules in question would be that there is a failure to comply with express legislative intent or that in adoption of the rule there has been arbitrariness and capriciousness. He said the phrase arbitrariness and capriciousness is a term that has been defined by courts and, in simple terms, means that the decision made to adopt the rules has no reasonable basis in facts that would justify the decision. He said the department has provided the background of legislative consideration and, if the committee considers voiding the fee increases, the role of the committee is to consider whether the department action is contrary to legislative intent or has no reasonable basis in facts.

It was moved by Representative Schatz and seconded by Representative Boehning that the Administrative Rules Committee void the fee rules adopted by the State Department of Health. After additional committee discussion, the question was called and **the motion failed**. Voting in favor of the motion were Representatives Boehning, Heller, B. Koppelman, and Schatz and Senators Andrist and Klein. Voting against the motion were Representatives Devlin, Frantsvog, K. Koppelman, Owens, Silbernagel, Thoreson, Toman, and Weisz and Senators Armstrong and Heckaman.

No further business appearing, Chairman Devlin adjourned the meeting at 3:30 p.m.

John Walstad
Code Revisor

ATTACH:18