

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Wednesday, June 11, 2014
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, Mike Schatz, Peter F. Silbernagel, Blair Thoreson, Nathan Toman; Senators John Andrist, Joan Heckaman, Connie Triplett

Members absent: Representatives Mark S. Owens, Robin Weisz; Senators Kelly M. Armstrong, Jerry Klein

Others present: Representative Marvin E. Nelson, member of the Legislative Management, was also in attendance.

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

It was moved by Senator Heckaman, seconded by Representative B. Koppelman, and carried on a voice vote that the minutes of the March 11, 2014, meeting be approved as distributed.

BOARD OF OCCUPATIONAL THERAPY PRACTICE

Chairman Devlin called on Ms. Marsha Waind, Board Member, Board of Occupational Therapy Practice, for testimony ([Appendix B](#)) relating to rules of the board carried over for consideration from the March committee meeting.

Ms. Waind said the committee concern was with regard to a rule change on requirements for licensure that would increase entry-level educational requirements from a bachelor's degree to a master's degree. She said the requirement of a master's degree for licensure will not apply to existing licensees. She said degree requirements are set by the Accreditation Council for Occupational Therapy Education, and the current requirement is completion of a master's degree to be eligible to sit for the certification examination. She said existing licensees who were able to sit for the examination with a bachelor's degree will not be affected by this change if they previously passed the examination. She said the master's degree requirement will apply for examinations taken after the rule change occurs.

HUMAN RESOURCE MANAGEMENT SERVICES

Chairman Devlin called on Ms. Laurie Sterioti Hammeren, Director, Human Resource Management Services, Office of Management and Budget, for testimony ([Appendix C](#)) regarding rules adopted by the Office of Management and Budget.

Representative K. Koppelman asked if there is identifiable fiscal impact under the tuition reimbursement program. Ms. Sterioti Hammeren said there appears to be no fiscal impact from the rule. Representative K. Koppelman said if an employee receives tuition reimbursement benefits from an agency and then transfers to another agency, it appears there would be a fiscal loss to the agency that provided reimbursement. Ms. Sterioti Hammeren said that has been considered, but it is believed that the agency to which the employee transfers receives the benefit of the educational assistance and the net effect to the state is a wash.

Representative Silbernagel asked how often it occurs that an employee who received tuition reimbursement transfers to another agency. Ms. Sterioti Hammeren said she does not recall any instance of such a transfer, but it may have occurred.

Senator Heckaman asked if training and tuition expenses are each agency's budget responsibility. Ms. Sterioti Hammeren said those expenses are part of the operating budget of agencies in cases of which she is aware.

Representative B. Koppelman asked if there should be a provision for an agency to repay another agency that paid for training when an employee transfers. Ms. Sterioti Hammeren said the division perceives no loss to the state in those situations, and the benefit of enhanced education remains in state government.

Representative K. Koppelman said his concern with fiscal impact is in regard to how costs of state government can grow. He said when training is gained and an employee changes agencies, there is going to be a cost increase somewhere.

Senator Triplett suggested a grammatical change on the final sentence of North Dakota Administrative Code (NDAC) Section 4-07-19-07. She said the sentence begins "An employee that", and she believes grammatically should be "An employee who". Ms. Sterioti Hammeren said that change would be acceptable. Committee Counsel said the change will be made as a grammatical correction.

BOARD OF ADDICTION COUNSELING EXAMINERS

Chairman Devlin called on Ms. Kristie Spooner, President, Board of Addiction Counseling Examiners, for testimony ([Appendix D](#)) regarding rules adopted by the board.

Representative Silbernagel suggested it might be appropriate to allow reciprocity for counselors from states with equal or higher standards. Ms. Spooner said the board has attempted to balance the interests of recruiting counselors to North Dakota and providing that adequate standards are in place for licensure as an addiction counselor in North Dakota. She said the board has tried to make it easier to gain licensure in North Dakota.

Representative Schatz asked if western North Dakota is in a crisis situation from lack of sufficient numbers of licensed addiction counselors. Ms. Spooner said most private agencies in western North Dakota are able to recruit addiction counselors. She said the Department of Human Services has trouble recruiting. She said the western part of North Dakota has not had a high number of providers in the past, and the rapid growth in caseload of counselors in the west has created difficulties. Representative Schatz said law enforcement and court officials in western North Dakota are frustrated with the lack of addiction counseling services. He said there have been individuals released from custody who should probably have received counseling, and some releases have resulted in suicides. He said improvements are needed in availability of counseling services.

Senator Heckaman said the rules allow the board to assess costs of disciplinary proceedings against the licensee. She asked how extensive the costs might be. Ms. Spooner said the board had an instance in which the cost to the board was about \$20,000 to resolve one disciplinary action. She said the board is a small licensing board and does not have adequate resources to absorb disciplinary costs of that magnitude. She said the board is also seeing increases in the number of ethical complaints.

Senator Triplett asked if the greater ability of private agencies to recruit addiction counselors is because they pay more to counselors. Ms. Spooner said that may be an issue, but in her employment with the Department of Human Services, the counseling program became more difficult to work in. She said she took a reduction in pay to go to private agency employment.

Representative Frantsvog asked if a person from another state with lower standards moves to North Dakota, would that person have to gain additional education to qualify for licensing. Ms. Spooner said the person would have to obtain additional education to meet the North Dakota requirement, and there is also a consideration regarding continuing education credit from experience in another state.

Representative K. Koppelman asked if Ms. Spooner can provide hours of experience requirements for other states. Ms. Spooner said she would provide the information, and the information provided is attached to her testimony.

STATE ELECTRICAL BOARD

Chairman Devlin called on Mr. James Schmidt, Executive Director, State Electrical Board, for testimony ([Appendix E](#)) relating to rules of the board.

Senator Triplett asked for a description of how the State Electrical Board develops a consensus and makes decisions representing the electrical industry. Mr. Schmidt said the board advertises consideration of changes to rules and obtains feedback from the industry. He said board members try to gauge the majority opinion and what is the industry consensus before making decisions on rules changes.

Representative K. Koppelman said in NDAC Section 24-02-01-19(13)(d), it is stated that inspection fees will be calculated with the minimum of no less than \$50. He said the language is redundant in stating "minimum of no

less" and he would suggest removing the words "of no less". Mr. Schmidt said he would agree the change would be appropriate. Committee Counsel said the change would be made as a grammatical correction before the rules are published in the North Dakota Administrative Code.

Representative K. Koppelman said there will be impact to the regulated community in these rules. He asked how the board determines how much the changes would impact the cost of a new home. Mr. Schmidt said the board does not determine an average cost for a new home from rules changes. He said in the present rules changes, the net effect is probably a reduction in cost for new construction. He said allowing use of metal cable in the same applications that now require metal raceways in some structures would be a labor-saving item. He said North Dakota is the only state that does not allow metal cable. He said on a single new construction project in Fargo, use of metal cable would save a significant amount in labor costs.

Senator Triplett said the next-to-last paragraph in NDAC Section 24-02-01-02 allows waiver of electrical regulations by special permission from the Executive Director. She asked how often waivers are granted. Mr. Schmidt said waivers are not granted very often. He said sometimes a standard code can have "gray" areas. He said conditions may arise that have not been anticipated by the code, and this authority allows flexibility for the board to address these problems.

STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

Chairman Devlin asked for a representative of the State Board of Registration for Professional Engineers and Land Surveyors to provide testimony on the rules of the board. No representative was present.

NORTH DAKOTA RACING COMMISSION

Chairman Devlin called on Mr. Gunner laCour, Director, North Dakota Racing Commission, for testimony ([Appendix F](#)) relating to rules of the commission.

Mr. laCour reviewed his prepared testimony. He said the rules would add authorization for the Tote-X wager in pari-mutuel pools. His testimony describes the wager methodology.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Ms. Julie Leer, Director, Legal Advisory Unit, Department of Human Services, for testimony relating to rulemaking activity of the department.

Ms. Leer said NDAC Section 75-03-17-15 was carried over for consideration from the previous committee meeting because of committee concerns about staff-to-child ratios due to concerns of affected providers. She said the department met with the groups having concerns and agreed to make changes to the rule ([Appendix G](#)) to satisfy those concerns. She said the rule as revised is proposed by the Department of Human Services with agreement of the concerned parties.

It was moved by Representative Frantsvog, seconded by Representative Silbernagel, and carried on a roll call vote that the committee agree with the Department of Human Services on the amendment to NDAC Section 75-03-17-15 as proposed to the committee. Representatives Devlin, Boehning, Boschee, Frantsvog, B. Koppelman, K. Koppelman, Schatz, Silbernagel, Thoreson, and Toman and Senators Andrist, Heckaman, and Triplett voted "aye." No negative votes were cast.

Ms. Leer presented a copy ([Appendix H](#)) of a request by the Department of Human Services for an extension of time to adopt rules for home and community-based services under the service payments for elderly and disabled (SPED) program and the Medicaid waiver for the aged and disabled program and expanded SPED.

It was moved by Representative K. Koppelman, seconded by Senator Triplett, and carried on a voice vote that the extension of time until October 1 be approved.

Ms. Leer presented testimony ([Appendix I](#)) of the Department of Human Services on medical services program rules. Senator Heckaman said the rules contain a reference to dental services by a public or private nonprofit provider. She asked what is included in that group of providers. Ms. Maggie D. Anderson, Executive Director, Department of Human Services, said governing federal regulations use this description of providers to separate them from private for-profit clinics.

Ms. Leer reviewed the testimony ([Appendix J](#)) of the Department of Human Services regarding changes to eligibility for Medicaid and children's health insurance program rules. She said the rules were adopted as emergency rules effective January 1, 2014.

Representative K. Koppelman asked if the state is obligated by federal law to fund mandates under the Affordable Care Act. Ms. Anderson said states have much less flexibility than before the Affordable Care Act.

Ms. Leer reviewed the testimony ([Appendix K](#)) of the Department of Human Services regarding ratesetting for basic care facilities.

Ms. Leer reviewed the testimony ([Appendix L](#)) of the Department of Human Services relating to ratesetting for providers of services to foster care group homes and residential child care facilities and licensing of group homes and residential child care facilities.

Ms. Leer presented testimony ([Appendix M](#)) of the Department of Human Services regarding an autism spectrum disorder voucher program and an autism services waiver and eligibility for intellectual disabilities and developmental disabilities case management services.

STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

Representative K. Koppelman asked if a motion is needed to carry over consideration of the rules of the State Board of Registration for Professional Engineers and Land Surveyors rules. Committee Counsel said a motion is not required, and there is a statutory provision that automatically carries over consideration of rules if a representative of the adopting agency is unable to appear at the meeting when the rules are scheduled for consideration. He said the rules will be carried over to the September meeting.

STATE WATER COMMISSION

Chairman Devlin called on Ms. Michelle Klose, Assistant State Engineer, State Water Commission, for testimony ([Appendix N](#)) regarding rules of the commission.

Representative Nelson asked a series of questions relating to water issues and the rules adopted by the State Water Commission. Several members of the commission's staff provided information in response to questions.

State Water Commission staff provided a description of determinations of sovereign lands status and navigable water status and the role of the Department of Trust Lands and State Water Commission in these determinations. It was pointed out that the definition of navigable waters in NDAC Section 89-10-01-03 removes reference to certain bodies of water. The reason expressed for removing references to these bodies of water is the potential for confusion in that these bodies have been determined to be navigable waters, either by court decision or through other means. The listing of bodies of water is not intended to be an exhaustive list of the navigable waters in the state, but having the list in the definition of navigable waters has the potential to mislead readers to think water not on the list has been determined not to be navigable waters, which would be an incorrect conclusion.

Senator Triplett said it may be useful to retain or create a list of the waters in the state that have been determined to be navigable and, if so, whether the determination was made by court decision or otherwise.

Ms. Jennifer L. Verleger, Special Assistant, Attorney General's office, said questions of navigable status of waters are sometimes subject to reinterpretation. She said a recent Montana court decision concluded that it may be inappropriate to designate an entire river as navigable and that status may need to be determined for segments of a river.

Representative Thoreson inquired about the new rule in NDAC Section 89-03-01-10.2 relating to temporary water permit fees. He asked why the temporary fees were included. Mr. Jon Patch, Director, Water Appropriations Division, State Water Commission, said two performance audits of the commission recommended establishing temporary water permit fees. He said temporary permit applications have increased from approximately 200 per year to more than 600 per year. Ms. Klose said the estimates for the temporary permit fees are included in the fiscal note attached to the testimony of the commission.

Chairman Devlin called on Mr. Pete Hanebutt, Director of Public Policy, North Dakota Farm Bureau, for comments on navigable waters status. Mr. Hanebutt said the Farm Bureau has a major concern at the national level of how navigable water is defined. He said if North Dakota hinges its definition on federal determinations, it could lead to unwanted impact.

BOARD OF COUNSELOR EXAMINERS

Chairman Devlin called on Ms. Constance Hofland, Board of Counselor Examiners, for testimony ([Appendix O](#)) of the board.

Senator Triplett said she believes there is a typographical error in NDAC Section 97-02-01-02, in which the phrase "practica of internships" should read "practica or internships". Ms. Hofland said she believes that is an error. Committee Counsel said the error will be corrected in the rule.

Senator Triplett said the disciplinary actions rule in NDAC Section 97-02-02-01 states that action "may" be taken by the board upon finding of unprofessional conduct. She asked why it would be discretionary for the board to take action in cases of unprofessional conduct rather than mandatory. Ms. Hofland said the language was phrased to be consistent with the statutory language in North Dakota Century Code (NDCC) Section 43-47-07.

Representative K. Koppelman said the statutory provision seems to require some kind of disciplinary action be imposed. He said the rule seems to allow the board an option of taking no action because of use of the word "may".

Ms. Hofland said she believes the board would agree to replace the word "may" with the word "must" in this section.

It was moved by Representative K. Koppelman, seconded by Representative Silbernagel, and carried on a roll call vote that the committee agree with the Board of Counselor Examiners to replace the word "may" with the word "must" in the introductory paragraph of NDAC Section 97-02-02-01(1). Representatives Devlin, Boehning, Frantsvog, Heller, K. Koppelman, Schatz, Silbernagel, Thoreson, and Toman and Senators Heckaman and Triplett voted "aye." No negative votes were cast.

Chairman Devlin called on Dr. Steven Hundley for a presentation ([Appendix P](#)) relating to a suggested change to the rules of the Board of Counselor Examiners.

Representative K. Koppelman asked if Dr. Hundley suggested this change to the Board of Counselor Examiners. Dr. Hundley said he made the suggestion, but it came too late in the hearing process for change so he hopes this committee and the board could agree to add this change to the rule.

Ms. Hofland said the Board of Counselor Examiners discussed this issue with Dr. Hundley. She said she believes this continuing education credit could be approved under the existing language of the rule.

Representative K. Koppelman asked if the Board of Counselor Examiners supports the suggested change. Ms. Hofland said she cannot consent on behalf of the board because the board has not voted on the issue.

Senator Triplett said in the fourth line from the bottom of NDAC Section 97-02-01.1-08 is a typographical error showing the word "continuted", which should be "continued". Committee Counsel said the correction will be made in that rule.

DEPARTMENT OF COMMERCE

Chairman Devlin called on Mr. Justin Dever, Manager, Office of Innovation and Entrepreneurship, Department of Commerce, for testimony ([Appendix Q](#)) relating to department policy on employer-paid costs of training or educational courses for employees.

Committee Counsel said the policies presented by the Department of Commerce are not administrative rules. He said the statutory provision on employer-paid tuition in NDCC Section 54-06-33 provides that an agency adopting these policies is required to submit the policies to the Office of Management and Budget for review and comment and to submit the policies to the committee for approval. He said these rules would not go into the North Dakota Administrative Code, but the statute requires approval by the committee, which means it would be necessary to have a motion of approval and a roll call vote.

It was moved by Representative Thoreson, seconded by Representative K. Koppelman, and carried on a roll call vote that the committee approve the policies adopted by the Department of Commerce relating to employer-paid costs of training or educational courses. Representatives Devlin, Boehning, Boschee, Frantsvog, Heller, B. Koppelman, K. Koppelman, Schatz, Silbernagel, Thoreson, and Toman and Senators Heckaman and Triplett voted "aye." No negative votes were cast.

COMMITTEE DISCUSSION

Senator Heckaman said she has concern that the rules of the Board of Addiction Counseling Examiners allow the board to impose costs of disciplinary proceedings on licensees. She said she is concerned that other boards and commissions will follow suit.

Representative K. Koppelman said he questions whether the committee is looking hard enough at whether agencies are properly considering fiscal notes on rules.

No further business appearing, Chairman Devlin adjourned the meeting at 3:10 p.m.

John Walstad
Code Revisor

ATTACH:17