

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday, December 5, 2017
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Bill Devlin, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives Bill Devlin, Randy Boehning, Joshua A. Boschee, Kim Koppelman, Scott Louser, Brandy Pyle, Jay Seibel, Nathan Toman, Robin Weisz; Senators Howard C. Anderson, Jr., Kelly M. Armstrong, Joan Heckaman, Ralph Kilzer, Jerry Klein, Nicole Poolman, David S. Rust

Members absent: Representative Mary Schneider; Senator Scott Meyer

Others present: Representative Corey Mock, member of the Legislative Management

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

It was moved by Senator Armstrong, seconded by Representative Boschee, and carried on a voice vote that the minutes of the September 12, 2017, meeting be approved.

**SUPERVISION OF OCCUPATIONAL AND
PROFESSIONAL LICENSING BOARDS STUDY**

Chairman Devlin called on Ms. Sandra DePountis, Assistant Attorney General, for testimony ([Appendix B](#)) regarding the United States Supreme Court's 2015 decision in *North Carolina State Board of Dental Examiners v. The Federal Trade Commission*.

In response to a question from Representative Weisz, Ms. DePountis said enforcement authority of licensing boards over nonlicensees varies from board to board. She said several boards have cease and desist authority. She said if a cease and desist order is disobeyed, it becomes necessary to involve law enforcement. She said she would provide the committee with a list of boards that have cease and desist authority.

In response to a question from Representative Koppelman, Ms. DePountis said very few licensing board's cases use the administrative law judge process.

In response to a question from Representative Boschee, Ms. DePountis said licensing boards are required to use either a special assistant attorney general or an assistant attorney general for legal counsel.

In response to a question from Representative Koppelman, Ms. DePountis said a broad study of licensing board supervision may be a good idea.

Chairman Devlin called on Mr. Mark Hardy, Executive Director, North Dakota Board of Pharmacy, for comments. Mr. Hardy said the Board of Pharmacy is unique in that it licenses both pharmacists and pharmacies. He said the issuance of cease and desist orders is rare; however, it is an important tool to have if there is a specific threat to public health.

In response to a question from Representative Weisz, Mr. Hardy said the Board of Pharmacy has the authority to take administrative action, such as the issuance of fines, if a cease and desist order is ignored. He said the Legislative Assembly gave the board the authority to issue cease and desist orders.

Senator Anderson said the Board of Pharmacy exercised its cease and desist authority in a case of a wholesaler of animal products shipping to North Dakota pet stores. He said in another instance the cease and desist authority was used when some out-of-state pharmacies were shipping certain products to reservations in the state.

Chairman Devlin said the committee will continue to gather information regarding the licensing boards study.

ATTORNEY GENERAL

Chairman Devlin called on Mr. Randy Miller, Executive Director, North Dakota Lottery, for testimony ([Appendix C](#)) regarding rules adopted by the Attorney General. Mr. Miller said rules are necessitated by the termination of the game, Hot Lotto, and its replacement, Lotto America.

STATE ELECTRICAL BOARD

Chairman Devlin called on Mr. Scott Porsborg, Special Assistant Attorney General, State Electrical Board, for testimony ([Appendix D](#)) regarding rules adopted by the State Electrical Board.

In response to a question from Representative Koppelman, Mr. Porsborg said it takes about 2 years to complete the required 576 hours of apprenticeship training classes.

GAME AND FISH DEPARTMENT

Chairman Devlin called on Mr. Scott Peterson, Deputy Director, Game and Fish Department, for testimony ([Appendix E](#)) regarding rules adopted by the Game and Fish Department. Mr. Peterson said the rules redefine legal live bait. He said this change eliminates the need for bait vendors who handle only terrestrial live bait to be licensed.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Mr. Jonathan Alm, Legal Counsel, Department of Human Services, for testimony ([Appendix F](#)) regarding rules adopted by the Department of Human Services.

In response to a question from Representative Koppelman, Mr. Jim Fleming, Director, Child Support Division, Department of Human Services, said the guidelines are based on income. He said one of the deductions allowed in calculating net income is the cost of health insurance premiums. He said increasing health insurance premiums will have a corresponding effect on the amount of child support paid to an obligee.

Mr. Fleming said the change to the child support guidelines for those obligors with less than \$700 per month in net income was done with the child support obligations of inmates in mind. He said eliminating or reducing the child support obligations of inmates allows an inmate to be released with a clean slate.

In response to a question from Senator Kilzer, Mr. Alm said the Department of Human Services is working with the Attorney General's office to develop a bill draft regarding a Medicaid fraud unit.

NORTH DAKOTA BOARD OF MEDICINE

Chairman Devlin called on Ms. Bonnie Storbakken, Executive Secretary, North Dakota Board of Medicine, for testimony ([Appendix G](#)) regarding rules adopted by the North Dakota Board of Medicine.

In response to a question from Senator Heckaman, Ms. Storbakken said 2015 legislation required licensing boards to adopt rules regarding participation in the prescription drug monitoring program. She said the Board of Medicine was awaiting the adoption of federal regulations before the board could finalize its rules.

In response to a question from Representative Koppelman, Ms. Storbakken said during the rules process, the Board of Medicine consulted with the Board of Nursing and the Board of Pharmacy. She said those boards have completed their rules on the prescription drug monitoring program.

In response to a question from Senator Anderson, Ms. Pam Sagness, Director, Behavioral Health Division, Department of Human Services, said Dr. Andrew McLean provided comments at the hearing regarding narcotic prescribing via telemedicine. She said the state did not have any opioid treatment providers in 2015. She said it is important to have further discussion and find solutions. She said access to the drugs used to treat opioid disorder should not be limited.

In response to a question from Representative Koppelman, Ms. Sagness said to prohibit the prescribing of drugs via telemedicine is too broad of a stroke since the treatment for opioid addiction includes drugs that are considered opioids.

Chairman Devlin called on Mr. John Ward, Teladoc. Mr. Ward introduced Dr. Donna Campbell, who is a member of the Texas Senate. Dr. Campbell provided testimony ([Appendix H](#)) regarding the telemedicine rules adopted by the North Dakota Board of Medicine.

In response to a question from Senator Anderson, Dr. Campbell said under Teladoc protocol, the doctor has the patient's record in view during the consultation. The doctor also may use high-definition photographs, and, if needed, video. She said telemedicine is not for complicated medical problems; however, a broad range of conditions can be handled by telemedicine. She said the doctor has the option of referring the patient to urgent care, the patient's primary care physician, or to an emergency room.

In response to a question from Representative Koppelman, Dr. Campbell said the lack of broadband access in some areas would make a required video consultation difficult for some patients. She said many people may not be technology savvy enough to use the equipment necessary for a video consultation.

In response to a question from Senator Heckaman, Dr. Campbell said the rule requiring the initial consultation to be conducted via video is arbitrary and capricious. She said a medical condition that creates the need for a second consultation may be unrelated and have no connection to the first visit with video.

In response to a question from Senator Anderson, Dr. Campbell said once the patient relationship is established, it is forever.

Chairman Devlin called on Dr. Jason Tibbels, Teladoc, for testimony regarding the telemedicine rules. Dr. Tibbels said physicians use professional judgment to make an informed decision regarding the care of the patient. He said that duty to make an informed decision is the same regardless of whether the consultation is done in person or via telemedicine. He said telemedicine is not a cure-all for all cases. He said the standard of care is the same whether it is the patient's 1st consultation or the 20th.

In response to a question from Senator Anderson, Dr. Tibbels said for telemedicine to be effective, the rules must use technology-neutral language. He also said the sharing of information is critical.

In response to a question from Senator Heckaman, Dr. Tibbels said Teladoc does not prescribe any controlled substances. However, he said, the treatment of opioids requires some prescribing of controlled substances. He said in his personal opinion, the opioid epidemic is huge and telemedicine should be permitted to be used to treat an epidemic.

Chairman Devlin called on Ms. Claudia Tucker, Vice President Government Affairs, Teladoc, for testimony ([Appendix I](#)) regarding the telemedicine rules. She said Teladoc is a very collaborative company. She said the company would be willing to participate in a database for the sharing of information.

In response to a question from Representative Koppelman, Ms. Tucker said Teladoc's issue with the Board of Medicine's telemedicine rule is the rule is not technology neutral.

Chairman Devlin said the committee was emailed letters regarding the rules from the Allergy & Asthma Network ([Appendix J](#)), The ERISA Industry Committee ([Appendix K](#)), AARP North Dakota ([Appendix L](#)), and the United Spinal Association ([Appendix M](#)).

It was moved by Senator Poolman, seconded by Representative Koppelman, and carried on a roll call vote to hold over to the next meeting the North Dakota Board of Medicine's rules on telemedicine on pages 90-91 of Supplement 367. Representatives Devlin, Boehning, Boschee, Koppelman, Louser, Pyle, Seibel, Toman, and Weisz and Senators Anderson, Armstrong, Heckaman, Kilzer, Klein, Poolman, and Rust voted "aye." No negative votes were cast.

STATE BOARD OF INDIAN SCHOLARSHIPS

Chairman Devlin called on Ms. Brenda Zastoupil, Director, Financial Aid, North Dakota University System, for testimony ([Appendix N](#)) regarding rules adopted by the State Board of Indian Scholarships.

In response to a question from Representative Boehning, Ms. Zastoupil said recipients of the scholarship must be North Dakota residents. She said the ability to provide documentation to prove eligibility has not been a problem.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Mr. Dale Patrick, Radiation and Asbestos Control Program, State Department of Health, for testimony ([Appendix O](#)) regarding rules adopted by the State Department of Health.

In response to a question from Representative Boehning, Mr. Patrick said the department is notified of any repeals or changes to federal rules which may affect the department's rules.

In response to a question from Senator Anderson, Mr. Patrick said the federal regulations, which were adopted in 2015, gave the states 3 years to adopt rules.

Chairman Devlin called on Dr. Darleen Bartz, Chief, Health Resources Section, State Department of Health, for testimony ([Appendix P](#)) regarding rules adopted by the State Department of Health.

In response to a question from Representative Weisz, Dr. Bartz said the Department of Human Services is reimbursing 14 basic care facilities that provide memory care or care for individuals with traumatic brain injury. She said one additional facility will qualify for reimbursement when the rules go into effect. She said if a facility holds itself out as a memory care facility, the facility must comply with federal regulations.

Chairman Devlin called on Ms. Molly Howell, Assistant Director, Medical Services Section, State Department of Health, for testimony ([Appendix Q](#)) regarding rules adopted by the State Department of Health.

In response to a question from Representative Boehning, Ms. Howell said most disease and demographic information received by the State Department of Health comes from laboratories. She said if a patient has a disease on the list of reportable conditions, the department is given the patient's name. She said department personnel who handle that information are required to sign confidentiality agreements.

Chairman Devlin called on Ms. Julie Wagendorf, Director of Food and Lodging, Health Resources Section, State Department of Health, for testimony ([Appendix R](#)) regarding rules adopted by the State Department of Health.

In response to a question from Senator Klein, Ms. Wagendorf said a food safety risk factor study was done in 2015. She said of the 300 food service businesses surveyed, poor personal hygiene violations were the most concerning. She said the survey revealed that employee health policies are not in compliance. She said regardless of whether a business has a certified food protection manager, the business must comply with the model food code. She said many food services businesses were not aware of the requirement that employees are required to report their illnesses. She said many food service businesses also were unaware of the length of time to restrict an employee's access to food following an illness.

Senator Klein said many small "mom and pop" restaurants are not going to be able to comply with the certified food protection manager requirement.

In response to a question from Representative Weisz, Ms. Wagendorf said one certified food protection manager is required for each location, not one per multiple businesses owned by the same company. She said the food code allows businesses to apply for a variance or hardship exemption. She said most large restaurants and franchise restaurants have certified food protection managers by policy. She said the department will provide as much assistance as possible to help small businesses come into compliance.

In response to a question from Senator Poolman, Ms. Wagendorf said the required courses, which must be taken every 5 years, take 4 to 8 hours to complete.

In response to a question from Senator Heckaman, Ms. Wagendorf said when licensed, food service establishments are made aware of the establishment's risk categorization.

In response to a question from Representative Boehning, Ms. Wagendorf said the rules only apply to child care centers that provide a food service. If a child care center uses a caterer, the caterer must comply with the rules, not the child care center.

In response to a question from Senator Poolman, Ms. Wagendorf said every licensed establishment was notified of the rules changes and told of the hearing. She said comments were received.

In response to a question from Senator Armstrong, Ms. Wagendorf said there are five accredited tests. She said the department's goal in adopting the model food code was to find the most efficient way of providing safety with the least impact on small businesses.

In response to a question from Senator Klein, Ms. Wagerdorf said the Centers for Disease Control and Prevention has found fewer outbreaks and health issues when a certified food protection manager is in place.

In response to a question from Senator Rust, Ms. Wagendorf said the State Department of Health updates the food code every 4 years to keep up with science and national standards.

Ms. Wagendorf worked with Senator Klein and a representative of the Attorney General's office to amend North Dakota Administrative Code Section 33-33-04.1-01 to remove the certified food protection manager requirement. She provided an amendment ([Appendix S](#)) that reflects the change.

In response to a question from Representative Boehning, Mr. Wagendorf said local public health units can adopt versions of the model food code based on local ordinance. She said Grand Forks requires certified food protection managers by ordinance.

It was moved by Senator Klein, seconded by Representative Weisz, and carried on a roll call vote that pages 72-73 of Supplement 367 be replaced with language provided by Ms. Wagendorf, which removed the requirement for a certified food protection manager. Representatives Devlin, Boehning, Boschee, Koppelman, Louser, Pyle, Seibel, Toman, and Weisz and Senators Anderson, Armstrong, Heckaman, Kilzer, Klein, Poolman, and Rust voted "aye." No negative votes were cast.

SUPERINTENDENT OF PUBLIC INSTRUCTION

Chairman Devlin called on Mr. Bob Marthaller, Assistant Superintendent, Department of Public Instruction, for testimony ([Appendix T](#)) regarding rules adopted by the Superintendent of Public Instruction.

In response to a question from Representative Boehning, Mr. Marthaller said school construction should be done with the possibility of school consolidation in mind.

In response to a question from Senator Rust, Mr. Marthaller said the repeal of Chapters 67-11-03.2 and 67-11-03.3 gives school districts the flexibility to administer Title I programs.

In response to a question from Senator Poolman, Mr. Marthaller said criteria for the innovative education programs has not been established, but the department will be looking for a great deal of engagement from all stakeholders, including parents, teachers, administrators, and business owners. He said the input of parents and teachers will carry the most weight in the final decisions.

WORKFORCE SAFETY AND INSURANCE

Chairman Devlin called on Ms. Anne Green, Director, Legal Services and Staff Counsel, Workforce Safety and Instruction, for testimony ([Appendix U](#)) regarding rules adopted by Workforce Safety and Insurance.

In response to a question from Senator Klein, Ms. Green said pollicization is a hand surgery technique in which a thumb is created from an existing finger.

REAL ESTATE APPRAISER QUALIFICATIONS AND ETHICS BOARD

Chairman Devlin called on Mr. Dave Lanpher, Chairperson, Real Estate Appraiser Qualifications and Ethics Board, for testimony ([Appendix V](#)) regarding rules adopted by the Real Estate Appraiser Qualifications and Ethics Board.

In response to a question from Representative Louser, Mr. Lanpher said there are no appraisal management companies in North Dakota. He said under federal law, states are required to have appraisal management companies regulated by the state's appraisal licensing and regulating agency. He said appraisal management companies have caused concerns in the real estate industry. He said if an appraisal board membership included only appraisers, that could be a problem. However, he said, the membership of the Real Estate Appraiser Qualifications and Ethics Board is not all appraisers. He said the members of the board are professional enough to remain neutral on disputes between appraiser management companies and appraisers.

In response to a question from Representative Koppelman, Mr. Lanpher said the rules require appraisal management companies to register with the Real Estate Appraiser Qualifications and Ethics Board. He said the board includes a representative of the banking industry. He said the appraisal management companies are aware of the rules. He said some banks have an in-house process for duplicating the appraisal management companies process.

NORTH DAKOTA MARRIAGE AND FAMILY THERAPY LICENSURE BOARD

Chairman Devlin called on Pastor Larry Giese, Board Administrator, North Dakota Marriage and Family Therapy Licensure Board, for testimony regarding rules adopted by the North Dakota Marriage and Family Therapy Licensure Board. Pastor Giese said the rules provide for a definition change, make changes to continuing education requirements, add education requirements for masters or doctoral degrees, increase the number of hours of experience required to 3,000, and provide a fees increase to help cover court fees incurred by the board.

In response to a question from Representative Boehning, Pastor Giese said it may take a year or two of increased fees for the board to pay its bills. He said the fees will be lowered after the debts are paid.

In response to a question from Representative Boschee, Pastor Giese said the board has been in existence since 2005. He said licensing began in 2008.

In response to a question from Senator Anderson, Pastor Giese said the rules work to address reciprocity issues. He said the board's complaint process works well.

No further business appearing, Chairman Devlin adjourned the meeting at 3:00 p.m.

Vonette J. Richter
Code Revisor

ATTACH:22