

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

**ADMINISTRATIVE RULES COMMITTEE**

Thursday, June 14, 2018  
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, Mary Schneider, Nathan Toman, Robin Weisz; Senators Howard C. Anderson, Jr., Joan Heckaman, Ralph Kilzer, Jerry Klein, Scott Meyer, David S. Rust

**Members absent:** Representative Jay Seibel; Senators Kelly M. Armstrong and Nicole Poolman

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

**It was moved by Senator Rust, seconded by Representative Boschee, and carried on a voice vote that the minutes of the March 12-13, 2018, meeting be approved as distributed.**

**BOARD OF ADDICTION COUNSELING EXAMINERS**

Chairman Devlin called on Dr. Julijana Nevland, Chair, Board of Addiction Counseling Examiners, for testimony ([Appendix B](#)) regarding the July 2018 rules of the Board of Addiction Counseling Examiners.

Chairman Devlin called on Mr. Kurt Snyder, Vice Chair, Board of Addiction Counseling Examiners, for testimony ([Appendix C](#)) regarding the rules of the board.

In response to a question from Senator Heckaman, Mr. Snyder said addiction counselors licensed as of June 30, 2018, will be grandfathered in as licensed clinical addiction counselors. He said the timeline on page 4 of Supplement 369 allows individuals entering the profession to begin at either the bachelor degree or master degree level.

In response to a question from Representative Koppelman, Mr. Snyder said 2017 Senate Bill No. 2033 mandated the educational changes for the various addiction counseling professions. He said the board has conducted a webinar to notify licensees of the changes to the licensing process. Regarding those individuals seeking licensure through reciprocity, he said, the rules allow the individual to be a part of the workforce while getting the experience hours needed.

In response to a question from Representative Weisz, Dr. Nevland said under the new rules, the total number of continuing education credits remains the same; however, the required ethics credits increased from 2 to 3 credits. She said a sign-in sheet to prove attendance at continuing education seminars satisfies the rule for a continuing education monitoring system. She said unlike the current rules, the amended rules include the minimum degree requirements.

In response to a question from Representative Pyle, Dr. Nevland said the master's degree requires a credit in clinical supervision.

**STATE BOARD OF PSYCHOLOGIST EXAMINERS**

Chairman Devlin called on Dr. Paul Kolstoe, State Board of Psychologist Examiners, for testimony ([Appendix D](#)) regarding the July 2018 rules of the State Board of Psychologist Examiners.

In response to a question from Senator Heckaman, Dr. Kolstoe said a licensed behavior analyst may practice independently; however, a registered behavior analyst must be supervised by a licensed psychologist or a board-certified behavior analyst. He said there are two registered behavior analysts in the state with a third in the pipeline. He said the board's licensing process typically takes less than 3 months. He said the applicant is permitted to practice during that time. He said a group of University of North Dakota graduate students is developing an assessment device for the board.

In response to a question from Representative Schneider, Dr. Kolstoe said the new ethics examination will not be available for several years. He said those applicants seeking licensure through reciprocity do not have an issue with the oral ethics examination. He said the greater barrier to attracting licensees from other states is the economic climate.

### **PUBLIC SERVICE COMMISSION**

Chairman Devlin called on Mr. John Schuh, Legal Counsel, Public Service Commission, for testimony ([Appendix E](#)) regarding the July 2018 rules of the Public Service Commission.

In response to a question from Representative Devlin, Mr. Schuh said three light-mitigating technology systems for wind energy conversion facilities have been approved by the Federal Aviation Administration. He said the rules allow the Public Service Commission to grant extensions to the December 31, 2021, deadline for technical or economic feasibility reasons.

### **PUBLIC EMPLOYEES RETIREMENT BOARD**

Chairman Devlin called on Ms. Sharon Schiermeister, Chief Operating Officer, Public Employees Retirement System, for testimony ([Appendix F](#)) regarding the July 2018 rules of the Public Employees Retirement System.

In response to a question from Representative Koppelman, Ms. MaryJo V. Anderson, Retirement Manager, Public Employees Retirement System, said the disability recertification process is similar to the initial determination process. She said a Social Security disability certification satisfies the certification requirements for the Public Employees Retirement System.

### **SEED COMMISSION**

Chairman Devlin called on Mr. Ken Bertsch, State Seed Commissioner, for testimony ([Appendix G](#)) regarding the July 2018 rules of the Seed Commission.

In response to a question from Senator Heckaman, Mr. Bertsch said the Seed Commission's standards only apply to industrial hemp. He said the commission does not have any control over standards for medical marijuana.

In response to a question from Representative Koppelman, Mr. Bertsch said the Legislative Assembly created good standards for the commercial production of industrial hemp. He said a set of industrial hemp standards that originated in Canada have been adopted. He said the program has produced sufficient seed for the anticipated number of acres.

### **PRIVATE INVESTIGATION AND SECURITY BOARD**

Chairman Devlin called on Mr. Justin Hagel, Vogel Law Firm, for testimony ([Appendix H](#)) regarding the July 2018 rules of the Private Investigation and Security Board.

In response to a question from Representative Koppelman, Mr. John J. Shorey III, Director, Private Investigation and Security Board, said the rules recognize military experience as private security service experience for licensing purposes. He said the term "criminal searches" in North Dakota Administrative Code Section 93-02-03-06 is the same as criminal history background checks. He said the board would not object to changing the term to be consistent with state law.

**It was moved by Representative Koppelman, seconded by Representative Schneider, and carried on a roll call vote that North Dakota Administrative Code Section 93-09-03-06(2) on page 103 of Supplement 369 be amended to replace "criminal searches" with "criminal history background checks".** Representatives Devlin, Boehning, Boschee, Koppelman, Louser, Pyle, Schneider, Toman, and Weisz and Senators Anderson, Heckaman, Kilzer, Klein, Meyer, and Rust voted "aye." No negative votes were cast.

In response to a question from Representative Boehning, Mr. Shorey said Capitol security is provided and approved by the Highway Patrol.

In response to a question from Representative Devlin, Mr. Shorey said there is not a standard across the nation regarding the hours of experience required for licensing.

### **STATE BOARD OF NURSING**

Chairman Devlin called on Dr. Stacey Pfenning, Executive Director, State Board of Nursing, for testimony ([Appendix I](#)) regarding the repeal of North Dakota Administrative Code Chapter 54-02-10. She said the Nurse Licensure Compact, which was passed in 2017 and implemented on January 19, 2018, supersedes the 2004 RN and LPN Licensure Compact.

**It was moved by Representative Boehning, seconded by Representative Koppelman, and carried on a roll call vote that North Dakota Administrative Code Chapter 54-02-10 be repealed.** Representatives Devlin, Boehning, Boschee, Koppelman, Louser, Pyle, Schneider, Toman, and Weisz and Senators Anderson, Heckaman, Kilzer, Klein, Meyer, and Rust voted "aye." No negative votes were cast.

### BOARD OF COUNSELOR EXAMINERS

Chairman Devlin called on Ms. Marge Ellefson, Executive Secretary, Board of Counselor Examiners, for testimony ([Appendix J](#)) regarding the July 2018 rules of the Board of Counselor Examiners. Ms. Ellefson said the updates to the board's counselor supervision requirements resulted from the passage of 2017 Senate Bill No. 2033.

### STATE GAMING COMMISSION

Chairman Devlin called on Ms. Deborah A. McDaniel, Gaming Division, Attorney General's office, for testimony ([Appendix K](#)) regarding the July 2018 rules of the State Gaming Commission.

Chairman Devlin said he discussed with the Attorney General the limit of five electronic pull tab devices per site in North Dakota Administrative Code Section 99-01.3-06.1-02. He said the Attorney General and the gaming industry are in agreement the five-device limit per site should be changed to 10 devices per site. He said the parties also agree to remove the authority of the Attorney General to waive the limit.

Representative Koppelman said the 2017 legislation that authorized electronic pull tab devices did not include a limit on the number of devices per site.

**It was moved by Representative Koppelman and seconded by Representative Boschee that the Gaming Commission rules be amended on page 164, North Dakota Administrative Code Section 99-01.3-06.1-02(1), to replace "five" with "ten" and remove "An organization may request, in writing, a waiver to the number of devices installed for consideration by the attorney general not to exceed fifteen devices per site."**

**It was moved by Senator Anderson that the motion to amend the Gaming Commission rules be tabled.**

The motion failed for lack of a second.

**The motion by Representative Koppelman carried on a roll call vote.** Representatives Devlin, Boehning, Boschee, Koppelman, Louser, Pyle, Toman, and Weisz and Senators Anderson, Heckaman, Kilzer, Klein, Meyer, and Rust voted "aye." No negative votes were cast.

Ms. McDaniel said the gaming industry has requested clearer language in several sections in the new rules. She said the proposed clarification language on pages 164 and 239 is as follows: "An organization may not have more than six electronic pull tab game titles selectable for play on the electronic pull tab devices device operating system at a site. Only one of the games can be selected for play on an electronic pull tab device at any given time." She also said on page 173, subsection 9, after "twenty-one", "and" should be replaced with "or".

**It was moved by Senator Heckaman, seconded by Representative Koppelman, and carried on a roll call vote that the changes on pages 164, 173, and 239 of Supplement 369, as proposed by Ms. McDaniel on pages 6, 9, and 16 of her testimony, be approved.** Representatives Devlin, Boehning, Boschee, Koppelman, Louser, Pyle, Toman, and Weisz and Senators Anderson, Heckaman, Kilzer, Klein, Meyer, and Rust voted "aye." No negative votes were cast.

In response to a question from Senator Klein, Ms. McDaniel said current definition of "bar" in North Dakota Administrative Code Section 99-01.3-02-01 is very restrictive. She said the new language is intended to provide clarification that a bar does not include off-sale liquor stores, gas stations, grocery stores, or convenience stores. She said any bar eligible to sell paper pull tabs also can sell electronic pull tabs. She said additional restrictions are not being imposed on a business that sells electronic pull tabs.

In response to a question from Representative Koppelman, Ms. McDaniel said some gaming managers have requested a clarification on what constitutes a bar.

In response to a question from Representative Boehning, Mr. Troy Seibel, Chief Deputy, Attorney General, said the Attorney General would not object to removing the proposed changes to the definition of "bar".

Chairman Devlin said he is reluctant to adopt a definition in a rule when the term is not defined in statute.

**It was moved by Representative Boehning, seconded by Representative Meyer, and carried on a roll call vote that the proposed changes to the definition of "bar" in North Dakota Administrative Code Section 99-01.3-02-01 on page 119 of Supplement 369 be removed.** Representatives Devlin, Boehning, Boschee, Koppelman, Louser, Pyle, Toman, and Weisz and Senators Anderson, Heckaman, Kilzer, Klein, Meyer, and Rust voted "aye." No negative votes were cast.

In response to a question from Representative Devlin, Ms. McDaniel said the electronic pull tab devices are expected to be operational before August 1, 2018. She said state law requires all pull tab deals to be comingled. She said no other states have the deal comingling requirement. She said manufactures have to develop a new program to accommodate this requirement. She said time also is needed to test the software.

### STATE BOARD OF RESPIRATORY CARE

Chairman Devlin called on Ms. Barbara Andrist, Public Member, State Board of Respiratory Care, for testimony ([Appendix L](#)) regarding the July 2018 rules of the State Board of Respiratory Care.

In response to a question from Representative Boehning, Ms. Andrist said there are 595 licensed respiratory therapists in the state. She said most of the respiratory therapist position vacancies are being filled. She said the new rules will expedite the online licensure process.

### PEACE OFFICERS STANDARDS AND TRAINING BOARD

Chairman Devlin called on Mr. Paul Lies, Sheriff, Eddy County, for testimony ([Appendix M](#)) regarding the July 2018 rules of the Peace Officer Standards and Training Board.

Chairman Devlin called on Mr. Ladd Erickson, McLean County State's Attorney, for testimony regarding the Peace Officer Standards and Training Board rules. Mr. Erickson said he would like the committee to consider adding "in-person" before "surreptitious" in North Dakota Administrative Code Sections 109-02-01-01(8), 109-02-06-01(1), and 109-02-06-01(7). He said this addition would be a fundamental change to the rules. He said Senator Kelly Armstrong and Mr. Mark Friese, both of whom are defense attorneys, support this change. He said without this amendment, the rules should be rejected.

Representative Koppelman said since the committee was unaware of this concern and because Senator Armstrong is not in attendance, it may be necessary to carry over the affected rules to the next meeting.

Chairman Devlin called on Mr. Duane Stanley, Bureau of Criminal Investigation, for testimony. Mr. Stanley said he is the Executive Secretary for the Peace Officer Standards and Training Board. He said he disagrees with some of Mr. Erickson's comments. He said if the confidential informant is to receive a benefit, the confidential informant must sign an agreement. He said the confidential informant cannot be in control of what is done in the investigation. He said parolees and probationers cannot be used as confidential informants without a hearing.

Representative Koppelman said the intent of the legislation was to have an agreement in place before using a person as a confidential information. He said he is concerned the amendment would narrow the legislative intent.

Mr. Lies said law enforcement needs to protect the confidential informant and a written agreement must be in place before the confidential informant can be used.

In response to a question from Senator Anderson, Mr. Lies said if "in-person" is added as suggested by Mr. Erickson, it may put other persons in danger.

In response to a question from Representative Koppelman, Mr. Stanley said North Dakota Administrative Code Section 109-02-06-01(6) requires the controlling agent to provide an operational/safety plan for each controlled buy or sale or in-person surreptitious recording attempted by the confidential informant.

**It was moved by Senator Klein, seconded by Representative Boehning, and carried on a roll call vote that North Dakota Administrative Code Sections 109-02-01-01(8), 109-02-06-01(1), and 109-02-06-01(7) be held over to the next meeting to allow for more information and testimony.** Representatives Devlin, Boehning, Boschee, Koppelman, Louser, Pyle, Toman, and Weisz and Senators Anderson, Heckaman, Kilzer, Klein, Meyer, and Rust voted "aye." No negative votes were cast.

### STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Ms. Julie Wagendorf, Director, Division of Food and Lodging, State Department of Health, for testimony ([Appendix N](#)) regarding the status of the administrative rules for North Dakota Century Code Chapter 23-09.5 regarding cottage food production and sales.

In response to a question from Representative Koppelman, Ms. Wagendorf said those involved in the cottage food industry were either included in the department's cottage food work group or were invited to the meetings. She said the law authorizing the production of cottage food industry products has been in effect since August 1, 2017.

In response to a question from Representative Boschee, Ms. Wagendorf said North Dakota Century Code Section 23-09.5-02(8) requires a cottage food operator to display a consumer advisory sign. She said the rules would have defined further what constitutes cottage foods.

Senator Anderson said the legislation was intended to be enabling. He said those in the cottage foods industry felt the proposed rules were more restrictive than was intended by the legislation.

Senator Klein said he is concerned about those in the cottage food industry acting as caterers without complying with safety rules.

Ms. Wagendorf said one of the main purposes of the Senate amendments to the bill was to define the term cottage food product. She said the term is being interpreted as any food eaten by nonpaying guests.

In response to a question from Representative Boehning, Ms. Wagendorf said lemonade at a lemonade stand could be considered a cottage food.

In response to a question from Representative Koppelman, Ms. Wagendorf said the State Health Council has general rulemaking authority. She said the department is looking for guidance or an extension. She said the reason for requesting an extension is more about clarifying legislative intent than the timeframe for adopting rules.

Senator Anderson said the legislation was intended to stand on its own. He said the 9-month window for adopting rules does not apply because the enabling legislation did not direct the State Health Council to adopt rules. He said the cottage foods production and sales law may need to be amended in the next legislative session.

Senator Klein said the testimony during the legislative session focused on baked goods, not catering. He said there was a lot of discussion the rules would handle the details. He said the intent was for rules to be drafted. He said the rules would clarify that "other food or drink" in the definition of cottage food product does not include catering.

**It was moved by Senator Klein and seconded by Representative Koppelman that the State Health Council be granted an extension for the adoption of rules relating to cottage foods production and sales.**

Chairman Devlin said legislators he should have been consulted before the State Health Council decided to cancel the hearings on the proposed rules.

In response to a question from Senator Kilzer, Ms. Wagendorf said cottage food laws in Wisconsin and Minnesota have been challenged successfully based on the cap on gross sales to be considered a cottage food operator. She said the department's rules did not address a cap on gross sales.

Ms. Wagendorf said the work group will continue to meet. She said North Dakota's law is less restrictive than most other states, except Wyoming, which allows for raw milk sales.

Representative Boschee said the State Department of Health is responsible for ensuring people are not harmed by the products.

Senator Rust said an extension is unnecessary. He said the issues with the cottage food industry can be addressed during the 2019 legislative session.

Senator Kilzer said an extension is proper. He said the State Health Council has a responsibility to provide guidance through rules.

In response to a question from Representative Boehning, Ms. Wagendorf said no direct complaints about illness due to cottage foods have been received since August 1, 2017. She said the department has investigated outbreaks in the past based on the consumption of food from nonlicensed vendors. She said most of the complaints relating to the cottage foods industry since the law's effective date are about operators selling meat, which is prohibited under this statute. She said meat sales require a license. She said the department also has received complaints from bakers.

Representative Weisz said the legislative intent was for the State Health Council to adopt rules.

In response to a question from Chairman Devlin, the Legislative Council staff said there is not enough time for the State Health Council to complete rules for the September 2018 meeting. She said the State Health Council would have time to complete rules for the December 2018 meeting.

**The motion carried on a roll call vote.** Representatives Devlin, Boehning, Boschee, Koppelman, Pyle and Weisz and Senators Anderson, Heckaman, Kilzer, and Klein voted "aye." Representatives Louser and Toman and Senators Meyer and Rust voted "nay."

### **OCCUPATIONAL AND PROFESSIONAL LICENSING BOARDS STUDY**

Senator Anderson said he is not aware of any evidence of anti-trust activities by occupational and professional licensing boards in North Dakota. He said the opinion in *North Carolina State Board of Dental Examiners v. FTC*, 135 S.Ct. 1101 (2015) serves as a reminder to the state's boards to not take actions that might trigger anti-trust concerns. He said to prevent a situation similar to what happened in North Carolina, North Dakota may want to consider requiring a board-issued cease and desist order to be reviewed by the Attorney General. He said he does not see a need for major changes as the result of the North Carolina dental case. He said the case has become an irritation to some of the boards in the state. He said none of the threats to boards have arisen to the level of anti-trust violations.

Representative Koppelman said the North Carolina dental case held that to obtain anti-trust immunity, a state agency must be actively supervised by the state. He said the Administrative Rules Committee oversight provides some of that active supervision.

Chairman Devlin said some of the state occupational and professional licensing requirements may be keeping people out of the professions.

Representative Koppelman said the North Carolina dental case has resulted in fence building. He said reciprocity legislation is working well to break down licensing barriers.

Senator Anderson said many of the issues boards face are related to scope of practice. He said if North Carolina law had said teeth whitening is a dental function, the case would not have happened. He said scope of practice revisions are made by the Legislative Assembly on an ongoing basis.

Representative Weisz said by having the authority to set experience hour requirements, boards can restrict entry into a field. He said while the licensing boards are the experts, it is the Legislative Assembly's responsibility to ensure the reason for the requirements is not to limit competition.

Representative Boschee said the challenge is how to ensure other states know North Dakota is open for business.

The Legislative Council staff said in May 2018, the Department of Commerce, Job Service North Dakota, and other agencies worked together to apply for a federal grant to study the potential barriers to employment in the requirements of occupational and professional boards.

Chairman Devlin said any changes to licensing requirements which may be recommended as the result of the study, including reciprocity, will require legislative changes.

No further business appearing, Chairman Devlin adjourned the meeting at 3:15 p.m.

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Vonette J. Richter  
Code Revisor

ATTACH:14