

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Wednesday, September 12, 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, Kim Koppelman, Scott Louser, Brandy Pyle, Jay Seibel, Nathan Toman; Senators Howard C. Anderson, Jr., Joan Heckaman, Ralph Kilzer, Jerry Klein, Scott Meyer, Nicole Poolman, David S. Rust

Members absent: Representatives Joshua A. Boschee, Mary Schneider, Robin Weisz; Senator Kelly M. Armstrong

Others present: See [Appendix A](#)

It was moved by Senator Rust, seconded by Representative Seibel, and carried on a voice vote that the minutes of the June 14, 2018, meeting be approved as distributed.

ATTORNEY GENERAL

Chairman Devlin called on Mr. Randy Miller, Director, Lottery Division, Attorney General's office, for testimony ([Appendix B](#)) regarding the October 2018 rules of the Attorney General.

In response to a question from Representative Koppelman, Mr. Miller said the North Dakota Lottery began offering subscriptions in 2005. He said the change to online play called "Pick & Click" is a rebranding of the former subscription service. He said the name of the state's lottery, North Dakota Lottery, is a registered trademark.

In response to a question from Representative Boehning, Mr. Miller said the former subscription service required a player to sign up for either a 13-week, 26-week, or full-year subscription. He said the subscription service, which was more cumbersome, required registrations to be entered manually. He said the manual process increased the opportunities for error. He said Pick & Click, which is done online by the player, allows a player to choose as few as one draw up to a full year of draws. He said an individual may not have more than one account and there is a cap of \$100 per player per week using Pick & Click. He said the player registration process includes comprehensive safeguards to verify a player's identity.

In response to a question from Senator Klein, Mr. Miller said Pick & Click, which was developed by the North Dakota Lottery, is not a Multi-State Lottery Association product. He said the North Dakota Lottery conducts five multistate games--Powerball, 2by2, Mega Millions, Lucky for Life, and Lotto America. He said the Hot Lotto game ended October 28, 2017, and Lotto America was added on November 12, 2017. He said for the fiscal year ending June 30, 2018, sales exceeded \$30 million, the second highest sales year for the North Dakota Lottery. He said over \$7 million was transferred to the general fund for the 2017-18 fiscal year, an amount consistent with previous years. He said the legislative members on the North Dakota Lottery Advisory Commission are Senator Nicole Poolman and Representative Thomas Beadle. He said the third legislative member, Representative Karla Rose Hanson, will be replacing Representative Lois Delmore on the commission. He said the other two members of the North Dakota Lottery Advisory Commission are Mr. Mike Rud, who serves as Chairman, and Mr. Russ Hanson, both of whom were appointed by the Attorney General.

STATE BOARD OF FUNERAL SERVICE

Chairman Devlin called on Mr. Dale G. Niewoehner, Executive Secretary, State Board of Funeral Service, for testimony ([Appendix C](#)) regarding the October 2018 rules of the State Board of Funeral Service.

In response to a question from Chairman Devlin, Mr. Niewoehner said the change in educational requirements from 2 years to 1 year for intern embalmers will allow more people to be an intern before enrolling in mortuary school. He said this change will allow embalmer interns to better understand the profession before making the commitment to attend mortuary school.

In response to a question from Representative Koppelman, Mr. Niewoehner said the difference between an embalmer and a funeral practitioner is the amount of education required and the intern component.

In response to a question from Representative Seibel, Mr. Niewoehner said some states have separate licenses for funeral directors and embalmers. He said North Dakota uses one license to license both professions.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Mr. Dale Patrick, Radiation and Asbestos Control Program, State Department of Health, for testimony ([Appendix D](#)) regarding the October 2018 rules of the State Department of Health. Mr. Patrick said the rules update provisions regarding radioactive materials. He said North Dakota adopts the rules of the federal Nuclear Regulatory Commission, by reference.

DEPARTMENT OF ENVIRONMENTAL QUALITY

Chairman Devlin called on Mr. Dave Glatt, Chief, Environmental Section, State Department of Health, for testimony ([Appendix E](#)) regarding the October 2018 rules of the Department of Environmental Quality (DEQ). Mr. Glatt said the purpose of adopting the rules in newly created North Dakota Administrative Rules (NDAC) Title 33.1 is to implement 2017 Senate Bill No. 2327, which provided for the creation of DEQ. He said the bill requires the chief of the Environmental Section to take "all necessary and appropriate steps to transfer authority, powers, and duties" relating to environmental quality from the State Department of Health to DEQ. He said as part of this process, the chief of the Environmental Section is authorized to adopt the rules necessary for DEQ to accomplish the transfer. He said the rules before the committee transfer the existing State Department of Health rules regarding environmental quality from NDAC Title 33, with minor edits, to NDAC Title 33.1.

In response to a question from Chairman Devlin, Mr. Glatt said because of environmental concerns regarding nutrient waste, NDAC Section 33-16-03.1-13(1) adds "significant revisions to a facility's nutrient management plan" to the list of actions for which a public notice may be required before a permit is issued. He said a nutrient management plan includes how much waste is generated, where the waste is deposited, and what is the quality of land upon which the waste is deposited. He said the authority to conduct a public hearing on a permit application is applied very judiciously.

In response to a question from Representative Koppelman, Mr. Glatt said significant revision is an identifiable standard.

Senator Klein said to allow input from interested parties, including the North Dakota Stockmen's Association, it may be necessary to hold over the new language in NDAC Section 33-16-03.1-13(1).

Mr. Glatt said the State Department of Health has permitted hundreds of animal feeding operations. However, he said, only four permit requests have resulted in a hearing since 1996. He said hearings, which can be contentious, require an administrative process and an opportunity for public input. He said if the option for an administrative hearing is removed from the permit application process, the matter potentially could be taken to court and decided by a judge. He said both state and local zoning play a role in the permitting process.

In response to a question from Senator Klein, Mr. Glatt said if the language in NDAC Section 33-16-03.1-13(1) is held over, he will work with the interested groups to better define "significant revisions."

In response to a question from Senator Anderson, Mr. Glatt said when citing to the Code of Federal Regulations, the regulations in effect on the effective date of the rules are the regulations relied upon for guidance.

In response to a question from Chairman Devlin, Mr. Peter Wax, Division of Water Quality, State Department of Health, said when considering rules regarding water pretreatment requirements, the human health criteria was re-evaluated. He said the changes are still below a detectable limit.

In response to a question from Senator Heckaman, Mr. Glatt said as part of the DEQ primacy approval process, he is required to submit the rules to the federal Environmental Protection Agency. He said the state rules are not more stringent than the federal rules.

In response to a question from Representative Boehning, Mr. Glatt said there are some rules that address areas for which only the state has rules and on which the federal government is silent.

In response to a question from Representative Koppelman, Mr. Glatt said the State Department of Health must be careful in defining "significant" because of the effect of the definition on other rules. However, he said, the definition of the term can be limited by stating the definition of the term only applies to the subsection in question.

He said NDAC Section 33-16-03.1-13 is a state rule. He said holding over this subsection to the next meeting will not hinder the federal approval process.

Mr. Glatt said the issue in dispute is not whether public hearings may be conducted under NDAC Section 33-16-03.1-13 but rather whether the public hearing process may be used for a permit that involves "significant revisions to a facility's nutrient management plan."

It was moved by Senator Klein, seconded by Representative Koppelman, and carried on a roll call vote that the new language in NDAC Section 33-16-03.1-13(1), "significant revisions to a facility's nutrient management plan" be held over to the December 2018 meeting. Representatives Devlin, Boehning, Koppelman, Louser, Pyle, Seibel, and Toman and Senators Anderson, Heckaman, Kilzer, Klein, Meyer, Poolman, and Rust voted "aye." No negative votes were cast.

RACING COMMISSION

Chairman Devlin called on Mr. Gunner laCour, Director, North Dakota Racing Commission, for testimony ([Appendix F](#)) regarding the October 2018 rules of the North Dakota Racing Commission.

In response to a question from Chairman Devlin, Mr. laCour said no one appeared at the hearing and no comments were received.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Mr. Jonathan Alm, Legal Advisory Unit, Department of Human Services, for testimony ([Appendix G](#)) regarding the October 2018 rules of the Department of Human Services.

In response to a question from Senator Anderson, Mr. Jim Fleming, Director, Child Support Enforcement, Department of Human Services, said the word "treaty" was added in NDAC Section 75-02-04.2-02(5). He said while the state does not have treaties with other countries, the state relies on treaties between the United States and other countries to aid in child support enforcement. He said federal law requires the Department of Human Services to use the language contained in this section.

PEACE OFFICER STANDARDS AND TRAINING BOARD

Chairman Devlin called on Mr. Duane Stanley, Executive Secretary, Peace Officer Standards and Training Board, for testimony ([Appendix H](#)) regarding July 2018 rules carried over from the June 14, 2018, meeting. Mr. Stanley said the Peace Officer Standards and Training (POST) Board met on August 15, 2018, to address the concerns raised by Mr. Ladd Erickson at the June 14, 2018, meeting. He said the POST Board agreed to add the words "in person" before "surreptitious" in NDAC Sections 109-02-01-01(8), 109-02-06-01(1), and 109-02-06-01(7). He said Mr. Erickson is in agreement with the changes approved by the POST Board.

It was moved by Senator Anderson, seconded by Representative Seibel, and carried on a roll call vote to amend the POST Board rules to add the words "in person" before "surreptitious" in NDAC Sections 109-02-01-01(8), 109-02-06-01(1), and 109-02-06-01(7). Representatives Devlin, Boehning, Koppelman, Louser, Pyle, Seibel, and Toman and Senators Anderson, Heckaman, Kilzer, Klein, Meyer, Poolman, and Rust voted "aye." No negative votes were cast.

DEPARTMENT OF TRUST LANDS

Chairman Devlin called on Ms. Jodi A. Smith, Commissioner, Department of Trust Lands, for testimony ([Appendix I](#)) regarding a request for an extension for the adoption of rules by the Department of Trust Lands (DTL).

Representative Koppelman said it is unclear as to why DTL does not understand the legislative intent of 2017 House Bill No. 1300. He said the previous commissioner understood the intent. He said making DTL subject to North Dakota Century Code (NDCC) Chapter 28-32 does not mean the Legislative Assembly will be scrutinizing every decision of DTL. He said the rules adopted by DTL will carry the effect of law. He said the administrative rules should mirror the processes currently used by DTL. He said the rules do not have to require an administrative process for every decision and contract. He said the awarding of contracts can be done by following a procedure set out in rule but the procedure itself does not need to be subject to NDCC Chapter 28-32.

Ms. Smith said upon becoming Commissioner of DTL in November 2017, the drafting of administrative rules was underway. She said she is unsure if it was the Legislative Assembly's intent for the rules to be adopted for DTL's loan programs. She said with the exception of surface management, minerals management, and the loan programs, the administrative rules have been drafted. She said the goal of the Board of University and School Lands is to create transparency. She said transparency includes an opportunity for industry and the public to comment.

In response to a question from Representative Koppelman, Ms. Smith said due to costs, she is requesting an extension for all rules until after the 2019 legislative session. She said if the committee would prefer, DTL could move forward the two divisions for which rules have been drafted.

Representative Koppelman said it sets a bad precedent when the Legislative Assembly directs an agency to do something and the directive is not followed, but rather the agency waits to ask for clarification in the next legislative session. He said DTL should move forward with the rules of the two divisions for which the rules have been completed.

In response to a question from Senator Heckaman, Ms. Smith said the easements and leases would be subject to up to an 18-month delay because those easements and leases have become subject to the requirements of NDCC Chapter 28-32.

Representative Koppelman said the rules should provide for the same process currently used. He said each easement and lease does not need to come before the Administrative Rules Committee.

Mr. David Garner, Attorney General's office, said because DTL now is subject to NDCC Chapter 28-32, the right to an administrative hearing is triggered. He said that right to a hearing changes the time frame for approving easements and leases. He said it was not until the rules were drafted that DTL realized the issues the department would face under NDCC Chapter 28-32.

In response to a question from Representative Koppelman, Ms. Smith said DTL has discussed the rules with the industry. She said she has spent considerable time identifying internal policies and determining which of those policies should be in rule. She said DTL's rules and policies have been intertwined which made it difficult to separate the two areas. She said a signed lease triggers an order, which then is subject to administrative hearing requirements of NDCC Chapter 28-32. She said rules regarding grants and unclaimed property have been drafted and have a hearing scheduled.

Chairman Devlin said the Administrative Rules Committee granted DTL an extension in March 2018. He said the Legislative Assembly was clear in its intent. He said he would resist any efforts of DTL to make changes in the 2019 legislative session. He said he would like the rules to be completed and brought forward to the Administrative Rules Committee as soon as possible.

Representative Koppelman said he is also reluctant to give an extension. He said DTL should go forward with rules that are ready and continue to work on the remaining rules.

Senator Anderson said whatever DTL's policies and procedures are should be adopted as rules.

Representative Koppelman said if expediency is required and the reason fits the criteria set forth in NDCC Chapter 28-32, DTL can ask the Governor for emergency rulemaking authority.

Chairman Devlin said DTL may not understand the administrative rules process. He said perhaps Representative Koppelman may wish to share his expertise with DTL to answer their questions.

Ms. Smith said because DTL does not have the money for outside assistance, the department would welcome any advice.

OTHER BUSINESS

At the request of Chairman Devlin, the Legislative Council staff presented a memorandum entitled [Administrative Rulemaking Statistics 2017-18](#). The Legislative Council staff said the memorandum summarizes the number of sections and pages reviewed by the committee during the 2017-18 biennium. She said the memorandum also includes a statistical summary of rulemaking by agency. She said the number of sections affected in a biennium is not necessarily reflective of the number of pages of rules. She said a statutory change in the mid-1990s, which allowed the Administrative Rules Committee to reject or carry over rules, has resulted in more carefully drafted rules.

It was moved by Senator Klein, seconded by Representative Koppelman, and carried on a voice vote that the Chairman and the Legislative Council staff be requested to prepare a report and to present the report to the Legislative Management.

No further business appearing, Chairman Devlin adjourned the meeting at 11:50 a.m.

Vonette J. Richter
Legal Division Director

ATTACH:9