

## NORTH DAKOTA LEGISLATIVE MANAGEMENT

### Minutes of the

## ADMINISTRATIVE RULES COMMITTEE

Tuesday, December 3, 2019  
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, Rick Becker, Josh Boschee, Andrew Marschall, Bernie Satrom, Vicky Steiner, Robin Weisz; Senators Joan Heckaman, Jerry Klein, Randy D. Lemm, Nicole Poolman, David S. Rust

**Members absent:** Representatives Kim Koppelman, Brandy Pyle, Dan Ruby, Nathan Toman

**Others present:** Representatives Karla Rose Hanson, Fargo, and Karen M. Rohr, Mandan, members of the Legislative Management

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

**It was moved by Representative Weisz, seconded by Senator Poolman, and carried on a voice vote that the minutes of the September 4, 2019, meeting be approved as distributed.**

### STATE BOARD OF ACCOUNTANCY

Chairman Devlin called on Mr. Michael Schmitz, State Board of Accountancy, for testimony regarding the January 2020 rules of the State Board of Accountancy. Mr. Schmitz said the purpose of the revised rules is to allow for continuous testing for examination candidates, change the date of continuing education reporting, and correct a citation. He said the rules are not expected to have an impact on the regulated community in excess of \$50,000.

In response to a question from Senator Klein, Mr. Schmitz said the rule change will allow applicants to take one section of the certified public accountant examination every 3 months. He said the goal is to allow applicants to complete the entire examination more quickly. He said an applicant will have an 18-month window to pass the entire examination before losing credit for the portions the applicant has passed.

### STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Ms. Brenda Weisz, Chief Administrative Officer, State Department of Health, for testimony ([Appendix B](#)) regarding requesting the repeal of obsolete rules of the department.

**It was moved by Representative Boschee, seconded by Senator Heckaman, and carried on a roll call vote that the administrative rules of the State Department of Health regarding environmental quality be repealed.** Representatives Devlin, Becker, Boschee, Marschall, Satrom, Steiner, and Weisz and Senators Heckaman, Klein, Lemm, Poolman, and Rust voted "aye." No negative votes were cast.

Chairman Devlin called on Ms. Julie Wagendorf, Director, Food and Lodging Division, State Department of Health, for testimony ([Appendix C](#)) regarding the January 2020 rules of the department.

In response to a question from Chairman Devlin, Ms. Wagendorf said the rules reference the definition of private home as that term is defined in North Dakota Century Code (NDCC) Section 23-09.5-01.

In response to a question from Representative Becker, Ms. Wagendorf said all the defined terms in the rules are used elsewhere in the definitions or are used within North Dakota Administrative Code (NDAC) Chapter 33-33-10.

In response to a question from Representative Steiner, Ms. Wagendorf said the rules further clarify the terms contained in NDCC Section 23-09.5-01. She said the rules do not make any changes to the definitions of baked goods.

In response to a question from Representative Becker, Ms. Wagendorf said state law requires a license for anyone who produces and sells low-acid canned foods.

Representative Becker said these rules are overstepping by an executive agency. He said the rules are contrary to legislative authority and intent. He said it was clear the 2019 Legislative Assembly rejected prohibiting the sale of foods prohibited by these rules. He said the rules set a precedent that an agency can bypass the Legislative Assembly's intent by adopting rules.

In response to a question from Representative Becker, Ms. Wagendorf said NDCC Section 23-09.5-01, which defines cottage foods as "baked goods, jams, and jellies, and other foods and drink products", is a list that was not meant to be all inclusive. She said the rules identify those "and other foods and drink products" items. She said otherwise there would be no limits on what constitutes a cottage food. She said any mushrooms sold as a cottage food must be grown and harvested by the cottage food operator. She said low-acid canned foods are a risk to public health. She said rules were written in light of public health and are not contrary to legislative intent.

In response to a question from Senator Poolman, Ms. Wagendorf said NDCC Chapter 23-09 authorizes the department to impose restrictions on low-acid canned foods.

Senator Poolman said because Senate Bill No. 2269 (2019) failed to pass, the bill cannot be used to determine legislative intent.

Chairman Devlin said the State Health Council has a duty to adopt rules to protect public health and prevent disease.

Chairman Devlin called on Ms. LeAnn Harner, Mandan, for testimony regarding the rules. Ms. Harner said the exclusions listed in House Bill No. 1433 (2017) are the only foods that may be excluded from the definition of a cottage food. She said there is a difference between the legislative intent and what is included in these rules. She said the law clearly states no state agency or political subdivision may require additional restrictions regarding licensing, certification, packaging, or labeling. She said there is a disconnect between what was intended by the Legislative Assembly and the rules adopted by the State Department of Health. She said there are items people will not be able to sell because of these rules. She said the rules will stifle economic development.

Chairman Devlin said Ms. Jennifer McDonald, Institute for Justice, who was unable to attend, submitted written testimony ([Appendix D](#)).

Representative Becker said his concern is not with the rules but with the process. He said while rules are within the purview of the agency, he is concerned about the department going forward with a rule on low-acid foods. He said the very specific law that failed in 2019 now is being adopted as a rule.

**It was moved by Representative Becker and seconded by Representative Marschall that NDAC Section 33-33-10-02(2) be voided for failure to comply with express legislative intent.**

Representative Becker said the Legislative Assembly's discussions and testimony on low-acid foods in 2019 can be considered when determining legislative intent.

The Legislative Council staff said the purpose of legislative intent is to interpret a statute. She said because Senate Bill No. 2269 (2019) failed, the bill cannot be used to determine legislative intent as there is not a statute to interpret. She said the rules adopted by the State Health Council regarding cottage foods are based upon House Bill No. 1433 (2017), the bill that created NDCC Chapter 23-09.5. She said the State Health Council had no choice but to rely on the 2017 legislation in drafting rules since there are not any other cottage food laws in place. She said any ambiguity in interpreting the intent of the Legislative Assembly in passing House Bill No. 1433 must be based upon the legislative history for the 2017 bill, not Senate Bill No. 2269, which failed.

In response to a question from Senator Poolman, Ms. Wagendorf said the cottage food producers are not licensed. She said a noncottage food producer may be prosecuted for selling products without a license.

**The motion failed on a roll call vote.** Representatives Becker, Marschall, and Steiner voted "aye." Representatives Devlin, Boschee, Satrom, and Weisz and Senators Heckaman, Klein, Lemm, Poolman, and Rust voted "nay."

## NORTH DAKOTA BOARD OF MEDICINE

Chairman Devlin called on Ms. Bonnie Storbakken, Executive Secretary, North Dakota Board of Medicine, and Mr. Jay Metzger, Board Member, North Dakota Board of Medicine, for testimony ([Appendix E](#)) regarding the January 2020 rules of the board.

## DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Mr. Jonathan Alm, Department of Human Services, for testimony ([Appendix F](#)) regarding the January 2020 rules of the department.

In response to a question from Representative Becker, Mr. Alm said the change from "women" to "individuals" in NDAC Section 75-02-02.1-05(2)(a) was made to include men with breast cancer in the coverage group. He said there was not a discussion about men with prostate cancer.

In response to a question from Representative Steiner, Ms. LeeAnn Thiel, Medical Services Division, Department of Human Services, said nursing home rates are calculated every January based on the annual cost report. She said in May of each year, the rates may be revised. She said the decision whether to seek additional funding from the Emergency Commission would be made by the director of the department.

In response to a question from Representative Becker, Ms. Nancy Nikolas-Maier, Director, Aging Services Division, Department of Human Services, said a federal rule provides a resident on Medicaid must be permitted to access at any time those foods the resident enjoys and likes to eat. She said a resident may be included in meal planning, grocery shopping, and meal preparation, all of which help preserve a resident's independence.

## NORTH DAKOTA BOARD OF OPTOMETRY

Chairman Devlin called Dr. Alan J. King, Executive Director, North Dakota State Board of Optometry, for testimony ([Appendix G](#)) regarding the January 2020 rules of the board.

In response to a question from Representative Becker, Dr. King said the prescribing authority of optometrists is limited to Tylenol 3. He said about 10 percent of optometrists have federal Drug Enforcement Administration authority to prescribe controlled substances. He said he is not sure how optometrists would comply with the requirement in NDAC Section 56-02-07-01(1) to assess a patient's drug monitoring program data every 12 months during the patient's treatment with a controlled substance. He said he would not object if the committee would remove that subsection.

Chairman Devlin said the committee would hold over NDAC Section 56-02-07-01(1) to the next meeting. He said Dr. King should review this rule with the North Dakota State Board of Optometry for more clarification on whether the rule is needed.

## STATE BOARD OF PSYCHOLOGIST EXAMINERS

Chairman Devlin called on Dr. Paul Kolstoe, Board Secretary, State Board of Psychologist Examiners, for testimony ([Appendix H](#)) regarding the January 2020 rules adopted by the board.

In response to a question from Senator Heckaman, Dr. Kolstoe said because 2019 legislation changed the responsibility for the oversight of applied behavior analysts from the State Board of Psychologist Examiners to the State Board of Integrative Health Care, the references to applied behavior analysts have been removed from NDAC Title 66.

In response to a question from Representative Steiner, Dr. Kolstoe because the state once faced a shortage of psychologists, the state allowed master's level psychologists to work under the supervision of a doctoral-level psychologist. He said although that shortage no longer exists and the law was changed, the master's level psychologists licensed at the time were grandfathered in and continue to be licensed.

In response to a question from Representative Rohr, Dr. Kolstoe said there are 8 to 12 doctoral-level psychology residents in the process at any given time.

## SUPERINTENDENT OF PUBLIC INSTRUCTION

Chairman Devlin called on Mr. Jim Upgren, Assistant Director, Office of School Approval and Opportunity, Department of Public Instruction, for testimony ([Appendix I](#)) regarding the January 2020 rules of the Superintendent of Public Instruction.

In response to a question from Representative Becker, Mr. Upgren said the rules regarding homeless child education applies to students through age 21. He said the authority of the Department of Public Instruction is limited to students in grades K-12. He said a student may be enrolled in public school through age 21 or until high school graduation, whichever occurs first.

In response to a question from Representative Rohr, Mr. Upgren said each school reports its homeless child data to the Department of Public Instruction, including when a child leaves the district.

In response to a question from Representative Boschee, Mr. Upgren said he would provide additional information on Title 1 paraprofessionals credentials.

In response to a question from Senator Heckaman, Mr. Upgren said he understands the frustration of having teacher licensing under the Education Standards and Practices Board and administrator licensing under the Department of Public Instruction.

### EDUCATION STANDARDS AND PRACTICES BOARD

Chairman Devlin called on Dr. Rebecca Pitkin, Executive Director, Education Standards and Practices Board, for testimony ([Appendix J](#)) regarding the January 2020 rules of the board.

### BOARD OF UNIVERSITY AND SCHOOL LANDS

Chairman Devlin called on Ms. Jodi A. Smith, Commissioner, Board of University and School Lands, for testimony ([Appendix K](#)) regarding the January 2020 rules of the board. Ms. Smith said the board would like to request an amendment to NDAC 85-01-01-02 to remove the phrase ", after due notice and hearing.". She said because the board is no longer subject to the adjudicative process in NDCC Chapter 28-32, the phrase should have been removed in the drafting of the January 2020 rules.

**It was moved by Representative Boschee, seconded by Representative Steiner, and carried on a roll call vote that NDAC Section 85-01-01-02 be amended to remove the phrase ", after due notice and hearing,".** Representatives Devlin, Becker, Boschee, Marschall, Steiner, and Weisz and Senators Heckaman, Klein, Lemm, Poolman, and Rust voted "aye." No negative votes were cast.

In response to a question from Representative Steiner, Ms. Smith said the rules do not provide for a penalty because the statute does not contain a penalty. She said the intent is to provide more education on proper signage.

In response to a question from Representative Becker, Ms. Smith said leases with a state agency are exempt from the public auction requirement in NDAC Section 85-04-02-02(4).

In response to a question from Representative Becker, Mr. Michael Humann, Surface Division Manager, Department of Trust Lands, said political subdivisions always have been exempt from the public auction requirement. He said fair market value is determined by using comparable property.

No further business appearing, Chairman Devlin adjourned the meeting at 2:00 p.m.

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Vonette J. Richter  
Legal Division Director

ATTACH:11