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## ADMINISTRATIVE RULES COMMITTEE

Wednesday, March 4, 2020  
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, Kim Koppelman, Andrew Marschall, Brandy Pyle, Bernie Satrom, Vicky Steiner, Nathan Toman, Robin Weisz; Senators Joan Heckaman, Jerry Klein, Randy D. Lemm, Nicole Poolman

**Members absent:** Representative Dan Ruby; Senator David S. Rust

**Others present:** Representative Karen M. Rohr, Mandan, member of the Legislative Management  
See [Appendix A](#) for additional persons present.

**It was moved by Representative Boschee, seconded by Representative Satrom, and carried on a voice vote that the minutes of the December 3, 2019, meeting be approved as distributed.**

### NORTH DAKOTA BOARD OF OPTOMETRY

Chairman Devlin called on Dr. Brian Beattie, Secretary, North Dakota Board of Optometry, for testimony regarding a January 2020 rule of the board carried over from the December 3, 2019, meeting. Dr. Beattie said because an optometrist's authority to prescribe drugs is limited to schedule III drugs, the board concluded the new language in North Dakota Administrative Code (NDAC) Section 56-02-07-01(1) was unnecessary.

**It was moved by Representative Becker, seconded by Representative Boschee, and carried on a roll call vote that the new language in NDAC Section 56-02-07-01(1) be removed.** Representatives Devlin, Becker, Boschee, Koppelman, Marschall, Pyle, Satrom, Steiner, Toman, and Weisz and Senators Heckaman, Klein, Lemm, and Poolman voted "aye." No negative votes were cast.

### PUBLIC EMPLOYEES RETIREMENT SYSTEM BOARD

Chairman Devlin called on Mr. Scott Miller, Executive Director, Public Employees Retirement System, for testimony ([Appendix B](#)) regarding the April 2020 rules of the Retirement Board.

In response to a question from Representative Becker, Mr. Miller said because a different methodology is used when scheduling firefighters and peace officers versus civilian employees, a different definition of the term "overtime" is required.

In response to a question from Representative Koppelman, Mr. Miller said the phrase "rule of eighty-five" was changed to "normal retirement date" because normal retirement date is determined by statute.

### OFFICE OF MANAGEMENT AND BUDGET

Chairman Devlin called on Ms. Lisa Kudelka, Chief People Officer, Human Resource Management Services Division, Office of Management and Budget, and the State Personnel Board, for testimony ([Appendix C](#)) regarding the April 2020 rules of the Office of Management and Budget and the State Personnel Board.

In response to a question from Representative Koppelman, Ms. Kudelka said the amount of sick leave permitted to be used for bereavement following the death of a child--160 hours--is set by statute.

In response to a question from Representative Rohr, Ms. Kudelka said the statute allowing bereavement leave upon the death of a child does not set a minimum age of the child. She said whether an employee may use the leave following a miscarriage or still birth is an agency decision.

In response to a question from Representative Steiner, Ms. Kudelka said the rule change does not affect performance bonuses. She said the rule change will allow an agency to give performance bonuses to more than 25 percent of its staff. She said the maximum bonus of \$1,500 per employee per year still applies.

## INDUSTRIAL COMMISSION

Chairman Devlin called on Mr. Bruce Hicks, Assistant Director, Oil and Gas Division, Industrial Commission, for testimony ([Appendix D](#)) regarding the April 2020 rules of the commission.

In response to a question from Representative Steiner, Mr. Hicks said the amendment to NDAC Section 43-02-03-10 allows the Industrial Commission to enter agreements with tribal authorities. He said an agreement made pursuant to this section must be related to the conservation of oil and gas. He said the change was not made to allow for the creation of tax sharing agreements with a tribe. He said the Industrial Commission does not have the authority to enter tax agreements. He said this rule change would allow memoranda of understanding and other agreements with tribes for any issue allowed by statute.

In response to a question from Chairman Devlin, Mr. Hicks said to be consistent with statutory definitions, he would support changing the term in NDAC Section 43-02-03-10 from "tribal authorities" to "tribal governments."

In response to a question from Representative Becker, Mr. Hicks said the rule states the agreements must relate to the conservation of oil and gas. He said the authority for this rule is derived from North Dakota Century Code (NDCC) Title 38. He said NDCC Title 57 provides for tax law and tax agreements. He said the authority to make tax sharing agreements is not within the authority of the Industrial Commission.

**It was moved by Representative Koppelman, seconded by Senator Poolman, and carried on a roll call vote that NDAC Section 43-02-03-10 be amended to change "tribal authorities" to "tribal governments," and Section 43-02-03-51.1(1)(h) be amended to remove the word "with" at the end of subdivision h.** Representatives Devlin, Becker, Boschee, Koppelman, Marschall, Pyle, Satrom, Steiner, Toman, and Weisz and Senators Heckaman, Klein, Lemm, and Poolman voted "aye." No negative votes were cast.

In response to a question from Representative Boschee, Mr. Hicks said the responsibility for plugging a temporarily abandoned well remains with the operator. He said the state may have some liability if the operator declares bankruptcy. He said extra bonding is required for an operator that intends to carry an abandoned well that has been abandoned for more than 7 years. He said the 7-year period refers to the total amount of time the well is abandoned, not the length of time it is owned by an operator. He said all transfers of abandoned wells must be approved by the director of the Oil and Gas Division.

In response to a question from Senator Heckaman, Mr. Hicks said the rule change to NDAC Section 43-02-06-01(4) does not amend the deductions requirements but is a clarification that the deductions are for the owners not the producers.

Chairman Devlin called on Mr. Brady Pelton, Government Affairs Manager, North Dakota Petroleum Council, for comments regarding the rules. Mr. Pelton said on behalf of the North Dakota Petroleum Council, he would like to commend the Industrial Commission for its work on the rules. He said the industry is supportive of the rule changes.

Chairman Devlin said the committee received written testimony ([Appendix E](#)) from Irish Oil & Gas, Inc.

Mr. Hicks said Irish Oil and Gas, Inc., did not offer any comments or concerns during the rulemaking procedure. He said he does not see a lot of merit in the concerns expressed in the letter.

## STATE BOARD OF PHARMACY

Chairman Devlin called on Mr. Mark Hardy, Executive Director, State Board of Pharmacy, for testimony ([Appendix F](#)) regarding the April 2020 rules of the board.

In response to a question from Representative Koppelman, Mr. Hardy said the National Association of Boards of Pharmacy (NABP) is a national organization that helps states' pharmacy boards perform their duties. He said NABP provides a uniform licensure examination and individual state examinations. He said NABP also operates an electronic license transfer program. He said the rule changes allow a military spouse to be issued a 3-month provisional license, after which time the military spouse must pass the multi-state examination. He said if an applicant fails the examination, there is a 30-day waiting period before the examination may be retaken.

## NORTH DAKOTA BOARD OF PHYSICAL THERAPY

Chairman Devlin called on Mr. Bruce Wessman, Executive Director, North Dakota Board of Physical Therapy, for testimony ([Appendix G](#)) regarding the April 2020 rules of the board.

In response to a question from Representative Rohr, Mr. Wessman said the board has never received a complaint regarding a physical therapy assistant. He said a physical therapy assistant must be supervised by a physical therapist.

In response to a question from Representative Pyle, Mr. Wessman said the difference in the process for a military spouse is the application, verification, and other procedures must be completed within 90 days after receiving a license rather than before licensure for a regular applicant.

In response to a question from Representative Rohr, Mr. Wessman said criminal history background checks for physical therapists and physical therapy assistants have been required since 2017. He said the applicant is responsible for the cost of the criminal history background check.

In response to a question from Representative Becker, Mr. Wessman said a licensee pays \$85 per year in compact membership fees. He said there are 28 states in the compact and 10 additional states are considering joining the compact this year.

In response to a question from Representative Koppelman, Mr. Wessman said most military spouses will be able to complete the licensure process in 1 month. He said the military spouses are given 90 days to complete the licensure process after being issued a provisional license with extensions granted for good cause. He said physical therapy assistants may be supervised by telehealth. He said physical therapy aides must have direct supervision.

In response to a question from Representative Rohr, Mr. Wessman said once a physical therapist evaluates a patient, the patient may have up to six visits with the physical therapy assistant before the physical therapist must evaluate the patient again.

In response to a question from Representative Steiner, Mr. Wessman said to avoid confusion, a physical therapist who has graduated from a doctor of physical therapy program may not use the title "doctor" without clearly informing the public of the physical therapist's occupation as a physical therapist. He said the rule applies to how physical therapists represent themselves, not how patients may address the physical therapist.

## STATE BOARD OF PLUMBING

Chairman Devlin called on Ms. Kimberley Tomanek, Business Manager, State Board of Plumbing, for testimony ([Appendix H](#)) regarding the April 2020 rules of the board.

In response to a question from Representative Koppelman, Ms. Tomanek said rather than listing the exceptions to the Uniform Plumbing Code, as published by the International Association of Plumbing and Mechanical Officials, the State Board of Plumbing included those exceptions in its publication known as the *2018 North Dakota Plumbing Code*. She said the International Association of Plumbing and Mechanical Officials published the book for North Dakota and included the exceptions that previously had been included in the Administrative Code.

In response to a question from Representative Boschee, Ms. Tomanek said when it is time to update the North Dakota Plumbing Code, the board will use the administrative rulemaking process to do so.

## 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 April 2020 rules of the Superintendent of Public Instruction. Mr. Upgren said in NDAC Section 67-11-22-02, the phrase "principal's credential" was used by mistake. He said the correct phrase should be "computer science and cybersecurity credential."

**It was moved by Representative Steiner, seconded by Representative Satrom, and carried on a roll call vote that in NDAC Section 67-11-22-02 on page 121 of Supplement 376, the phrase "principal's credential" be replaced with "computer science and cybersecurity credential."** Representatives Devlin, Becker, Boschee, Koppelman, Marschall, Pyle, Satrom, Steiner, Toman, and Weisz and Senators Heckaman, Klein, Lemm, and Poolman voted "aye." No negative votes were cast.

Mr. Upgren said regarding rules for the school psychology intern approval in NDAC Chapter 67-11-15, the department proposed the repeal of this chapter. He said he recently discovered there are some rare occasions when a school psychology intern approval is issued by the department, and therefore, the rules should not be repealed.

**It was moved by Senator Heckaman, seconded by Representative Boschee, and carried on a roll call vote that, as requested by Mr. Upgren, NDAC Chapter 67-11-15, as published on pages 119-120 of Supplement 376, not be repealed and remain in effect.** Representatives Devlin, Becker, Boschee, Koppelman, Marschall, Pyle, Satrom, Steiner, Toman, and Weisz and Senators Heckaman, Klein, Lemm, and Poolman voted "aye." No negative votes were cast.

In response to a question from Representative Rohr, Mr. Upgren said because computer science and cybersecurity is a rapidly changing area, the department will continue to update the credential requirements as standards are updated.

In response to a question from Representative Becker, Mr. Upgren said the local law enforcement officer with authority to approve a school's armed first responder program could be either the police chief or the county sheriff, depending on which official provides direct protection for that school.

In response to a question from Representative Rohr, Mr. Upgren said the department does not plan to publish a list of schools with an armed first responder program.

Representative Satrom said publishing such a list may make schools more vulnerable to attack if the public knows which schools do not have an armed first responder program.

In response to a question from Representative Koppelman, Mr. Upgren said the intent of the rules was to develop the process for approving an armed first responder program, to identify a contact person at the department, and to establish deadlines. He said the department will rely on the expertise of law enforcement and the Department of Emergency Services when approving programs.

In response to a question from Representative Koppelman, Mr. Upgren said school resource officers are employed by law enforcement agencies. He said he is not aware of any administrative rules for school resource officers.

In response to a question from Senator Heckaman, Mr. Stan Schauer, Assistant Director of Adult Education, Department of Public Instruction, said the Private Investigative and Security Board is developing the training specifics for the armed first responder program. He said the training specifics will be adopted as rules and will be reviewed by the Administrative Rules Committee at a future meeting. He said local schools will have the discretion whether to inform the public of its armed first responder program. He said regarding the local law enforcement question, all local law enforcement would have to be on board for the program to work. He said more discussion will be needed to address the law enforcement approval process.

Chairman Devlin called on Mr. ElRoy Burkle, Executive Director, North Dakota Small Organized Schools, for comments regarding the department's rules. Mr. Burkle said the department did a good job in developing rules and in creating a workable process. He said it is likely small schools will work on plans with the county sheriff rather than the police chief. He said schools in small towns typically will have a longer law enforcement response time than schools in larger cities.

## **WORKFORCE SAFETY AND INSURANCE**

Chairman Devlin called on Mr. Tim Wahlin, Chief of Injury Services, Workforce Safety and Insurance, for testimony ([Appendix J](#)) regarding the rules of Workforce Safety and Insurance.

In response to a question from Representative Steiner, Mr. Wahlin said outside counsel defense fees are reviewed every 2 years. He said the fees closely track injured worker attorney's fees.

In response to a question from Representative Koppelman, Mr. Wahlin said under NDCC Section 65-02-20, medical determination disputes use a different dispute resolution process than other appeals. He said the new rule aligns the pharmacy dispute resolution process with the medical dispute resolution process. He said if there is a denial of a payment or service, the injured worker can appeal to district court.

In response to a question from Senator Klein, Mr. Wahlin said the rule regarding coverage for footwear needed clarification. He said the intent is to make the coverage consistent.

## **DEPARTMENT OF HUMAN SERVICES**

Chairman Devlin called on Mr. Jonathan Alm, Legal Advisory Unit, Department of Human Services, for testimony ([Appendix K](#)) regarding the April 2020 rules of the department. Mr. Alm said to make the income level consistent in subdivisions d and k of subsection 2 on page 179 of the supplement, the new language in subdivision k should be changed from "sixty-two" to "fifty-seven."

**It was moved by Representative Becker, seconded by Representative Pyle, and carried on a roll call vote that NDAC Section 75-02-02-29(2)(k) be amended to replace "sixty-two" with "fifty-seven."** Representatives Devlin, Becker, Boschee, Koppelman, Marschall, Pyle, Satrom, Steiner, Toman, and Weisz and Senators Heckaman, Klein, Lemm, and Poolman voted "aye." No negative votes were cast.

In response to a question from Representative Boschee, Mr. Alm said a maximum of \$12,500 per eligible child under the autism spectrum disorder voucher program was based upon the funding appropriated.

Ms. Katherine Barchenger, State Autism Coordinator, Department of Human Services, said \$12,500 is adequate. She said most cases will not reach that amount.

In response to a question from Representative Weisz, Ms. Karla Backman, Long-term Care Ombudsman, Division of Aging Services, Department of Human Services, said under state law, a roommate of the resident being electronically monitored may withdraw consent at any time in writing and have the device disabled. She said the device must be disabled immediately upon notice of the withdrawn consent.

In response to a question from Representative Steiner, Ms. Pamela Sagness, Director, Behavioral Health Division, Department of Human Services, said the law allows the department to charge up to \$300 for licensing medication units. She said the rules set a licensing fee of \$150 for a 3-year license.

Mr. Alm said the department reviewed its rules to make the rules accurate and consistent with terminology used in state law and to comply with Senate Bill No. 2124 (2019). He said the proposed changes change "county agency" or "county" to "human service zone"; "county general assistance" to "general assistance"; "county agency" to "department"; "county social service board" to "human service zone" or "human service zone director"; "county social service agencies" to "human service zones"; "social service board of North Dakota" to "department"; or "county social services" to "human service zones." He said the changes also repeal obsolete provisions.

**It was moved by Representative Koppelman, seconded by Senator Poolman, and carried on a roll call vote that the proposed changes to NDAC Chapters 75-01-02, 75-01-03, 75-01-04, 75-02-01.2, 75-02-01.3, 75-02-10, 75-03-17.1, 75-03-21, 75-03-33, 75-03-36, 75-03-40, and 75-03-41, and Article 75-07, be approved.** Representatives Devlin, Becker, Boschee, Koppelman, Marschall, Pyle, Satrom, Steiner, Toman, and Weisz and Senators Heckaman, Klein, Lemm, and Poolman voted "aye." No negative votes were cast.

## **NORTH DAKOTA BOARD OF CLINICAL LABORATORY PRACTICE**

Chairman Devlin called on Dr. Christie Massen, ex-officio member, North Dakota Board of Clinical Laboratory Practice, for testimony ([Appendix L](#)) regarding the April 2020 rules of the board.

In response to a question from Representative Koppelman, Dr. Massen said the board recognizes several national certifying examinations. She said some national certifying examinations allow an applicant to challenge an examination without completing the educational requirements. She said the board does not allow an applicant to challenge an examination, but an applicant may test to be able to perform limited functions in a laboratory.

Representative Koppelman said the state does not want to put up licensing barriers to limit people who want to practice in the state.

Dr. Massen said the state recognizes education received in other states.

In response to a question from Representative Rohr, Dr. Massen said because the board frequently receives questions regarding the tests a clinical laboratory specialist can perform, a rule was added to identify those specialty areas.

In response to a question from Senator Poolman, Dr. Massen said changes were not necessary to address the military spouse issue because the board had a provisional license process.

## **MEDICAL IMAGING AND RADIATION THERAPY BOARD**

Chairman Devlin called on Ms. Shirley Porter, President, Medical Imaging and Radiation Therapy Board, for testimony ([Appendix M](#)) regarding the April 2020 rules of the board.

In response to a question from Representative Rohr, Ms. Porter said the rules give the board the authority to hire an executive director. She said there are no immediate plans to hire an executive director but as more people become licensed, it may become necessary. She said the board wanted to have the option to hire an executive director if the increased workload becomes too much for the board to handle.

In response to a question from Representative Koppelman, Ms. Porter said the board is funded through licensure fees. She said per diem is set in statute and rule.

### **NORTH DAKOTA BOARD OF MEDICINE**

Chairman Devlin called on Ms. Lynette McDonald, Deputy Executive Secretary, North Dakota Board of Medicine, for testimony ([Appendix N](#)) regarding a request to repeal NDAC Section 50-02-11-02. Ms. McDonald said Senate Bill No. 2173 (2019) authorized the state to join the Medical Licensing Compact. She said NDAC Section 50-02-11-02, which limits the time allowed to complete examination requirements, is in conflict with the standards in the compact and should be repealed.

**It was moved by Representative Koppelman, seconded by Representative Satrom, and carried on a roll call vote that NDAC Section 50-02-11-02 be repealed.** Representatives Devlin, Becker, Boschee, Koppelman, Marschall, Pyle, Satrom, Steiner, Toman, and Weisz and Senators Heckaman, Klein, Lemm, and Poolman voted "aye." No negative votes were cast.

No further business appearing, Chairman Devlin adjourned the meeting at 2:15 p.m.

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Vonette J. Richter  
Legal Division Director

ATTACH:14