

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Wednesday, July 17, 2002
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative LeRoy G. Bernstein, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives LeRoy G. Bernstein, Duane DeKrey, William R. Devlin, Mary Ekstrom, Bette Grande, Kim Koppelman, Jon O. Nelson, Sally M. Sandvig, Blair Thoreson, Dwight Wrangham; Senators John M. Andrist, Thomas Fischer, Layton Freborg, Deb Mathern, David O'Connell, Bob Stenehjem

Members absent: Representatives Nancy Johnson, Darrell D. Nottestad; Senator Jerry Klein

Others present: See Appendix A

It was moved by Senator O'Connell, seconded by Representative Grande, and carried on a voice vote that the minutes of the March 27, 2002, meeting be approved as distributed.

Chairman Bernstein called on committee counsel for a briefing on relevant occurrences since the previous committee meeting.

Committee counsel said at the previous committee meeting, the Administrative Rules Committee approved a motion to carry over consideration of rules adopted by the Racing Commission. He said the motion was passed at the request of Mr. Lance Hagen, a member of the Racing Commission, who has since resigned from the commission. He said Mr. Bill Peterson, Assistant Attorney General, representing the Racing Commission, sent a letter to inform the committee that the commission would not recommend any changes to its rules. A copy of Mr. Peterson's letter is attached as Appendix B.

Committee counsel said the North Dakota Supreme Court has issued its opinion in *Clayburgh v. American West Community Promotions, Inc.*, 2002 ND 98, filed June 4, 2002. He said this decision is significant because the Supreme Court has ruled that a portion of North Dakota Administrative Code Section 81-04.1-01-28 is void because it is beyond the scope of the Tax Commissioner's statutory authority. He said the decision has to do with application of sales taxes to sales of coupon books and the portion of the rule in question provided that sales of coupon books are sales of tangible personal property that are subject to sales taxes. He said the decision involved examination of legislative intent and the significance to be given to an administrative interpretation of a statutory provision. He said the

administrative rule has existed since 1989 while the sales tax has existed since 1935 and the Supreme Court found it significant that the rule interpretation has not been continuous nor contemporaneous with the sales tax law. He said the Supreme Court did not provide information on how long coupon books have been available. He said the Supreme Court discussed the doctrine of legislative acquiescence, under which an agency interpretation of a statute gains additional value as evidence of legislative intent as time passes and the Legislative Assembly does not overrule the interpretation. He said the majority opinion states that there is nothing in the legislative history to indicate that the Legislative Assembly considered the 1989 administrative rule during any subsequent reenactment of the statutory provision. He said this appears to be a substantial change in the doctrine of legislative acquiescence because previous decisions have stated that with regard to application of the doctrine of legislative acquiescence, the Legislative Assembly is presumed to know the construction of its statutes by administrative agencies. He said a dissenting opinion in *American West* also pointed out that there is evidence that the Legislative Assembly was cognizant of the rule because the Administrative Rules Committee has reviewed the 1989 administrative rule. The dissenting opinion also pointed out that previous court decisions have concluded that the Legislative Assembly is presumed to be aware of an agency interpretation of a statute, without any evidence that the legislature's attention had been directed to the agency interpretation. Committee counsel said the committee should be aware of *American West* for several reasons, including the uncertainty that now exists in the doctrine of legislative acquiescence, the status of administrative rules review under the doctrine of legislative acquiescence, and the likelihood that legislation will be introduced during the 2003 legislative session regarding application of sales taxes to coupon book sales.

Committee counsel said a rule of the Department of Financial Institutions regarding deferred presentment service providers was voided by motion of the Administrative Rules Committee at its March 27, 2002, meeting. He said the department did not file an appeal of that action. He said the rule has

been changed in the North Dakota Administrative Code to reflect the committee action.

Committee counsel said a letter opinion was issued by Mr. Calvin N. Rolfson, Special Assistant Attorney General, State Board of Nursing, dated May 10, 2002. A copy of the opinion is attached as Appendix C. Committee counsel said the opinion relates to whether rules to implement legislation must be adopted by the State Board of Nursing within the nine-month deadline of North Dakota Century Code Section 28-32-07. He said the opinion concludes that because statutory authority for rulemaking by the State Board of Nursing is optional because the statute uses the word "may," the nine-month deadline within which to implement rules does not apply. Committee counsel said if this opinion is strictly applied, each bill considered by the Legislative Assembly, and perhaps each section of each bill, would require the Legislative Assembly to consider whether mandatory rulemaking should be required so that the nine-month deadline for rule adoption would apply. He said this would be an undesirable interpretation and result. He said he believes the opinion does not give consideration to situations in which legislation requires rulemaking to be implemented and inaction by an agency would amount to an "administrative veto" of legislation. He said in such situations, he believes there would be an implied mandatory rulemaking duty, although statutory provisions do not use mandatory language. Committee counsel said he wanted to point these issues out to the committee because of their potential significance to future legislation and Administrative Rules Committee actions.

Representative Devlin asked whether it would be advisable for the committee to seek a formal opinion from the Attorney General to clarify these issues. Committee counsel said that is an option but if the opinion of the Attorney General reaches the same conclusion as the letter opinion, it would carry more legal significance than the letter opinion.

Representative Bernstein asked Representative Devlin whether he believes there is a need for legislation to address optional and mandatory rulemaking responsibilities. Representative Devlin said he will consult with committee counsel regarding this issue before the next committee meeting.

Committee counsel said one other item of interest was reported in the Montana Legislative Services publication of interim activities. He said 2001 Montana legislation substantially revised the interim committee structure in Montana. He said now each interim committee is responsible to review administrative rules in its subject matter area and there is no Administrative Code Committee. He said the Administrative Code Committee had been responsible to review all agency rules and was limited to acting only after rules were proposed or adopted. He said the new approach allows interim committees to become involved in administrative rulemaking

before proceedings are even begun. He said the apparent objectives of the approach are to provide more legislative experience in the subject matter field and to provide earlier involvement in rulemaking. He said the approach in North Dakota has been to require membership from each legislative standing committee on the Administrative Rules Committee to provide subject matter familiarity. He said it appears that weaknesses in the Montana approach include no committee with developed expertise in administrative rules procedures and review and potential for increased criticism of legislative branch interference in executive branch functions, which might be perceived as a violation of the separation of powers doctrine.

AERONAUTICS COMMISSION

Chairman Bernstein called on Mr. Gary R. Ness, Director, North Dakota Aeronautics Commission, for testimony regarding June 2002 rules of the commission. A copy of Mr. Ness's prepared testimony is attached as Appendix D.

BOARD OF DENTAL EXAMINERS

Chairman Bernstein called on Mr. Jerome Kettleon, legal counsel, Board of Dental Examiners, for testimony relating to June 2002 rules of the board. A copy of Mr. Kettleon's prepared testimony is attached as Appendix E.

Senator Andrist said he supported expanded authority for dental hygienists and asked whether the rules are consistent with that legislative change. Mr. Kettleon said 2001 legislation allowed expansion of functions that may be performed by dental hygienists in both primary and satellite facilities and these rule changes are consistent with that legislation.

HIGHWAY PATROL

Chairman Bernstein called on Captain Mark Bethke, Safety and Education Officer, Highway Patrol, for testimony relating to June 2002 rules of the Highway Patrol. A copy of Captain Bethke's prepared testimony is attached as Appendix F.

Representative Nelson asked how the availability of the Internet driver education training course is advertised or otherwise made known to the public. Captain Bethke said the school that has been authorized to conduct the course is allowed to advertise and the Department of Transportation also provides information to potential students.

Representative Grande asked whether students are allowed to regain their driver's license privileges by taking this course. Captain Bethke said if drivers lose license privileges, they must go at least six months without a license if they are under age 18. He said after that suspension they are eligible for reinstatement upon meeting certain requirements and this Internet course can be used to fulfill one of those requirements, but it is not enough by itself to reinstate driving privileges. He said these individuals must also

complete 30 hours of behind-the-wheel driver's training and retake the driver's license test.

In response to a question from Representative Bernstein, Captain Bethke said Minot State University is the only approved program for the Internet driver's training program at this time. He said successful completion of the course entitles the individual to a certificate of completion as evidence that the course has been completed.

Senator Stenehjem said the information presented by Captain Bethke indicates the Internet course is available only for individuals whose license or permit has been canceled for accumulating in excess of five points or committing an alcohol offense. Senator Stenehjem said he recalls the legislation required six points for suspension. He said he thinks the rules should be carried over to make clear at what point license or permit privileges are canceled for minors.

It was moved by Representative DeKrey, seconded by Senator Stenehjem, and carried on a voice vote that the committee carry over consideration of the June 2002 rules of the Highway Patrol.

INDUSTRIAL COMMISSION OIL AND GAS DIVISION

Chairman Bernstein called on Mr. Bruce E. Hicks, Assistant Director, Oil and Gas Division of the Industrial Commission, for presentation of testimony relating to July 2002 rules of the commission. A copy of Mr. Hicks' prepared testimony is attached as Appendix G.

In response to a question from Representative Ekstrom, Mr. Hicks said there are inspectors in the field within the state to check the quality of dikes required around oil production sites to retain potential spills. He said the preventive approach is preferable to remediation that would be required after a substantial spill. He said there is a notification process requiring notice to the Oil and Gas Division and other agencies anytime more than one barrel of petroleum products is spilled.

Senator O'Connell said he has farmed around these sites for over 30 years and in his experience the dikes are not properly constructed and fail to hold spills. He said he has lost several acres of farmland because of spills. Mr. Hicks said incorrect approaches have been found in some areas, such as using gravel or scoria for a dike material. He said this makes the dike permeable and is an improper procedure. He said the Oil and Gas Division is trying to tighten the rules for these dikes and enforcement of the rules to prevent the kind of problems Senator O'Connell described.

STATE BOARD OF MEDICAL EXAMINERS

Chairman Bernstein called on Mr. Rolf P. Sletten, Executive Secretary and Treasurer, State Board of Medical Examiners, for presentation of testimony

relating to May 2002 rules of the board. A copy of Mr. Sletten's prepared testimony is attached as Appendix H.

STATE BOARD OF NURSING

Chairman Bernstein called on Ms. Connie Kalanek, Executive Director, State Board of Nursing, for presentation of testimony relating to June 2002 rules of the board. A copy of Ms. Kalanek's prepared testimony is attached as Appendix I.

Senator Fischer asked about the definitions of "personal care" and "safe and healthy environment" and whether these would include bedmaking tasks. Ms. Kalanek said the personal care definition is intended to include any task delegated by a nurse.

Representative Koppelman said in the area of disciplinary investigations, it is provided that a report may be expunged if it is found there is no merit to the complaint. He asked why expunging a report is optional when there is no merit and whether it should instead be mandatory to expunge the report. Ms. Kalanek said she is not certain why the language was chosen and would have to consult with legal counsel regarding this issue.

Representative Koppelman said North Dakota Administrative Code Section 54-02-07-07 allows imposition of penalty fees after disciplinary actions and said it appears penalty fees are unlimited. Ms. Kalanek said the amount to be assessed as penalty fees has by custom been within the discretion of the board.

Representative Koppelman said fees for transitional license applications were doubled and are now nonrefundable. He asked why these changes were necessary. Ms. Kalanek said the fee was made nonrefundable to be consistent throughout rules with regard to application fees. She said after processing applications, the board has incurred costs and the fee for the application should be retained to cover the board's costs for processing the application. She said the fee was doubled for transitional licenses because transitional licenses were inadvertently omitted from the last fee increases so it is necessary to increase these fees by a greater amount.

Representative Devlin said suspension of licenses by action of the director is allowed. He said these suspensions must be reviewed by the board and asked what time might pass before a suspension decision of the director is reviewed by the board. Ms. Kalanek said a maximum of approximately two months could elapse before review by the board if a suspension by the director occurred right after a board meeting. She said the board felt this option was necessary because other states have encountered problems when there was nothing that could be done to stop improper practice until a board meeting is held.

Representative Devlin asked what date the board decision was made to proceed with adoption of

foreign practitioners' rules. Ms. Kalanek said she can provide the minutes of the meeting when that decision was made by mail to Representative Devlin, but she does not recall the date of the meeting at this time.

STATE BOARD OF PHARMACY

Chairman Bernstein called on Mr. Howard C. Anderson, Jr., R.Ph., Executive Director, State Board of Pharmacy, for presentation of testimony relating to May 2002 rules of the board. A copy of Mr. Anderson's prepared testimony is attached as Appendix J.

In response to a question from Senator Mathern, Mr. Anderson said the board does not anticipate that a pharmacist would administer injections without a physician's or nurse practitioner's authorization.

In response to a question from Representative Bernstein, Mr. Anderson said there could be instances when a flu vaccine is administered to a group of people but only if directed by a physician and the individuals to receive the vaccination are specifically named in the directive from the physician.

Senator O'Connell said he thinks there may be rural areas where pharmacists are too busy to get into administering injections. Mr. Anderson said there will not be unanimous use of the authority to administer injections, but it will be useful in some communities. He said it is voluntary whether to participate.

SUPERINTENDENT OF PUBLIC INSTRUCTION

Chairman Bernstein called on Dr. Gary Gronberg, Department of Public Instruction, for presentation of testimony regarding June 2002 rules of the Superintendent of Public Instruction. A copy of Dr. Gronberg's prepared testimony is attached as Appendix K.

Representative Grande asked why in the driver's education rules is a reference overstruck relating to driving under the influence of alcohol offenses. Dr. Gronberg said there is a provision for review of any moving violation which would include driving under the influence violations, so the language was struck out as surplus.

In response to another question from Representative Grande, Dr. Gronberg said the rule currently requires that an instructor have a driving record that shows 36 months without a violation to be eligible for teaching driver's education.

Representative Ekstrom questioned how the new federal "no child left behind" legislation will impact school districts and whether there is a sense of how school districts are responding. Dr. Gronberg said the new federal program will present a challenge for some school districts. He said one aspect of the federal law that presents concerns is that a teacher must have a college major in the field in which that person is teaching. He said in North Dakota, teachers have been allowed to teach in a field in which they

have a college minor and this will now be prohibited. He said the Superintendent of Public Instruction is looking at options to avoid forcing these teachers to go back to college to obtain more college credits in their teaching field. He said it appears there may be options involving testing for competency or other possibilities to avoid forcing teachers to return to college or give up their teaching positions.

Representative Ekstrom said North Dakota Administrative Code Section 67-19-02-07 allows a school to request and obtain a waiver of an accreditation standard. She asked how many waivers have been requested and granted. Ms. Anita Decker, Director of School Accreditation, Department of Public Instruction, said so far only one waiver has been requested and granted and it related to a school principal.

In response to a question from Representative Nelson, Dr. Gronberg said the federal "no child left behind" legislation requires all teachers to be "highly qualified," which is defined as having a college major in the subject matter in which they are teaching or an acceptable alternative. He said the option of an acceptable alternative may mean some sort of testing might be substituted to demonstrate competency in core subjects. He said the federal law will require that in core subjects, a teacher must have a college major or the equivalent acceptable alternative.

In response to a further question from Representative Nelson, Dr. Gronberg said the federal government gave the state a substantial amount of money to get teachers up to qualification under the federal law and allowed until 2005 for existing teachers to meet the required qualifications. He said the federal law also allows alternatives, although it is not clear exactly what those alternatives are. He said other states already have required teachers to have a major in the area in which they are teaching, so this requirement is not a big problem for those states. He said North Dakota allows teachers to teach in a field in which they have a college minor and the requirement of a college major will be a problem for some North Dakota teachers.

In response to a question from Representative Grande, Dr. Gronberg said that money made available by the federal government is for retraining of teachers already in the teaching profession who do not meet the requirements of a major in their core area.

SECRETARY OF STATE

Chairman Bernstein called on Mr. Alvin A. Jaeger, Secretary of State, for presentation of testimony relating to June 2002 rules of the Secretary of State. A copy of Mr. Jaeger's prepared testimony is attached as Appendix L.

Representative Koppelman said North Dakota Administrative Code Section 72-01-02-11 appears to require the Social Security number in the searchable

index for Uniform Commercial Code documents. He asked why the Social Security number is required. Ms. Llona Sailing, Secretary of State's office, said Social Security numbers are required by federal law for certain filings. She said on Uniform Commercial Code filings, the Secretary of State's office blocks out Social Security numbers so they cannot be accessed and used for improper purposes.

DEPARTMENT OF HUMAN SERVICES

Chairman Bernstein called on Ms. Melissa Hauer, Director, Legal Services Division, Department of Human Services, for presentation of testimony relating to June and July 2002 rules of the department. Copies of Ms. Hauer's prepared testimony are attached as Appendices M and N.

Representative Ekstrom asked whether there is any problem under these rules with regard to application of long-term care insurance coverage to assisted living facility residents. Ms. Hauer said the department involved representatives of the Insurance Department in the rulemaking action and believes problems have been addressed. Ms. Linda Wright, Director, Aging Services, Department of Human Services, said there are some remaining problems with coverage under existing policies in assisted living facilities, but new long-term care insurance coverage policies will cover services in assisted living facilities.

Chairman Bernstein called on Ms. Krista Andrews, legal counsel, Department of Human Services, for presentation of testimony relating to a request by the department for committee approval of the repeal of North Dakota Administrative Code Chapters 75-02-01.1 and 75-06-01 on the grounds these provisions are obsolete. Copies of Ms. Andrews' prepared testimony are attached as Appendices O and P.

It was moved by Representative Devlin, seconded by Representative Ekstrom, and carried on a roll call vote that the committee agrees with the Department of Human Services that repeal of North Dakota Administrative Code Chapters 75-02-01.1 and 75-06-01 is approved under North Dakota Century Code Section 28-32-18.1. Representatives Bernstein, Devlin, Ekstrom, Grande, Koppelman, Nelson, Sandvig, Thoreson, and Wrangham and Senators Andrist, Fischer, Freborg, Mathern, and O'Connell voted "aye." No negative votes were cast.

TEACHERS' FUND FOR RETIREMENT

Chairman Bernstein called on Ms. Fay Kopp, Deputy Executive Director, Retirement and Investment Office, for testimony relating to May 2002 rules of the Board of Trustees for the Teachers' Fund for Retirement. A copy of Ms. Kopp's prepared testimony is attached as Appendix Q.

Senator Mathern asked whether the rule change relating to multiple beneficiaries was made for

administration purposes. Ms. Kopp said that is correct and the multiple beneficiaries alternative has never been used, but if it would have been, it would have been a problem. She said many of the benefit options have never been used so the rules modifications were intended to keep the most viable options available.

TAX COMMISSIONER

Chairman Bernstein called on Mr. Gary Anderson, Tax Department, for testimony regarding June 2002 rules of the Tax Commissioner. A copy of Mr. Anderson's prepared testimony is attached as Appendix R.

Committee counsel said the Administrative Rules Committee has been briefed on the North Dakota Supreme Court decision in the *American West* case. He said the Supreme Court ruled that a portion of North Dakota Administrative Code Section 81-04.1-01-28 is void. He asked whether the Tax Department would have a problem if the language in question is removed from the Administrative Code. Ms. Donita Wald, legal counsel, Tax Department, said the department would welcome removal of the language from the Administrative Code so it will not be necessary to include the change in formal rulemaking proceedings.

STATE BOARD OF VETERINARY MEDICAL EXAMINERS

Chairman Bernstein called on Dr. John Boyce, Executive Secretary, State Board of Veterinary Medical Examiners, for testimony regarding June 2002 rules of the board. A copy of Dr. Boyce's prepared testimony is attached as Appendix S.

STATE BOARD OF WATER WELL CONTRACTORS

Chairman Bernstein called on Mr. William Lindell, Special Assistant Attorney General, State Board of Water Well Contractors, for presentation of testimony regarding May 2002 rules of the board. A copy of Mr. Lindell's prepared testimony is attached as Appendix T.

WORKERS COMPENSATION BUREAU

Chairman Bernstein called on Ms. Jodi Bjornson, Workers Compensation Bureau staff counsel, for presentation of testimony regarding May 2002 rules of the bureau. A copy of Ms. Bjornson's prepared testimony is attached as Appendix U.

In response to a question from Representative Ekstrom, Ms. Anne Green, Policyholders Services Division, Workers Compensation Bureau, said the rules consolidate two penalty sections on delinquent employers. She said the only possible substantive change involved relates to a billing option.

In response to a question from Representative Ekstrom, Ms. Mary Selzler, Workers Compensation Bureau, said palliative care may only be approved for six months at a time. She said there would be no lifetime awards of palliative care benefits.

BOARD OF CLINICAL LABORATORY PRACTICE

Chairman Bernstein called on Mr. Tom Tupa, Board of Clinical Laboratory Practice representative, for presentation of testimony regarding May 2002 rules of the board. A copy of Mr. Tupa's prepared testimony is attached as Appendix V.

STATE GAMING COMMISSION

Chairman Bernstein called on Mr. Chuck Keller, Attorney General's office, Gaming Division, for presentation of testimony regarding July 2002 rules of the State Gaming Commission. A copy of Mr. Keller's prepared testimony is attached as Appendix W.

COMMITTEE DISCUSSION

Senator Andrist said he is somewhat frustrated by rules of boards and commissions increasing license fees without a demonstrated need for the enhanced revenue. He said a bill was considered and defeated during the 2001 legislative session which would have limited fee increases by rule to no more than a 10 percent increase. He asked whether committee members would support considering reintroducing that bill.

Senator Fischer said he would support a limit on fee increases by rules. He said he has observed that some fee increases appear to have been excessive.

Senator O'Connell said it is significant to consider the cost to boards and commissions of publishing notice of proposed rulemaking in weekly newspapers. He said for smaller occupational licensing groups, the cost of a rulemaking proceeding may be a substantial amount for each licensee. He asked whether there is a way to compare publication costs under the current requirement as opposed to the method that was previously required. Committee counsel said information should be available for comparison from agency testimony on rulemaking activity for the

current interim and the last interim in which publication was required in daily newspapers.

Chairman Bernstein directed committee counsel to prepare for committee consideration a bill draft based on the bill defeated in the 2001 Legislative Assembly to limit the fee increases that may be instituted for licensees by rulemaking. Senator Andrist requested that the bill status report for that legislation also be made available to committee members.

Senator Fischer said some occupational licensing boards and commissions represent very few members so costs cannot be spread among as many licensees. He said consideration must be given to whether limiting fee increases would make publication costs prohibitive and discourage rulemaking activity.

Representative Nelson said it appears that when levy limitations for political subdivisions exist, those limitations tend to encourage the political subdivision to take the maximum allowable tax increase and build a surplus. He said having a limit on fee increases may serve as the same kind of inflationary incentive.

Representative Wrangham said the State Board of Accountancy increased license fees not long ago. He said these were substantial fee increases and there was not any significant objection from members. He said perhaps members are intimidated and will not criticize fee increases endorsed by their licensing board. He said this may be a reason why it would be useful to impose a statutory limit on the amount of increases that may be made by rulemaking.

Senator Andrist said limiting the amount of a fee increase that may be approved by rule would not prevent larger increases from occurring but would require an agency seeking a larger increase to obtain legislative approval. He said he thinks it would be appropriate that when a large increase is considered, the issue should be brought to the Legislative Assembly.

No further business appearing, Chairman Bernstein adjourned the meeting at 3:10 p.m.

John Walstad
Code Revisor

ATTACH:23