

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday and Wednesday, July 15-16, 2003
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative William R. Devlin, Chairman, called the meeting to order at 1:00 p.m.

Members present: Representatives William R. Devlin, LeRoy G. Bernstein, Duane DeKrey, Rod Froelich, Matthew M. Klein, Kim Koppelman, Jon O. Nelson, Sally M. Sandvig, Blair Thoreson, Alon Wieland; Senators John M. Andrist, Dennis Bercier, April Fairfield, Layton Freborg, Jerry Klein, Rich Wardner

Members absent: Representatives Bruce Eckre, Dan J. Ruby, Dwight Wrangham; Senators Tom Fischer, Gary A. Lee

Others present: See Appendix A

Chairman Devlin called on Mr. Jay E. Buringrud, Assistant Director, Legislative Council, who reviewed the *Supplementary Rules of Operation and Procedure of the North Dakota Legislative Council*.

Chairman Devlin welcomed committee members and reviewed his expectations of committee activities.

BACKGROUND MEMORANDUM

Chairman Devlin called on committee counsel for presentation of a memorandum entitled *Administrative Rules Review - Background Memorandum*. Committee counsel reviewed the history of publication of the North Dakota Administrative Code and the number of sections and pages of rules reviewed by the Administrative Rules Committee during previous interims. Committee counsel reviewed the statutory provisions for rules review, governed by North Dakota Century Code (NDCC) Chapter 28-32, the Administrative Agencies Practice Act.

Committee counsel said the Administrative Rules Committee is established by statute and is not discharged upon making its report to the Legislative Council at the end of the interim. He said the committee could be called to meet at any time, including during a legislative session. He said NDCC Section 54-35-02.5 requires the committee membership to include at least one member from each standing committee of the House of Representatives or Senate in the most recently completed legislative session.

Committee counsel said since 1995 the Administrative Rules Committee has had statutory authority to find that all or any portion of a rule is void if the committee makes the specific finding that one of six

statutory requirements exists with regard to the rule. He said NDCC Section 28-32-18 requires consideration by the committee within 90 days of the date of the Administrative Code supplement in which a rule change appears for the committee to have authority to find the rule void. He said for this reason the committee will meet within each 90-day time period. He said rules appearing in the Administrative Code supplement from November 1 through May 1 encompassing a regular session of the Legislative Assembly are subject to an exception that allows consideration at the first committee meeting following a regular legislative session and that is the reason rules being considered at this meeting cover the time period from December 2002 through July 2003.

Committee counsel reviewed 2003 legislation affecting administrative rulemaking and review. He said Senate Bill No. 2051 transferred control over the State Toxicologist from the State Department of Health to the Attorney General. He said the legislation contained a provision for transfer of related administrative rules designated by the Attorney General. He said he would interpret this provision to allow transfer of the rules within the North Dakota Administrative Code but without any substantive changes. He said Senate Bill No. 2418 provides that when an agency files a notice of proposed rulemaking on any matter governed by the No Child Left Behind Act of 2001, the agency is required to provide a copy of the notice to the chairman of the Legislative Council interim No Child Left Behind Committee. He said that committee must convene within 60 days after the notice or as soon as practicable to receive an agency presentation on the nature and scope of the proposed rules and receive public comments on the topic. He said that committee is not given authority to take action affecting proposed rules but is to report to the 59th Legislative Assembly if it determines the state is not in compliance with any requirement of the No Child Left Behind Act of 2001. He said House Bill No. 1212 creates a new requirement for economic impact analysis statements for rules affecting small entities. He reviewed the provisions of the law and said the bill also contains a provision to study the effects and operation of requiring agency consideration of effect of proposed rules on small businesses, organizations, and political subdivisions. He said the

Legislative Council assigned this study topic to the Administrative Rules Committee.

Committee counsel reviewed the list of questions asked of agencies in making presentations to the committee regarding rulemaking activity. He said an additional question should be added to the list relating to impact of rules on small entities and language should be adjusted to distinguish analysis of impact to small entities from a regulatory analysis.

DEPARTMENT OF FINANCIAL INSTITUTIONS

Chairman Devlin called on Mr. Robert J. Entringer, Department of Financial Institutions, for a presentation regarding December 2002 and April 2003 rules of the department. A copy of Mr. Entringer's prepared testimony is attached as Appendix B.

Representative Klein asked why Corporate Central Credit Union is omitted from these rules. Mr. Entringer said that is a federally chartered credit union and not subject to these rules.

Representative Koppelman asked why the rules change references from "executive officer" to "key person." Mr. Entringer said that change is made because that language is used in federal regulations.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on representatives of the State Department of Health for presentation of testimony relating to several sets of rules adopted by the department.

Mr. Tom Bachman, State Department of Health, presented testimony relating to air pollution control rules amendments. A copy of Mr. Bachman's testimony is attached as Appendix C.

In response to a question from Senator Klein, Mr. Bachman said the State Department of Health is still engaged in discussions with the Environmental Protection Agency of what constitutes a proper method for measuring effects of air quality in national park areas.

Mr. Ken Wangler, State Department of Health, presented the department's testimony relating to North Dakota radiological health rules. A copy of his testimony is attached as Appendix D.

Mr. Larry A. Shireley, State Department of Health, presented the department's testimony relating to rules on reportable conditions. A copy of his prepared testimony is attached as Appendix E.

Senator Fairfield asked whether these rules changes would be in conflict with 2003 legislation. Mr. Shireley said there would be no conflict between these rules and recent legislation because the rules address different issues.

Ms. Karen Oby, State Department of Health, Division of Maternal and Child Health, presented the department's testimony on newborn screening rules changes. A copy of her prepared testimony is attached as Appendix F.

Representative Koppelman asked whether the provisions of the rules relating to privacy issues are necessary when statutory provisions already cover this topic. Ms. Oby said some of the privacy provisions of the rules relate to clarifying issues regarding sharing of information when necessary.

Representative Nelson asked what percentage of newborns are being screened. Ms. Oby said a very small number are not being screened and most of those are home births.

INSURANCE COMMISSIONER

Chairman Devlin called on Mr. Charles E. Johnson, General Counsel, Insurance Department, for presentation of testimony relating to January 2003 rules of the Insurance Commissioner. A copy of Mr. Johnson's prepared testimony is attached as Appendix G.

STATE BOARD OF ANIMAL HEALTH

Chairman Devlin called on Dr. Larry A. Schuler, Executive Officer and State Veterinarian, State Board of Animal Health, for presentation of testimony relating to May 2003 rules of the board. A copy of Dr. Schuler's prepared testimony is attached as Appendix H.

Representative Koppelman asked whether Dr. Schuler is comfortable that these rules now satisfy concerns of the public about moving domestic animals and pets across the state border. Dr. Schuler said he believes the rules have struck a balance to allow family pets and similar domestic animals to be transported across the border. He said the adjustments to the rules perhaps have a cost in terms of less protection from diseases but that compromise was necessary to address public concerns about transporting family pets and similar animals.

In response to a question from Representative Froelich, Dr. Schuler said the recent outbreak of monkey pox in prairie dogs is an example of how the rules give the State Board of Animal Health flexibility to address emergencies that arise.

STATE BOARD OF MEDICAL EXAMINERS

Chairman Devlin called on Mr. Rolf P. Sletten, Executive Secretary and Treasurer, State Board of Medical Examiners, for presentation of testimony relating to March 2003 rules of the board. A copy of Mr. Sletten's prepared testimony is attached as Appendix I.

Senator Andrist said he is pleased to see that the State Board of Medical Examiners seeks ways to empower licensees for serving rural areas. He asked whether it would be possible for the State Board of Medical Examiners and the Board of Nursing to get together to unify licensing requirements for physician assistants and nurse practitioners. Mr. Sletten said there are similarities between these professionals, but

educational differences in existing requirements would probably be the biggest stumbling block.

BOARD OF NURSING

Chairman Devlin called on Ms. Constance B. Kalanek, Executive Director, Board of Nursing, for testimony relating to May 2003 rules of the board. A copy of Ms. Kalanek's prepared testimony is attached as Appendix J.

Representative Koppelman said he is concerned with the adoption of interstate compacts through the rulemaking process.

In response to questions from Representative Koppelman, Ms. Kalanek said it has now been three years since the first state adopted the Nurse Licensure Compact and North Dakota is only the second state out of 18 member states which has adopted the compact by rule.

In response to a question from Representative Devlin, Ms. Kalanek said Minnesota has not adopted the Nurse Licensure Compact and has existing rules that allow licensed nurses from neighboring states to practice in Minnesota but do not allow Minnesota-licensed nurses to practice in other states.

Chairman Devlin recessed the committee meeting until 9:00 a.m., Wednesday, July 16, 2003.

BOARD OF EXAMINERS FOR NURSING HOME ADMINISTRATORS

Chairman Devlin called on Ms. Bev Herman, Executive Secretary, State Board of Examiners for Nursing Home Administrators, for testimony relating to December 2002 rules of the board. A copy of Ms. Herman's prepared testimony is attached as Appendix K.

Representative Klein said the rules relate to a national passage standard for examinations and asked what the national standard is. Ms. Herman said the national standard is scaled based on the weight of the test and is usually around 70 percent.

Senator Fairfield said one of the standards for denial of a license for an administrator relates to the issue of good moral character. She asked how this standard is interpreted. Ms. Barb Fischer, board member, said it is hard to define this phrase accurately and it is taken from the statutory requirements.

Senator Fairfield said the rules changes eliminate the culpability standard for violations by eliminating use of the word "willful." Mr. Randy Albrecht, board member, said legal counsel for the board informed the board that whether a violation is willful is not a significant consideration. He said legal counsel said the existence of a violation is the only significant issue. Representative DeKrey said it appears that removing the willful nature of violations from consideration means that the licensee could not use as a defense an allegation that a violation was inadvertent. He suggested the board discuss this issue further with legal counsel.

PESTICIDE CONTROL BOARD

Chairman Devlin called on Mr. Patrick S. O'Neil, Department of Agriculture, for presentation of testimony relating to March 2003 rules of the Pesticide Control Board. A copy of Mr. O'Neil's prepared testimony is attached as Appendix L.

Representative Froelich said it appears the rules prohibit private parties from using fumigants without certification. Mr. O'Neil said the Department of Agriculture was informed by the Environmental Protection Agency that federal rules were forthcoming that would require anyone using fumigants to be certified. He said the North Dakota statute was changed based on that information, but the Environmental Protection Agency has not followed through. Representative Froelich said he is concerned about the impact of this requirement on farmers doing private fumigant application. Mr. O'Neil said he does not believe farmers are required to obtain commercial certification for private uses. He said he believes farmers would be required to obtain certification through a private application examination.

Mr. Jerry Thompson, Department of Agriculture, said there is an 88-question test for both private and commercial fumigant application which is available at the county extension office. In response to a question from Representative Devlin, Mr. Thompson said a recent change was made to not allow applicants to take the fumigant test home to complete.

BOARD OF PHARMACY

Chairman Devlin called on Mr. Howard C. Anderson, Jr., Executive Director, Board of Pharmacy, for testimony relating to January 2003 rules of the board. A copy of Mr. Anderson's prepared testimony is attached as Appendix M.

SUPERINTENDENT OF PUBLIC INSTRUCTION

Chairman Devlin called on representatives of the Superintendent of Public Instruction for presentation of testimony relating to July 2003 rules of the department.

Mr. Tom Decker, Department of Public Instruction, distributed copies of a memorandum from Superintendent of Public Instruction Wayne Sanstead and a copy of prepared testimony relating to the rules on standards for schoolbuses. Copies of these materials are attached as Appendices N and O.

Mr. Robert Rutten, Director of Special Education, Department of Public Instruction, presented testimony relating to special education credentials rules. A copy of Mr. Rutten's prepared testimony is attached as Appendix P.

Representative Froelich asked whether these rules changes will require teachers to go back to school for additional training. Mr. Rutten said there are probably very few teachers who would be required to get additional training for sign language under these rules.

In response to a question from Senator Andrist, Mr. Rutten said these rules changes do not apply to teachers who do not work with hearing-impaired students.

Representative Koppelman asked for information on the effect of the changes in the language of North Dakota Administrative Code (NDAC) Chapter 67-11-12. Ms. Rosellen Sand, Department of Public Instruction, said the need for the change is because rule authority must be tied to school accreditation because the department has no authority regarding issuance of teacher credentials. She said 2003 legislation changed this situation and additional rules changes must be made, which will be forthcoming.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on representatives of the Department of Human Services for presentation of testimony relating to six sets of rulemaking changes of the department effective January, February, March, April, or July 2003.

Ms. Melissa Hauer, Legal Advisory Unit Director, Department of Human Services, presented testimony relating to department rules on nursing home ratesetting, basic care facility ratesetting, medical services, and Medicaid eligibility. Copies of Ms. Hauer's prepared testimony on these topics are attached as Appendices Q, R, S, and T.

Representative Devlin asked whether the nursing home care ratesetting rules allow reimbursement for salary of persons who are not certified nurse aides. Ms. Barb Fischer, Department of Human Services, said 2003 House Bill No. 1201 involved discussions of reimbursement for services of individuals in nursing homes providing feeding assistance. She said a conflict that existed between nursing rules and Department of Human Services rules was addressed by House Bill No. 1201. Representative Devlin said he recalls that House Bill No. 1201 allowed certain individuals who were not performing hands-on tasks to be included in direct care cost reimbursements. Ms. Shelly Peterson, North Dakota Long Term Care Association, said these rules disallow direct care cost reimbursement for all services of disabled persons. She said these rules require certification. Wages of a developmentally disabled person who makes beds in a nursing home under this rule must be classified as indirect care costs that are nonreimbursable.

Senator Klein said he questions whether these rules conflict with House Bill No. 1201. Ms. Hauer said this rule was put in place before passage of House Bill No. 1201. She said perhaps the committee could hold over consideration of these rules to allow the department to provide further information. Chairman Devlin said he will ask the committee at the end of the meeting for its wishes on holding over these rules.

Ms. Hauer said the rules changes to NDAC Chapter 75-02-07.1 were made to comply with July

2002 budget allotments. Representative Koppelman asked whether these reimbursement changes are still necessary. Ms. Fischer said these changes will be useful in the future and are not related only to July 2002 allotments.

Ms. Hauer said the rules under NDAC Chapter 75-02-02 relate to Medicaid recipient payment changes to address anticipated shortfalls in 2001-03 funds. Senator Fairfield asked how this rule compares with 2003 legislation. Ms. Hauer said the rules are written to provide flexibility and she believes they do not conflict with 2003 legislation.

Ms. Maggie Anderson, Department of Human Services, said the department has never stopped payments for full dentures. She said 2003 legislation required adding payments for partial dentures and root canals. She said the rules will be changed to include these provisions and the program is being adjusted to cover those costs.

Ms. Hauer said with regard to the Medicaid eligibility rules in NDAC Chapter 75-02-02.1, it appears there is a partial conflict with 2003 legislation. She said NDAC Section 75-02-02.1-30.1 appears to be in conflict with 2003 Senate Bill No. 2384. She said the department requests the committee to approve repeal of this section pursuant to NDCC Section 28-32-18 due to conflict with statutory law.

Representative Klein asked whether the annuities rule would be redone if this repeal is approved. Ms. Hauer said the department believes eliminating the rule will allow the department to deal with these situations under the legislative authority contained in Senate Bill No. 2384.

It was moved by Representative Klein, seconded by Representative DeKrey, and carried on a roll call vote that NDAC Section 75-02-02.1-30.1 be repealed under NDCC Section 28-32-18 on the grounds that the rule is no longer in compliance with law. Voting in favor of the motion were Representatives Devlin, Bernstein, DeKrey, Froelich, Klein, Koppelman, Sandvig, Thoreson, and Wieland and Senators Andrist, Bercier, Fairfield, Freborg, Klein, and Wardner. No negative votes were cast.

Ms. Krista Andrews, attorney, Department of Human Services, presented written testimony on temporary assistance for needy families program rules and ratesetting for providers of services to foster children group homes and residential child care facilities. Copies of Ms. Andrews' prepared testimony are attached as Appendices U and V. She said the rule change in NDAC Section 75-02-01.2-28.1 changes noncitizen immigrant eligibility waiting from five to seven years. She said this would not comply with federal standards and the rule should be changed back to five years for residents for benefits.

It was moved by Representative DeKrey, seconded by Representative Koppelman, and carried on a roll call vote that the committee and

the Department of Human Services agree to amend the benefit eligibility residence in NDAC Section 75-02-01.2-28.1 to reinstate a five-year residence requirement. Voting in favor of the motion were Representatives Devlin, DeKrey, Klein, Koppelman, Sandvig, Thoreson, and Wieland and Senators Andrist, Bercier, Fairfield, Freborg, Klein, and Wardner. No negative votes were cast.

Representative Froelich asked whether all reimbursements for nursing or foster care and other programs administered by the department are subject to a cost-of-living adjustment. He said his concern is that removing the inflation growth factor from some programs but not other programs could result in unfairness in some programs, especially when budget allotments are ordered across the board.

STATE WATER COMMISSION

Chairman Devlin called on Mr. Matthew Sagsveen, State Water Commission, for presentation of testimony relating to the March 2003 rules of the commission. A copy of Mr. Sagsveen's prepared testimony is attached as Appendix W.

DEPARTMENT OF HUMAN SERVICES

After the luncheon recess, Chairman Devlin asked whether persons in attendance have comments relating to the rules of the Department of Human Services. Ms. Diane Szudera, North Dakota Home on the Range, presented testimony in opposition to the change to NDAC Section 75-03-15-04. A copy of Ms. Szudera's prepared testimony is attached as Appendix X.

Senator Klein asked whether the Home on the Range presented this concern to the department during the hearings on these rules. Ms. Szudera said this concern was presented at October hearings.

In response to a further question from Senator Klein, Ms. Szudera said the current rules would allow the department to use an inflation factor at its discretion, but the April 2003 rate adjustment did not include an inflation factor.

Representative DeKrey said he thought that during the 2003 legislative session legislators were told that no service provider would be receiving reduced reimbursements. Chairman Devlin said the committee will request the department to address that question.

Chairman Devlin called on Ms. Marge Ramsay, Dakota Boys Ranch, for testimony relating to Department of Human Services rules. A copy of her prepared testimony is attached as Appendix Y.

Chairman Devlin asked whether the Dakota Boys Ranch also presented its objection to the department during October hearings. Ms. Ramsay said the objection was presented.

Chairman Devlin asked for a response to the issue raised by Representative DeKrey. Mr. Paul Ronningen, Department of Human Services, said his comments on reimbursement during the legislative

session reflected the change in the application of the inflation factor.

Chairman Devlin asked whether Mr. Ronningen and department personnel would visit with concerned parties on how these facilities will be addressed and funding provided.

Representative Froelich said he would like to see comparison of the costs for foster homes versus Youth Correctional Center and State Penitentiary costs of services for an individual.

Ms. Tove Mandigo, Department of Human Services, said the recent influx of federal funds provides \$8 million additional funds for programs funded by legislative appropriation. She said these funds are not available for spending enhancements.

Representative DeKrey asked whether the committee could invite a member from the Appropriations Committee to brief the Administrative Rules Committee on expectations for funding for these areas during the legislative session.

WORKERS COMPENSATION BUREAU

Chairman Devlin called on Ms. Jodi Bjornson, Vice President of Legal Services, Workers Compensation Bureau, for testimony relating to March 2003 rules of the bureau. A copy of Ms. Bjornson's prepared testimony is attached as Appendix Z.

Representative Sandvig asked whether these rules will affect townships. Ms. Bjornson said the 2003 legislation would govern township workers' compensation premiums.

Representative Koppelman said 2003 legislation was enacted relating to employee staffing arrangements. He said NDAC Section 92-01-02-21 appears to be in conflict with the legislation. Ms. Bjornson said the rule would be superseded by the statutory change effective August 1, 2003.

It was moved by Representative Koppelman, seconded by Representative DeKrey, and carried on a roll call vote that NDAC Section 92-01-02-21 be repealed by agreement with the bureau effective August 1, 2003, on the grounds that as of that date the rule will no longer be in compliance with the law. Voting in favor of the motion were Representatives Devlin, Bernstein, DeKrey, Klein, Koppelman, Sandvig, Thoreson, and Wieland and Senators Andrist, Bercier, Fairfield, Freborg, Klein, and Wardner. No negative votes were cast.

REAL ESTATE APPRAISER QUALIFICATIONS AND ETHICS BOARD

Chairman Devlin called on Ms. Jodi Campbell, Executive Secretary, Real Estate Appraiser Qualifications and Ethics Board, for testimony relating to the February 2003 rules of the board. A copy of Ms. Campbell's prepared testimony is attached as Appendix AA.

Senator Fairfield said it appears the rules changes will allow anonymous complaints to be filed with the

board. She said the rules also provide that grounds for disciplinary action include filing a frivolous complaint against a permitted appraiser. She said it appears the rules would encourage appraisers to file anonymous complaints to avoid the possibility of disciplinary action if a complaint is found to be frivolous.

Representative DeKrey said he does not believe the board should accept anonymous complaints. He said anonymous complaints can create a waste of time and a person should have the right to face an accuser.

Representative Koppelman said allowing anonymous complaints may lead to abuse such as a large increase in complaints filed with the board. He said he doubts that an appraiser would put his name on a complaint if there might be disciplinary action if the complaint is determined to be frivolous. Representative Klein asked whether the committee could carry over consideration of these rules to let the board reconsider these provisions. Chairman Devlin said if the board thinks the rule could be improved, it could resubmit a revised version at the next meeting.

DEPARTMENT OF COMMERCE DIVISION OF COMMUNITY SERVICES

Chairman Devlin called on Mr. Jim Boyd, Division of Community Services, for testimony relating to the April 2003 rules of the division and a request for approval of amendments to Administrative Code provisions to conform to current statutory provisions. A copy of Mr. Boyd's prepared testimony is attached as Appendix BB.

It was moved by Representative DeKrey, seconded by Representative Klein, and carried on a roll call vote that the Administrative Rules Committee agree with the Division of Community Services on proposed amendments to NDAC Sections 108-02-01-01, 108-02-01-04, 108-02-01-07, and 108-02-01-08 on the grounds that these amendments are necessary to conform these rules with current statutory provisions. Voting in favor of the motion were Representatives Devlin, DeKrey, Klein, Koppelman, Sandvig, Thoreson, and Wieland and Senators Andrist, Bercier, Fairfield, Freborg, Klein, and Wardner. Representative Froelich voted "nay."

PUBLIC SERVICE COMMISSION

Chairman Devlin called on Mr. Jon Mielke, Public Service Commission, for testimony relating to the March 2003 rules of the commission. A copy of Mr. Mielke's prepared testimony is attached as Appendix CC.

COMMITTEE DISCUSSION

Chairman Devlin said it appears there are pending issues for consideration regarding Department of Human Services rules, Workers Compensation Bureau rules, and rules of the Real Estate Appraiser Qualifications and Ethics Board.

Representative Froelich said he believes there is also concern with adoption of the nursing compact by administrative rules. Representative Koppelman said he checked with the Attorney General's office on the legislation governing adoption of professional licensing compacts. He said several boards asked to be excluded and were excluded in the legislation, but many are covered, including the Board of Nursing, so there is apparently nothing the committee can do with regard to what has occurred. He said perhaps the committee should consider whether the statutory provision allowing adoption of licensing compacts by rule is appropriate state policy. He said he believes adoption of compacts with other states is a legislative function.

It was moved by Representative Koppelman, seconded by Representative Thoreson, and carried on a voice vote that the Administrative Rules Committee carry over consideration of the rules presented at this meeting by the Department of Human Services, Workers Compensation Bureau, and Real Estate Appraiser Qualifications and Ethics Board.

It was moved by Representative Froelich, seconded by Representative DeKrey, and carried on a voice vote that the committee carry over consideration of Department of Public Instruction special education rules. Representative Froelich said his concern is whether the University System is able to provide the training qualifications being required by these rules. He said he has had some frustration on prior requirements of this kind not being available at universities in the state.

Representative Koppelman said reviewing comments on rules at the time committee members are reviewing rules would be useful. He said rule comments are required to be filed with rules filed for publication with the Legislative Council. He said if the comments could be provided to members with administrative rules to be reviewed, it would provide useful information. Chairman Devlin requested the Legislative Council office provide comments on rules with the rules for committee consideration prior to meetings.

The meeting was adjourned subject to the call of the chair at 3:15 p.m.

John Walstad
Code Revisor

ATTACH:29