

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Wednesday, October 20, 2004
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative William R. Devlin, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives William R. Devlin, LeRoy G. Bernstein, Rod Froelich, Matthew M. Klein, Kim Koppelman, Jon O. Nelson, Dan J. Ruby, Sally M. Sandvig, Blair Thoreson, Alon Wieland, Dwight Wrangham; Senators John M. Andrist, April Fairfield, Tom Fischer, Layton Freborg, Jerry Klein, Gary A. Lee, Rich Wardner

Members absent: Representatives Jeff Delzer, Duane DeKrey; Senator Dennis Bercier

Others present: See Appendix A

It was moved by Senator Fischer, seconded by Representative Koppelman, and carried on a voice vote that the minutes of the July 26, 2004, committee meeting be approved as distributed.

RULEMAKING STATISTICS

Chairman Devlin called on committee counsel for presentation of rulemaking statistics for the period December 2002 through November 2004. A copy of the *Statistical Summary of Rulemaking* is attached as Appendix B. Committee counsel said rulemaking activity appears to have increased substantially during this rule review cycle. He said the statistics might be misleading because rules of the State Department of Health required for compliance with rules of the Environmental Protection Agency are extremely large in volume and will substantially influence the statistics for rulemaking activity in a rulemaking cycle. He said an extremely large group of such rules was delivered for publication early in this rulemaking cycle and if those rules had been received two months earlier the large number of sections affected would have been included in the previous cycle and evened out the number of sections affected for the most recent two rulemaking cycles.

SECURITIES COMMISSIONER

Chairman Devlin called on Mr. Matthew Bahrenburg, Securities Department Legal Counsel, for presentation of a request for approval of repeal of obsolete administrative rules. A copy of Mr. Bahrenburg's prepared testimony is attached as Appendix C. Mr. Bahrenburg explained the reasons why each of the identified sections has become obsolete.

It was moved by Representative Klein, seconded by Representative Bernstein, and carried on a roll call vote that the Administrative Rules Committee approve the request of the Securities Commissioner to repeal North Dakota Administrative Code Sections 73-02-02-04, 73-02-03-01, 73-02-03-02, 73-02-03-04, 73-02-04-01, 73-02-06-03, and 73-02-08-01 pursuant to North Dakota Century Code Section 28-32-18.1 on the grounds that the rules have become obsolete. Voting in favor of the motion were Representatives Devlin, Bernstein, Froelich, Klein, Koppelman, Nelson, Ruby, Thoreson, Wieland, and Wrangham and Senators Andrist, Fairfield, Fischer, Freborg, Klein, Lee, and Wardner. No negative votes were cast.

DEPARTMENT OF FINANCIAL INSTITUTIONS

Chairman Devlin said a motion was approved at the previous meeting to carry over consideration of rules of the Department of Financial Institutions. He said Representative Koppelman requested that the rules be carried over and asked Representative Koppelman whether there are any further issues for discussion regarding these rules. Representative Koppelman said his further discussions of these rules with interested parties have satisfied his concerns and there are no further issues regarding these rules for committee consideration.

HUMAN RESOURCE MANAGEMENT SERVICES

Chairman Devlin said a motion was approved by the committee at the previous meeting to carry over consideration of rules of the Office of Management and Budget Human Resource Management Services. He called on Ms. Laurie Sterioti Hammeren, Director, Human Resource Management Services, for presentation of information requested by the committee relating to equity salary increase allowances. A copy of Ms. Hammeren's prepared testimony is attached as Appendix D.

Ms. Hammeren reviewed the reasons why equity salary increases are required in some agencies and reviewed statistics on equity salary increases given during the 12 months ending July 31, 2004.

Chairman Devlin thanked Ms. Hammeren for the information. He said it appears the information requested was intended to serve as background information for committee members, especially those serving on Appropriations Committees.

STATE PROCUREMENT OFFICE

Chairman Devlin called on Ms. Sherry Neas, State Procurement Office, Office of Management and Budget, for testimony relating to state procurement practices rules. A copy of Ms. Neas' testimony is attached as Appendix E.

Ms. Neas said the rules repealed outdated provisions and adopted a new article on state procurement practices to implement statutory changes made by 2003 House Bill No. 1180. She said the most significant changes relate to procurement of services, requests for proposals, and the protest and appeal process. She said the Office of Management and Budget has also repealed North Dakota Administrative Code Articles 4-06, 4-09, and 4-10 because they address records management and forms management, which is no longer a responsibility of the Office of Management and Budget because the responsibility has been transferred to the Information Technology Department.

In response to a question from Representative Nelson, Ms. Neas said service contracts must be let on bids. She said the rules allow flexibility for service contracts, including options for renewal, and this will allow agencies to better address janitorial-type service contracts and similar arrangements. Representative Nelson said this is significant because under service contracts the bidder must purchase necessary supplies and equipment and would not purchase new lawnmowers and similar equipment if contracts are only allowed for one year without renewal options.

In response to a question from Representative Koppelman, Ms. Neas said a procurement manual has been published and is available on the office web site.

STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

Chairman Devlin called on Mr. Gene Jackson, State Board of Registration for Professional Engineers and Land Surveyors, for testimony relating to rules adopted by the board. A copy of Mr. Jackson's prepared testimony is attached as Appendix F.

Mr. Jackson reviewed comments received during the public hearing process. He said seven or eight public meetings were held and rules development involved the professional societies regulated by the board. He said much of the change made in rules was updating of provisions that have grown obsolete because of changes in state law and changes in the practice of engineering and land surveying.

Senator Andrist said he is interested in availability of continuing education for licensees and asked whether it is possible to obtain continuing education requirements at home. Mr. Jackson said there is a substantial amount of continuing education available online so it should be possible to obtain necessary continuing education at home.

Chairman Devlin called on Mr. Michael Zimny, North Dakota licensed professional land surveyor, for comments on the State Board of Registration for Professional Engineers and Land Surveyors. A copy of a letter regarding this topic from Mr. Zimny to committee members is attached as Appendix G. Mr. Zimny said his concerns are not with conduct of members of the board but rather with the fact that separate professions are governed by a single regulatory board. He said he believes land surveyors and engineers should be governed by separate professional licensing boards.

Chairman Devlin thanked Mr. Zimny for the information. He said it is not within the committee's authority to separate the licensing boards for engineers and land surveyors. He said that would be an issue for consideration by the Legislative Assembly and suggested that if Mr. Zimny wishes to pursue that objective, he should seek legislative sponsorship for a bill to accomplish that purpose. Mr. Zimny said he understands the need for legislation to make the change he suggested, but he wanted to provide his views to the committee.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on committee counsel for comments on State Department of Health rules. Committee counsel said the rules published with an August 1, 2004, effective date were considered during public hearings on ambulance rules previously considered by the Administrative Rules Committee. He said these rules were forwarded by the State Department of Health after review of the previous rules by the committee, with the explanation that the rules were inadvertently omitted from the rules as submitted for publication but had been approved by the Attorney General's office and adopted by the State Health Council. Committee counsel said the rules have been published in the North Dakota Administrative Code and the State Department of Health did not wish to present further testimony. Committee counsel said Mr. Tim Meyer, State Department of Health, informed him that Representative Todd Porter, who had concerns previously expressed to the Administrative Rules Committee, is aware of these rules and finds them acceptable and within his understanding of legislative intent of 2003 legislation.

Chairman Devlin said he would contact Representative Porter and requested that Mr. Meyer attend later in the meeting to address questions the committee might have.

INSURANCE COMMISSIONER

Chairman Devlin called on Mr. Douglas L. Holloway, Deputy Insurance Commissioner, for testimony relating to rules adopted by the Insurance Commissioner. A copy of Mr. Holloway's testimony is attached as Appendix H. Mr. Holloway said the rules change the previous "opt out" provision for nonpublic personal financial information disclosure to an "opt in" provision governing insurance companies and agents. He said the rules prevent disclosure of nonpublic personal financial information in the custody of an insurance company or agent without prior approval from the affected individual, subject to certain exceptions. He said these rules were adopted to further the legislative intent of 2003 House Bill No. 1179.

STATE BOARD OF ANIMAL HEALTH

Chairman Devlin called on Dr. Susan J. Keller, State Veterinarian, for presentation of testimony relating to rules adopted by the State Board of Animal Health. A copy of Dr. Keller's prepared testimony is attached as Appendix I. Dr. Keller said the rules changes were made to be consistent with 2003 Senate Bill No. 2290, which updated brand inspection rules. She said the rules changes were requested by the North Dakota Stockmen's Association.

Chairman Devlin called on Mr. Wade Moser, North Dakota Stockmen's Association, for comments on the rules. Mr. Moser said the Stockmen's Association supports the rules as adopted by the State Board of Animal Health.

Representative Froelich said he is concerned about the effect of these rules on markets located within 35 miles outside the North Dakota border. He asked whether in-state markets are required to post a bond with the Stockmen's Association. Mr. Moser said in-state markets are not required to post a bond. He said the concern of the Stockmen's Association is to assure that North Dakota producers are not charged over and above normal costs when marketing livestock outside the border of North Dakota. He said hiring personnel to staff these locations costs the Stockmen's Association a significant amount of money.

Representative Froelich said his concern is that if these markets within 35 miles outside the North Dakota border shut down temporarily and restart operations, the cost of compliance with these rules would be substantial and would be passed to North Dakota producers.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Ms. Melissa Hauer, Department of Human Services Legal Advisory Unit Director, for testimony relating to department rules on licensing of family foster homes for adults. A copy of Ms. Hauer's prepared testimony is attached as Appendix J.

Committee counsel said the committee is monitoring the analysis of rules affecting small entities as required by North Dakota Administrative Code Section 28-32-08.1, as enacted in 2003. He asked whether the Department of Human Services has encountered any problems or questions regarding preparation of the small entity analysis. Ms. Hauer said the requirements for analysis of rules affecting small entities do not present a large compliance problem but the department has had questions of interpretation with regard to the requirement that the agency consider establishment of performance standards for small entities to replace design or operational standards required in the proposed rule. She said it is not clear what this language requires.

BOARD OF VETERINARY MEDICAL EXAMINERS

Chairman Devlin called on Dr. John Boyce, Board of Veterinary Medical Examiners Executive Secretary, for testimony relating to rules of the board. A copy of Dr. Boyce's prepared testimony is attached as Appendix K.

Senator Andrist asked whether continuing education for veterinarians is available online or through other means of at-home study for residents of small communities. Dr. Boyce said some continuing education is available online or by mail but some must be obtained by direct attendance at an annual meeting or local meetings set up by drug companies and others.

Senator Lee asked whether information on veterinarian treatment of an animal is available to a third party. Dr. Boyce said treatment records for animals must be made available to a client. He said treatment records are available to a third party only if authorized by the client or required by law.

Representative Froelich said he is concerned about the unprofessional conduct rule that would prohibit performing surgery to conceal genetic or congenital defects with the knowledge that the surgery has been requested to deceive a third party. He said a common practice is to fix hernias in young horses and asked whether that practice would be prohibited by this rule. Dr. Boyce said he is not certain whether that would create a problem, but he believes an intent to deceive may not exist in those situations.

Representative Koppelman said the rules provide for a board member per diem of \$125. He said that seems rather high in comparison with per diem for service on other professional licensing boards. Dr. Boyce said the rule does not increase the per diem amount. He said the per diem of \$125 per day for board members has been paid for many years and is being placed in the rules at the suggestion of legal counsel for the board.

OFFICE OF ADMINISTRATIVE HEARINGS

Chairman Devlin called on Mr. Allen Hoberg, Director, Office of Administrative Hearings, for testimony regarding rules of the office. A copy of Mr. Hoberg's prepared testimony is attached as Appendix L. Mr. Hoberg said the rules result primarily from statutory changes made by the Legislative Assembly. He said the rules were not controversial and no one attended the public hearing and no one filed written comments on the rules.

Representative Wrangham said North Dakota Administrative Code Section 98-02-04-07(8) provides that a petition to reopen a hearing is deemed denied if it is not acted on within 30 days after filing of a petition. He said this sounds like a pocket veto. Mr. Hoberg said he does not recall this situation happening but the rule follows a longstanding practice in law. He said if there was no time limit for consideration, an agency could hold a matter indefinitely and the petitioner would not be able to appeal. He said when a petition is deemed denied, the petitioner has an opportunity for an appeal to a court. He said North Dakota Century Code Section 28-32-40 contains the same requirement that failure to act on a petition within 30 days results in the petition being deemed denied.

Representative Delmore asked whether the 30-day limit for consideration of a petition before it is deemed denied was part of failed legislation from a recent legislative session. Mr. Hoberg said he does not believe this was drawn from failed legislation.

Representative Koppelman asked whether a hearing officer may impose a penalty for failure to respond to a subpoena from an administrative hearing officer. Mr. Hoberg said a hearing officer would not have authority to impose a penalty and any penalty would have to be imposed in district court.

PEACE OFFICER STANDARDS AND TRAINING BOARD

Chairman Devlin called on Mr. Ken Sorenson, Assistant Attorney General, for presentation of testimony of the Peace Officer Standards and Training Board relating to rules of the board. A copy of Mr. Sorenson's prepared testimony is attached as Appendix M. Mr. Sorenson said the rules relate to peace officer licensing, licensing fees, training requirements, weapon training, and instructor and training course requirements. He said many comments were received regarding the need for licensing part-time peace officers. He said legislative action has excluded licensing for part-time officers. He said the board anticipates that legislation will be presented in 2005 regarding licensing part-time peace officers because the board presently has no authority to require licenses or training.

Senator Andrist asked whether the board would accommodate continued employment of existing part-time peace officers. Mr. Sorenson said the board

would probably seek to apply a grandfather provision for existing part-time officers to avoid hurting agencies or employees.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Mr. Tim Meyer, Director, Division of Emergency Medical Services, State Department of Health, for comments on ambulance rules discussed earlier in the meeting. In response to a question from Chairman Devlin, Mr. Meyer said the rules in question were inadvertently not published with previously considered rules that the Administrative Rules Committee has already reviewed. He said the newly published rules were part of the hearing process for the earlier rules. Chairman Devlin said he contacted Representative Todd Porter, who agreed that these rules were covered in the previous hearings and were intended to be part of the rules already reviewed by the Administrative Rules Committee.

COMMITTEE CONSIDERATION

It was moved by Representative Nelson, seconded by Representative Klein, and carried that the chairman and the staff of the Legislative Council be requested to prepare a report of the committee and to present the report to the Legislative Council.

Chairman Devlin said the State Department of Health has recently adopted livestock feedlot rules that have been filed for publication in the North Dakota Administrative Code. He said he has heard numerous comments critical of the effect of the rules on the livestock industry. He said if there appears to be a problem the committee might be able to address, the committee may meet in December to review those rules.

Representative Koppelman said the per diem for members of the Board of Veterinary Medical Examiners seems high. He said he does not believe other boards provide that much per diem for members. Senator Klein said he can see why \$125 is probably a reasonable amount to get veterinarians to serve on the board. Representative Koppelman said he would like to consider the per diem amount if the committee meets in December.

Representative Froelich said he would like further consideration of the State Board of Animal Health rules as they apply to markets within a 35-mile distance outside the border of North Dakota. He said the requirements for reopening a market seem unnecessary and perhaps are too costly.

It was moved by Representative Klein, seconded by Representative Koppelman, and carried that the Administrative Rules Committee carry over consideration of the Board of Veterinary Medical Examiners per diem rule and the State Board of Animal Health rule regarding markets located outside the state.

It was moved by Representative Koppelman, seconded by Senator Fischer, and carried that the Administrative Rules Committee carry over consideration of rules of the Office of Administrative Hearings to determine whether the 30-day petition consideration deadline before it is deemed denied provision of the rules is based on legislation that was defeated.

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

John Walstad
Code Revisor

ATTACH:13