

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday, June 13, 2006
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, Randy Boehning, Rod Froelich, Pat Galvin, Ronald A. Iverson, Kim Koppelman, Margaret Sitte, Blair Thoreson, Dwight Wrangham; Senators John M. Andrist, Richard L. Brown, April Fairfield, Tom Fischer, Jerry Klein, Gary A. Lee, Constance Triplett

Members absent: Representatives Duane DeKrey, Mary Ekstrom, Jon O. Nelson, Sally M. Sandvig; Senators Dennis Bercier, Layton W. Freborg

Others present: See Appendix A

It was moved by Senator Brown, seconded by Senator Lee, and carried on a voice vote that the minutes of the March 14, 2006, committee meeting be approved as distributed.

DEPARTMENT OF PUBLIC INSTRUCTION

Chairman Devlin called on Dr. Gary Gronberg, Assistant Superintendent, Department of Public Instruction, for testimony relating to rules of the department carried over for consideration from the previous committee meeting. Dr. Gronberg distributed four documents, including prepared testimony, which are attached as Appendices B, C, D, and E.

Dr. Gronberg said representatives of the department had meetings with representatives of the North Dakota Education Coalition regarding the issues raised at the previous committee meeting. He said the committee concerns and the discussions with the Education Coalition focused on accreditation rules.

Dr. Gronberg said standards for accreditation are either "required" or "point value" standards. He said discussions concluded that the existing system of required and point value accreditation standards has been in place for many years and should be retained.

Dr. Gronberg said a substantial amount of discussion focused on concerns about budget impact of the rules for some small school districts. He said it was agreed that rule content for time requirements of secondary, middle level or junior high, and elementary principals would be amended by removing references to a fraction of an instructional day. He said the recommended changes to accomplish this are included in Appendix C.

Dr. Gronberg said discussions between department and Education Coalition representatives did not result in agreement on the rule relating to seventh and eighth grade curriculum. He said

Appendix B contains suggested changes from the department relating to the rule on health curriculum. He introduced Ms. Anita Decker, Department of Public Instruction, for explanation of the memorandum from the Attorney General's office attached as Appendix E. Ms. Decker said the department requested the Attorney General's office to review the health education requirements of the rule in light of the applicable statutory authority. She said the Superintendent of Public Instruction is required by statute to ensure that students receive education in health. She said the memorandum from Ms. Julie A. Krenz, Assistant Attorney General, concludes that it is a reasonable interpretation of the statutory requirement to require by rule that health be taught in seventh and eighth grade.

In response to a question from Senator Klein, Ms. Decker said expressing time assignments for principals and assistant principals in minutes per week would allow more flexibility than the previous requirement of fractional parts of a day.

Senator Lee asked why time requirements for principals are needed. Ms. Decker said these types of requirements have existed for many years to require a minimum level of time to be devoted to principal duties.

Dr. Gronberg said discussions between department and Education Coalition representatives concluded no change should be made to the class size rules that were contained in the original rule without proposed changes in the rules submitted by the department. He said the class size requirement is a point value criterion, not a required criterion.

Dr. Gronberg said Appendix B contains a description of the agreed effective dates of rules changes. He said a more recent meeting of department and Education Coalition representatives concluded with recommended effective dates of rules with some changes that are contained in Appendix D. He said on some of the rules no consensus was reached regarding effective dates. He said those provisions for which no consensus was reached are shown in Appendix D.

Representative Froelich asked how the effective date for credentials standards might affect recent graduates. Dr. Gronberg said the rules on Title I coordinator credentials have not existed before. He said the rules on special education director credentials have existed before. He said the rules on paraeducator certificates become effective July 1,

2006, under federal law and funding requirements, so it does not appear that a different effective date would alter application of federal standards.

Representative Sitte said she hopes the rules are not making credentials requirements too difficult to attract staff, especially for smaller schools. She asked what foreign language instruction requirements would apply. Ms. Decker said foreign language instruction is governed by a statutory provision that requires two years of foreign language instruction during every four-year period.

Chairman Devlin called on Ms. Bev Nielson, North Dakota School Boards Association, for comments on the Department of Public Instruction rules. Ms. Nielson said she appreciates the cooperation of the Department of Public Instruction in discussions regarding the rules. She said after these discussions, there were only two unresolved issues. She said one of the unresolved issues relates to requiring health instruction in both seventh and eighth grade and it appears that issue was rendered moot by the memorandum from the Attorney General's office that was reviewed by the committee. She said health education instruction requirements may be the subject of legislation in 2007. She said the other unresolved issue relates to the time some of the rules take effect. She said the issues described by Dr. Gronberg regarding effective dates of rules would impact some schools if they become effective July 1, 2006. She said the School Boards Association would recommend those rules take effect on July 1, 2007, so as not to impact current hiring decisions.

Chairman Devlin called on Mr. Douglas Johnson, North Dakota Council of Educational Leaders, for comments on the rules of the Department of Public Instruction. A copy of a memorandum prepared by Mr. Johnson is attached as Appendix F. He said the memorandum was prepared to show the areas of agreement with Department of Public Instruction representatives regarding issues under the proposed rules. He said the memorandum was prepared before the most recent discussions on these topics.

Mr. Johnson said one problem school districts have with the rules proposals time requirements is helped by interpreting a full day for principals as eight hours or 480 minutes.

Mr. Johnson said requiring health instruction in both seventh and eighth grade may present problems for some schools. He said many schools provide health instruction only for one of those years and they will have to restructure if the requirement of instruction in both years becomes effective next year. He said the Education Coalition will consider the impact of this requirement and whether legislation in 2007 may be considered.

Senator Klein asked whether schools have been breaking the law regarding health instruction in seventh and eighth grade and why the Legislative Assembly was not made aware of this. Mr. Johnson said schools have not been breaking the law intentionally. He said the statute was subject to argument and the conclusion of the memorandum

from the Attorney General's office has just been received.

Representative Iverson asked why the requirements could not be satisfied by just allowing a joint health class for seventh and eighth grade. Mr. Johnson said his experience indicates that eighth grade students would not be comfortable in a combined class with seventh grade students.

In response to a question from Senator Klein, Mr. Johnson said the Education Coalition would recommend a July 1, 2007, effective date for the rules on which the Education Coalition and Department of Public Instruction did not reach consensus on appropriate effective dates. These rules include Title I coordinator credentials, special education director credentials, paraeducator certificates of completion, and special education strategist credentials.

Representative Devlin asked if the Department of Public Instruction would agree to a July 1, 2007, effective date for the four categories of rules described by Mr. Johnson. Ms. Decker said the department did not agree with a delayed effective date for these categories of rules. Dr. Gronberg said the Title I credential requirements are effective July 1, 2006, by operation of federal law so there would be no point in agreeing to a delayed effective date for Title I standards.

Representative Devlin thanked the Department of Public Instruction staff and representatives of the Education Coalition for their cooperation and efforts to reach agreement on rules proposals.

It was moved by Representative Iverson, seconded by Representative Koppelman, and carried on a roll call vote that the Administrative Rules Committee agree with the Superintendent of Public Instruction on suggested further amendments to rules of the Department of Public Instruction as described in the documents submitted by the department. Committee counsel said this motion would include approval of the July 1, 2006, effective date for Title I coordinator credentials, special education director credentials, paraeducator certificates of completion, and special education strategist credentials. Representative Devlin said that is correct and those are the dates to which the Department of Public Instruction would agree. He said the committee cannot approve an amendment except upon agreement by the adopting agency. Voting in favor of the motion were Representatives Devlin, Bernstein, Boehning, Galvin, Iverson, Koppelman, Thoreson, and Wrangham and Senators Andrist, Brown, Fischer, Klein, and Lee. Voting in opposition to the motion were Representatives Froelich and Sitte and Senator Triplett.

LOTTERY RULES

Chairman Devlin called on Mr. Chuck Keller, Director, North Dakota Lottery Division, for testimony relating to lottery rules carried over for consideration from the previous committee meeting. A copy of Mr. Keller's prepared testimony to the committee is attached as Appendix G.

Mr. Keller said four items were carried over for consideration from the rules submitted by the state lottery. Mr. Keller said the North Dakota Lottery Division would agree to eliminate three of the proposed amendments but would request retention of the amendment allowing the name and the picture of the Attorney General to appear on the lottery web site and in the lottery newsletter.

In response to a question from Representative Iverson, Mr. Keller said statutory provisions allow any lottery prize winner the right to remain anonymous.

Representative Koppelman said one of the rules carried over for consideration allows the lottery to waive any lottery rule. He asked committee counsel whether this broad kind of waiver authority exists in other areas of law or rule. Committee counsel said there are more specific waiver provisions in other laws and rules, such as authority for the Tax Commissioner to waive application of penalties and interest. He said he is not certain without researching the question but he is not aware of any rules provisions allowing waiver of application of any rule.

Mr. Keller said the authority to waive lottery rules is patterned after a charitable gaming rule that has been very useful in regulating charitable gaming. He said charitable gaming groups have proposed alternative methods of controlling gaming which would result in better controls than exist under gaming rules and, in those instances, it has been useful to be able to allow a waiver to allow the group to operate under the new approach.

In response to a question from Representative Wrangham, Mr. Keller said he does not believe the Attorney General is required to promote the lottery directly but it is common to have pictures taken of the Attorney General with prize winners in the lottery and the rule change would allow those pictures to appear on the web site and in the newsletter.

It was moved by Representative Koppelman, seconded by Senator Brown, and carried on a roll call vote that the Administrative Rules Committee agree with the suggestions for changes to the rules as adopted and submitted by the North Dakota Lottery Division. Voting in favor of the motion were Representatives Devlin, Bernstein, Boehning, Froelich, Galvin, Iverson, Koppelman, Sitte, Thoreson, and Wrangham and Senators Andrist, Brown, Fischer, Klein, Lee, and Triplett. No negative votes were cast.

SECRETARY OF STATE

Chairman Devlin called on Mr. Al Jaeger, Secretary of State, for testimony relating to voting system hardware and software rules as adopted by the Secretary of State. A copy of Mr. Jaeger's prepared testimony is attached as Appendix H.

STATE BOARD OF ANIMAL HEALTH

Chairman Devlin called on Dr. Susan Keller, Executive Officer and State Veterinarian, State Board of Animal Health, for testimony relating to July 2006

rules of the board. A copy of Dr. Keller's prepared testimony is attached as Appendix I.

Dr. Keller said the rules were made to make North Dakota rules consistent with the federal scrapie eradication program. She said states that are not consistent with the federal program are ineligible for federal funds for scrapie education, control, and eradication. She said sheep from states not consistent with the federal program are not allowed to enter interstate commerce.

Senator Klein said he understands that identification is only required for animals imported from a foreign country. He asked whether the United States has reached a point of required identification for interstate shipment of animals. Dr. Keller said she expects interstate identification requirements will be imposed in the future but at this time only foreign-origin animals require identification.

Representative Froelich asked what is required if he buys cows from South Dakota. Dr. Keller said North Dakota requires official identification on breeding livestock coming from South Dakota.

SUPERINTENDENT OF PUBLIC INSTRUCTION

Chairman Devlin called on Dr. Gronberg for testimony relating to rules adopted by the Department of Public Instruction relating to standards for schoolbuses and English language learner programs. A copy of Dr. Gronberg's prepared testimony is attached as Appendix J. Dr. Gronberg said after the rules were submitted for publication, it was determined that references to the MIS03 form were not accurate and should be replaced. He said a separate memorandum was distributed to committee members regarding the replacement of this reference. A copy of the memorandum relating to the suggested additional rules changes is attached as Appendix K.

Chairman Devlin called on Ms. Sanela Alagic for comments on the English language learner program rules adopted by the department. A copy of Ms. Alagic's prepared testimony is attached as Appendix L. She said she supports the rules adopted by the department.

Chairman Devlin called on Mr. Jody Thompson, Assistant Superintendent, Grand Forks Public Schools, for comments on the English language learner program rules adopted by the department. Mr. Thompson said he chairs the North Dakota English Language Learner Advisory Committee. He said the committee appreciates the opportunity to provide insight and recommendations to the department regarding the English language learner program. He said the committee questions the effective date of the rules as set for July 1, 2006. He said the committee believes assessment of students should be done in the spring of 2007 rather than in the fall of 2006. He said implementing a new program will require a substantial amount of staff development and training. He requested the committee be consulted before a final timeline for student assessments is

established. A copy of his prepared testimony is attached as Appendix M.

Senator Klein asked Dr. Gronberg whether the Department of Public Instruction has flexibility to allow assessment of students in the spring as suggested by Mr. Thompson. Dr. Gronberg said yes, he believes the Department of Public Instruction has that flexibility.

PUBLIC SERVICE COMMISSION

Chairman Devlin called on Ms. Annette Bendish, Public Service Commission, for testimony relating to four Public Service Commission rulemaking proceedings and the rules adopted. A copy of Ms. Bendish's testimony is attached as Appendix N. She said the four sets of rules were related to natural gas pipeline safety, telecommunications, siting of energy transmission facilities, and electric regulation.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chairman Devlin called on Mr. Sparb Collins, Executive Director, Public Employees Retirement System, for testimony relating to rules adopted by the Public Employees Retirement System. A copy of Mr. Collins' testimony is attached as Appendix O.

STATE SEED DEPARTMENT

Chairman Devlin called on Mr. Ken Bertsch, Seed Commissioner, State Seed Department, for testimony relating to rules adopted by the department. A copy of Mr. Bertsch's prepared testimony is attached as Appendix P.

STATE BOARD OF ACCOUNTANCY

Chairman Devlin called on Mr. Bill Peterson, Assistant Attorney General representing the State Board of Accountancy, for testimony relating to State Board of Accountancy rules carried over from the previous committee meeting. A copy of Mr. Peterson's prepared testimony is attached as Appendix Q.

Mr. Peterson said the committee requested the State Board of Accountancy to consider changes in the proposed rule to address concerns about the length of the disclaimer. He said the board has proposed a further amendment to the rule to shorten the required disclaimer and eliminate the type-size requirement.

Mr. Peterson said it is important to understand that a statutory provision in North Dakota Century Code (NDCC) Section 43-02.2-12(7) prohibits unlicensed or uncertified persons or firms from using the titles accountant or accounting. He said use of the title accountant by unlicensed and uncertified persons has been prohibited by statute since 1975.

Mr. Peterson said legislation was introduced in the past three legislative sessions relating to licensing accredited business accountants. He said proponents did not achieve the results they desired and filed a lawsuit against the state alleging that NDCC Section 43-02.2-12(7) is unconstitutional. He said the state is

being defended in the lawsuit by the Attorney General's office and he is the assistant attorney general assigned to represent the state in the lawsuit.

Mr. Peterson said the State Board of Accountancy has suggested a revised amendment to the rule in question to require only that a person using the word accountant must include a statement that the person is not a CPA or LPA and for a firm using the word accountant or accounting, a disclaimer must be included that the firm is not a CPA firm or LPA firm. Mr. Peterson said without the rule, the statutory prohibition on use of the terms accountant and accounting would continue to be effective. He said if the rule is approved by the committee, the pending lawsuit will be dismissed and the state will not incur further costs to defend it.

In response to questions from Senator Klein and Representative Koppelman, Mr. Peterson said the plaintiffs in the lawsuit would agree to dismiss the lawsuit if the proposed amendment is approved.

Representative Devlin said the suggested amendment is much better than the lengthy disclaimer that would have been required by the amendment as originally submitted. He said his question is when a disclaimer would be required. Mr. Peterson said the use of the disclaimer would be required anytime an unlicensed person or firm uses the word accountant or accounting to describe services provided.

In response to a question from Senator Klein, Mr. Peterson said in a telephone white pages listing, the disclaimer would not be required because the listing is made by the telephone company. He said in a yellow pages ad, the disclaimer would be required because the contents of the ad are the choice of the purchaser.

Chairman Devlin called on Mr. Monte Rogneby, legal counsel for the plaintiffs Spaedy and Krueger in the lawsuit against the state regarding limitation on the use of the terms accountant and accounting, for comments on the proposed rule change. Mr. Rogneby said his clients and others similarly situated have sought legislative change to recognize a new classification of services by accountants who are not licensed by the State Board of Accountancy. He said his clients initiated the lawsuit after five years of unsuccessful attempts at legislative changes to resolve the problem. He said the lawsuit is all but settled and he believes the state recognizes the merit of his clients' challenge.

Mr. Rogneby said he has a concern with the assertion that if no rule is adopted by the State Board of Accountancy the statutory provision would serve as an absolute prohibition against use of the terms accountant or accounting. He said the interpretation of the statute as an absolute prohibition was what the plaintiffs challenged as unconstitutional about the statutory provision. He said if the statutory provision is an absolute prohibition against use of the words accountant or accounting by unlicensed individuals, then that statutory prohibition would supersede a rule like the one proposed by the State Board of Accountancy. He said a statutory provision is superior

to any conflicting rule provision. He said he would urge the committee not to accept the disclaimer amendment suggested on the basis of an interpretation that the statutory provision is an absolute prohibition. He said he believes the statute must be read in a manner that would allow it to be found constitutional, which would allow adoption of rules to interpret the statutory provision.

Representative Koppelman said there is no apparent agreement between the parties that would settle the lawsuit. He asked if the committee accepts the amendment offered by the State Board of Accountancy, whether the lawsuit would go on. Mr. Rogneby said he is not sure what the plaintiffs would decide to do. He said the interpretation of the statutory provision as a prohibition on use of the terms accountant or accounting presents a possible problem because a rule may not contravene a statute. He said if the statute is interpreted as an absolute prohibition on use of these terms, that would make the status of this rule questionable. He said if the Attorney General or State Board of Accountancy would agree that a constitutional reading of the statute applies, then the rule can be valid. He said that is the plaintiffs' interpretation and he would hope that the Attorney General and State Board of Accountancy would agree.

Representative Koppelman reviewed the options available to the committee for action with regard to the amendment as offered and asked which way Mr. Rogneby would prefer the committee to act. Mr. Rogneby said he would suggest that because options for further consideration have passed, that the committee adopt the change offered by the State Board of Accountancy as the best option that exists at this point. He said the plaintiffs would interpret that as a constitutional reading of the statutory provision, allowing adoption of rules of interpretation.

In response to a question from Senator Klein, Mr. Rogneby said a state Supreme Court, which he believes was in Massachusetts, construed a similar statutory provision of that state and concluded that the statute must be construed, if possible, to be constitutional in application.

In response to a question from Senator Triplett, Mr. Rogneby said his clients would support a statutory change to make clear that use of the words accountant and accounting are acceptable by individuals in his clients' position. He said the suggested amendment today is much less onerous than the previous proposed amendment but his clients would still prefer no requirement of using a disclaimer. Senator Triplett asked if Mr. Rogneby would prefer the committee not to accept the suggested rule change. Mr. Rogneby said that is correct.

Representative Koppelman reviewed the options the committee has to address the rule offered by the State Board of Accountancy. He asked Mr. Peterson what he would recommend. Mr. Peterson said it appears the options would be to approve the proposed rule to allow use of the terms accountant and accounting with the shortened disclaimer and this

would save the costs of the lawsuit to the state but it would probably be necessary to consider 2007 legislative changes. He said if the committee voids the rule, the plaintiffs would not be allowed to use the terms accountant or accounting, the state would have to spend funds for the lawsuit, and 2007 legislation would still be needed. He said given these choices, it appears the best result for all interested parties would be approval of the rule amendment.

Representative Koppelman asked whether a rule can negate a statute that prohibits use of the terms accountant and accounting. Mr. Peterson said the statute in question says the terms cannot be used in a manner that suggests the person has special competence. He said the State Board of Accountancy and the Attorney General's office believe the rule would comply with the statutory requirements.

Senator Klein said legislation has been introduced in the past three legislative sessions but he is not sure the Legislative Assembly has ever addressed the statute regarding use of the terms accountant and accounting. He said the bills submitted were about establishing a new category of licensing for accountants. He said the disclaimer requirement of the rule is better than nothing until the matter can be reconsidered in 2007.

Chairman Devlin said the committee would hold consideration of the proposed rule until later in the meeting.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Ms. Krista Andrews, Legal Advisory Unit, Department of Human Services, for presentation of testimony relating to four sets of rules adopted by the department. A copy of Ms. Andrews' prepared testimony relating to family foster care home rules is attached as Appendix R. A copy of Ms. Andrews' prepared testimony relating to the authorized agent in providing child welfare services is attached as Appendix S. A copy of Ms. Andrews' prepared testimony relating to rules for assessment of child abuse and neglect reports is attached as Appendix T. A copy of Ms. Andrews' prepared testimony relating to rules governing the Child Fatality Review Panel is attached as Appendix U. The summary of comments and each other attachment to these appendices are on file in the Legislative Council office.

Representative Sitte said in the rules provisions relating to assessment of child abuse and neglect reports, it is provided in North Dakota Administrative Code (NDAC) Section 75-03-19-09 that at the first face-to-face contact, the department shall advise the subject of a report of suspected child abuse or neglect of the specific complaints or allegations made against that person. She said that information should be provided at the first contact with the person. Ms. Gladys Cairns said the department wanted to provide the consistency of face-to-face meetings of social services personnel and an individual who is the subject of complaints or allegations. Representative Sitte said she would prefer the rules to reflect the

statutory requirement that this information be provided to an individual upon initial contact. Representative Sitte said the rule provision also states that the department shall maintain a child welfare certification training program. She said the statutory provision contains the specific statement and the rules provision should also include the statement that the program is to protect the legal rights and safety of children and families. She said inclusion of the word families is very important. Ms. Cairns said she believes that statement reflects the entire purpose of the rules and should be not a problem to include in the rules.

In response to a question from Senator Fairfield, Ms. Andrews said statutory provisions established the Child Fatality Review Panel several years ago and provided authority for adoption of rules. Ms. Cairns said the Department of Human Services has performed functions under the statutory provision since the law was created regarding collection of data and presentation of information to the Child Fatality Review Panel. She said the timeline for review of child fatalities is about six months. Senator Fairfield asked if there are open records law problems with the information prepared by the department for this purpose. Ms. Cairns said after the department prepares information and submits a report to the Child Fatality Review Panel, the department would not share those records with others because they are confidential by statute.

Chairman Devlin asked if there are individuals in attendance who would like to comment on the rules adopted by the Department of Human Services. Ms. Diedre Godycki, Rugby, commented on the family foster care homes rules adopted by the Department of Human Services. A copy of her prepared testimony is attached as Appendix V.

Chairman Devlin asked Ms. Godycki if her suggestions were submitted to the Department of Human Services during the hearings on the proposed rules. Ms. Godycki said she submitted her suggestions to the department during the proceedings.

Mr. John Ford, Rugby, commented on the child protective services process and foster care program administered by the Department of Human Services. A copy of Mr. Ford's prepared testimony is attached as Appendix W.

In response to a question from Representative Devlin, Ms. Andrews said some of the comments provided by Ms. Godycki and Mr. Ford were presented to the Department of Human Services during the rulemaking proceedings and some of the comments were not submitted.

Chairman Devlin called on Ms. Melissa Hauer, Department of Human Services legal counsel, for testimony relating to eight sets of rules submitted by the Department of Human Services. A copy of Ms. Hauer's prepared testimony relating to appeals and hearings is attached as Appendix X. A copy of Ms. Hauer's prepared testimony relating to medical services is attached as Appendix Y. A copy of Ms. Hauer's prepared testimony relating to eligibility

for Medicaid is attached as Appendix Z. A copy of Ms. Hauer's prepared testimony relating to the children's health insurance program is attached as Appendix AA. A copy of Ms. Hauer's prepared testimony relating to child support enforcement is attached as Appendix BB. A copy of Ms. Hauer's prepared testimony relating to licensing of assisted living facilities is attached as Appendix CC. A copy of Ms. Hauer's prepared testimony relating to licensing of programs and services for individuals with developmental disabilities is attached as Appendix DD. A copy of Ms. Hauer's prepared testimony relating to reimbursement for providers of services to individuals with developmental disabilities is attached as Appendix EE. Copies of attachments, including a summary of comments, regulatory analysis, small entity regulatory analysis, and takings assessments for each of these appendices are on file in the Legislative Council office.

Chairman Devlin said Representative Sitte had some concerns about wording of child abuse and neglect report rules. He said perhaps the rules should be carried over to allow her to discuss changes with department staff. **It was moved by Senator Brown, seconded by Representative Iverson, and carried on a roll call vote that the committee carry over consideration of the rules relating to assessment of child abuse and neglect reports under NDAC Chapter 75-03-19.** Voting in favor of the motion were Representatives Devlin, Bernstein, Boehning, Galvin, Iverson, Sitte, Thoreson, and Wrangham and Senators Brown, Fairfield, Fischer, Klein, Lee, and Triplett. No negative votes were cast.

ATMOSPHERIC RESOURCE BOARD

Chairman Devlin called on Mr. Darin Langerud, Director, Atmospheric Resource Board, State Water Commission, for testimony relating to rules adopted by the Atmospheric Resource Board. A copy of Mr. Langerud's prepared testimony is attached as Appendix FF.

WORKFORCE SAFETY AND INSURANCE

Chairman Devlin called on Ms. Jodi Bjornson, General Counsel, Workforce Safety and Insurance, for testimony relating to rules adopted by Workforce Safety and Insurance. A copy of Ms. Bjornson's prepared testimony is attached as Appendices GG and HH.

Ms. Bjornson said a proposed additional amendment for committee consideration is attached to her prepared testimony (Appendix GG).

Representative Devlin said the amendment in NDAC Section 92-01-02-30(7) requires prior approval by Workforce Safety and Insurance for a branded equivalent of a generically available medication. He said legislators have had concerns about a similar provision in human services programs in the past. He said the concern is with placing these kinds of restrictions on physicians' choices for treating patients.

Chairman Devlin called on Mr. David Peske, North Dakota Medical Association, for comments on the Workforce Safety and Insurance rules. Mr. Peske distributed a copy of a letter from Mr. Bruce Levi to Workforce Safety and Insurance dated February 3, 2006.

Representative Koppelman said it appears the rules presented by Workforce Safety and Insurance already include the suggested changes in the letter distributed by Mr. Peske to committee members. Mr. Peske said the letter distributed is a copy of the original comments on the rulemaking submitted by the Medical Association. He said the changes suggested by the North Dakota Medical Association in the letter have been made by Workforce Safety and Insurance before final adoption of the rules.

PEACE OFFICER STANDARDS AND TRAINING BOARD

Chairman Devlin called on Mr. Ken Sorenson, Assistant Attorney General appearing on behalf of the Peace Officer Standards and Training Board, for testimony relating to rules adopted by the board. A copy of Mr. Sorenson's prepared testimony is attached as Appendix JJ.

OFFICE OF MANAGEMENT AND BUDGET STATE PROCUREMENT OFFICE

Chairman Devlin called on committee counsel to review correspondence received from Ms. Susan Fugere, State Procurement Office, for an extension of time to adopt administrative rules. A copy of the letter from Ms. Fugere is attached as Appendix KK.

Chairman Devlin called on Ms. Sherry Neas, State Procurement Office, for testimony relating to the request for an extension of time to adopt rules. A copy of Ms. Neas' prepared testimony is attached as Appendix LL.

It was moved by Representative Iverson, seconded by Representative Wrangham, and carried on a voice vote that the Administrative Rules Committee approve the extension of time to adopt administrative rules as requested by the Office of Management and Budget State Procurement Office.

STATE BOARD OF ACCOUNTANCY

Senator Brown said it appears the best course for the committee at this time is to approve the suggested amendment offered by the State Board of Accountancy. He said this would allow unlicensed accountants to use the terms accountant and accounting with a shortened disclaimer. He said it is likely this issue will be examined by the Legislative Assembly in 2007. **It was moved by Senator Brown and seconded by Senator Klein that the Administrative Rules Committee approve the amendment offered by the State Board of Accountancy for a shortened disclaimer to be used by individuals or firms not licensed by the**

State Board of Accountancy when using the word accountant or accounting.

Senator Triplett said it might be more appropriate for the committee to consider voiding the original rule adopted by the State Board of Accountancy. She said no one seems to be happy with this version of the rule or the rule as originally submitted. She said perhaps court resolution of the issue would be the best result.

Senator Klein said he believes accepting the amendment would at least give unlicensed accountants some opportunity to use the word accountant in describing their services with a shortened disclaimer. He said he would support the amendment as offered.

In response to a question from Senator Fairfield, committee counsel reviewed potential timelines for consideration of changes to the rule and statutory provisions relating to use of the terms accountant and accounting. Committee counsel said if the committee approves the amendment suggested by the State Board of Accountancy, it would become effective July 1, 2006. He said it is very difficult to predict when lawsuits will be finally determined but the lawsuit challenges constitutionality of a statutory provision and the Constitution of North Dakota requires four of the five justices of the North Dakota Supreme Court to declare a statute unconstitutional. He said he believes the lawsuit is pending in district court so there may be an extended period of time before the lawsuit is finally resolved. He said legislation to amend the statutory provisions regarding use of the terms accountant and accounting could be introduced in January 2007 and if enacted without an emergency clause, the legislation would probably become effective August 1, 2007.

The question was called and **the motion carried**. Voting in favor of the motion were Representatives Devlin, Bernstein, Boehning, Galvin, Iverson, and Koppelman and Senators Brown, Fischer, Klein, and Lee. Voting in opposition to the motion were Representatives Sitte, Thoreson, and Wrangham and Senators Fairfield and Triplett.

It was moved by Senator Triplett, seconded by Senator Fairfield, and failed on a recorded roll call vote that the Administrative Rules Committee void the rule adopted by the State Board of Accountancy governing use of the terms accountant and accounting by an unlicensed person or firm. Voting in favor of the motion were Representatives Galvin and Wrangham and Senators Fischer and Triplett. Voting in opposition to the motion were Representatives Devlin, Bernstein, Boehning, Iverson, Koppelman, Sitte, and Thoreson and Senators Brown, Fairfield, Klein, and Lee.

DEPARTMENT OF HUMAN SERVICES

Ms. Andrews submitted proposed amendments to NDAC Sections 75-03-19-10 and 75-03-19-09. Committee counsel said the proposed amendment to Section 75-03-19-10 would add the words "to protect the legal rights and safety of children and families" at the end of the first sentence. She said the proposed

change to Section 75-03-19-09 would replace the words "face-to-face" with the word "initial" in the first sentence. Representative Sitte said this resolves her concerns expressed earlier in the meeting. **It was moved by Representative Sitte, seconded by Representative Wrangham, and carried on a roll call vote that the Administrative Rules Committee agree with the Department of Human Services for the suggested amendment of North Dakota Administrative Code Sections 75-03-19-09 and 75-03-19-10 and that North Dakota Administrative Code Chapter 75-03-19 not be carried over for further consideration.** Voting in favor of the motion were Representatives Devlin, Bernstein, Boehning, Galvin, Iverson, Koppelman, Sitte, Thoreson, and Wrangham and Senators Brown, Fairfield, Fischer, Klein, Lee, and Triplett. No negative votes were cast.

DEPARTMENT OF PUBLIC INSTRUCTION

Representative Koppelman said it was requested that the Department of Public Instruction allow until spring of 2007 for assessments for English language learner program students. He said it appears the last two sentences of NDAC Section 67-28-01-08 would not allow an assessment to be delayed until spring. He said the committee should carry over consideration of these final two sentences. **It was moved by Representative Koppelman, seconded by Representative Boehning, and carried on a voice vote that the Administrative Rules Committee carry over consideration of the last two sentences of Section 67-28-01-08.**

WORKFORCE SAFETY AND INSURANCE

Chairman Devlin said he is concerned with the requirement of NDAC Section 92-01-02-30(7) regarding prior approval of a branded equivalent of a generically available medication. He said this kind of provision can be an unnecessary interference with a physician's treatment of a patient. He suggested that this provision be carried over for further consideration. He also suggested that the amendment suggested by Workforce Safety and Insurance in the testimony presented could be approved. **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 North Dakota Administrative Code Section 92-01-02-30(7) and approve the amendment offered by Workforce Safety and Insurance to Section 92-01-02-34.** Senator Brown said the Legislative Assembly has spent a substantial amount of time debating preauthorization of medication in human services programs. He said he would support carrying over consideration of the rule for Workforce Safety and

Insurance on the same issue but he believes it is necessary to allow prior authorization by agencies to save money or to go to a formulary approach. Representative Devlin said this issue will probably receive legislative consideration and it would be appropriate to provide the same treatment for Workforce Safety and Insurance as is provided in human services programs.

COMMITTEE DISCUSSION

Representative Koppelman said the committee received an enormous amount of printed material with testimony at today's meeting. He said there is not enough time for committee members to review the information, especially information on comments during rulemaking, to give committee members adequate time to review the material. He said he would like committee members to receive comments on rules in advance of the meeting. He said if comments are provided to committee members at the time rules are received for review prior to the meeting, committee members would be able to better understand concerns expressed to agencies by the public. Chairman Devlin said committee counsel should provide comments on rules to committee members in advance. He said he will work with committee counsel to arrange for providing the material to committee members. Representative Thoreson said it would be even more useful if comments on rules are provided by electronic mail for review by committee members.

Representative Sitte said sponsors of legislation should receive notice of rulemaking regarding legislation on which they appeared as sponsors. She said she has not received rulemaking notice on a bill on which she was a sponsor and rulemaking has been conducted. In response to a question from the chairman, committee counsel said a statutory provision requires rulemaking notice from an agency to an individual who appeared as a sponsor on legislation under which rulemaking is being conducted. Chairman Devlin requested committee counsel to send a reminder to administrative agencies that they should be providing notice of rulemaking to sponsors appearing on legislation being implemented by rulemaking.

No further business appearing, Chairman Devlin adjourned the meeting at 3:40 p.m.

John Walstad
Code Revisor

[ATTACH:38](#)