

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Wednesday, January 28, 1998
Roughrider Room, State Capitol
Bismarck, North Dakota

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

Members present: Representatives LeRoy G. Bernstein, Charles Axtman, Chris Christopherson, Scot Kelsh, Keith Kempenich, Kim Koppelman, Stacey L. Mickelson, Jon O. Nelson, Darrell D. Nottestad, Bill Oban, Bob Skarphol, Rich Wardner; Senators John M. Andrist, Bob Stenehjerm, Steven W. Tomac

Members absent: Representatives William R. Devlin, Tom D. Freier

Others present: See Appendix A

It was moved by Representative Wardner, seconded by Representative Axtman, and carried on a voice vote that the minutes of the previous meeting be approved as mailed.

STATE DEPARTMENT OF HEALTH

Chairman Bernstein called on Ms. Darleen Bartz, State Department of Health, for comments on rules of the department effective January 1998 relating to home health agencies. A copy of Ms. Bartz's testimony is attached as Appendix B.

In response to a question from Representative Bernstein, Ms. Bartz said copies of the proposed rules were sent to all home health agencies before the public hearings.

Senator Andrist asked whether there was significant industry opposition to the rules changes. Ms. Bartz said the industry suggested that the department do this updating of rules so there was no significant opposition. She said some concerns surfaced during the rulemaking proceeding which were addressed in the process. Senator Andrist said he would prefer issues such as these home health agency rules to be addressed in legislation in the future. Ms. Bartz said the department will give thought to that suggestion.

Chairman Bernstein called on Mr. Fred Heer, Director, Division of Disease Control, State Department of Health, for testimony relating to January 1998 rules on inoculations. A copy of Mr. Heer's testimony is attached as Appendix C.

Representative Nottestad asked how home school students are treated in rules on inoculation. Ms. Barbara Frohlich, Division of Disease Control, State Department of Health, said home school students are required to be covered by reports due on August 1 of each year.

Representative Koppelman inquired about exemptions from the required inoculation provisions. Ms. Frohlich described provisions exempting those opposed to inoculations based on religious beliefs and said an exemption is also available for medical reasons. Mr. Heer distributed copies of North Dakota Century Code (NDCC) Section 23-07-17.1, which provides a medical reason exemption from inoculation requirements.

BOARD OF NURSING

Chairman Bernstein called on Ms. Carolyn Bryan, Board of Nursing, for a presentation on December 1997 Board of Nursing rules relating to advanced practice registered nurse licensure and requirements for prescriptive authority for nurses. A copy of Ms. Bryan's testimony is attached as Appendix D.

In response to a question from Representative Bernstein, Ms. Bryan said no individual mailings of notice to affected nurses were done because the rules relate to 1997 legislation and the members of the affected group of advanced practice registered nurses were aware of and participated in the 1997 legislation.

INSURANCE COMMISSIONER

Chairman Bernstein called on Mr. Vance Magnusson, Department of Insurance, for comments on January 1998 rules relating to Medicare supplement insurance adopted by the commissioner. Mr. Magnusson distributed copies of a memorandum from Mr. Chris Edison, Legal Counsel, Department of Insurance, a copy of which is attached as Appendix E.

Representative Skarphol asked whether the rule changes meet or exceed federal requirements, and Mr. Magnusson said the rules

were designed to meet Medicare supplement insurance minimum standards of federal law.

CARRYING OVER CONSIDERATION OF RULES

Chairman Bernstein called on committee counsel to present a memorandum entitled *Administrative Rules Committee Holding Consideration of a Rule to a Subsequent Meeting*. Committee counsel said there was discussion at the previous committee meeting about whether the committee must take action to hold rules over for consideration or whether all administrative rules are automatically carried over for one meeting for consideration by the committee. He said a 1997 amendment to NDCC Section 28-32-03.3(2) provided that the committee "may hold consideration" of a rule for one subsequent meeting rather than being limited by the provision of previous law that the committee would have to act at the meeting at which a rule is initially considered if the committee chooses to find a rule to be void. He said statutory and Supreme Court guidance on statutory interpretation indicates that in statutory interpretation the first step is to examine the plain, ordinary, and commonly understood meaning of the language. If there is no ambiguity, interpretation ends with the plain meaning of the statutory language. He said the word "hold" is capable of many nuances of meaning. He said the use of the words "may hold" is significant because the North Dakota Supreme Court has observed that the use of the word "may" is permissive and indicates it is a matter of discretion. He said this reading by the Supreme Court indicates that rules would be subject to discretionary authority of the committee to carry them over to a subsequent meeting, which means rules would not be automatically carried over for consideration. He said that because the word "may" always implies discretion, it appears the statutory language is unambiguous.

Committee counsel said examination of the history of the statutory change in question indicates that the Administrative Rules Committee was concerned with instances in which the committee required further information or consideration on decisions regarding whether to void a rule. He said it appears the intent was that the committee would direct certain questions to the agency and the agency would return during the subsequent meeting to provide requested information. He said it is also significant to note that if the provision were interpreted so that rules would automatically be carried over for consideration, agencies would be put in the position of

having to be in attendance for the duration of the subsequent meeting in case questions arise and may not have advance notice of issues about which the committee is concerned.

Senator Tomac said he believes the policy of the committee should be that a motion would be required to carry over consideration of rules to a subsequent meeting. He asked whether a motion would be required to adopt this policy. Chairman Bernstein said a motion is not necessary. He said it has been the practice of the committee to require a motion to carry rules over for consideration and that he, as chairman, would continue to follow that procedure.

STATE DEPARTMENT OF HEALTH

Senator Andrist said it is difficult to determine the changes being made in the State Department of Health rules adopted in the new North Dakota Administrative Code (NDAC) Chapter 33-03-10.1, relating to home health agencies. He said the previous chapter is shown as repealed, but the language is not reprinted in the supplement available to the committee. He said he has no specific problem with the rules, other than believing the topic should be addressed in legislation. He said questions may arise and further consideration may be needed with regard to these rules so he thinks they should be carried over for an additional meeting.

It was moved by Senator Andrist, seconded by Representative Nelson, and carried on a roll call vote that State Department of Health rules in Chapter 33-03-10.1 and the repeal of Chapter 33-03-10 be carried over for consideration by the Administrative Rules Committee until the next meeting of the committee. Representative Oban requested a recorded roll call vote on the motion. Representative Skarphol said when rules are carried over for consideration, he believes the agency should be notified and the issue should be placed on the agenda for discussion at the subsequent meeting. Voting in favor of the motion were Representatives Bernstein, Axtman, Kempenich, Koppelman, Mickelson, Nelson, Nottestad, Skarphol, and Wardner and Senators Andrist, Stenehjelm, and Tomac. Voting in opposition to the motion were Representatives Christopherson, Kelsh, and Oban.

Representative Oban said the committee should carry over rules for consideration with regard to voiding of the rules only when there are serious issues regarding the possibility of voiding rules. He said he opposed the motion because there appears to be no specific concern regarding the rules.

STATE BOARD OF OPTOMETRY

Chairman Bernstein called on Dr. Theodore J. Becker, President, State Board of Optometry, for testimony relating to November 1997 rules of the State Board of Optometry. Dr. Becker said the rules were enacted pursuant to 1997 legislation allowing an optometrist to treat open angle glaucoma and to administer acetaminophen with 30 milligrams of codeine. A copy of Dr. Becker's testimony is attached as Appendix F.

BOARD OF PODIATRIC MEDICINE

Chairman Bernstein called on Mr. Gary Thune, Special Assistant Attorney General representing the Board of Podiatric Medicine, for a presentation regarding January 1998 rules of the board. A copy of Mr. Thune's testimony is attached as Appendix G. Mr. Thune said the most controversial aspect of the rulemaking proceeding is the increase in the annual license fee from \$200 to \$500. He said the fee increase was made necessary by a financial hardship experienced by the board due to the high cost of administrative and judicial proceedings involved with a disciplinary action against a licensee.

Representative Bernstein asked how long it will take for the board to eliminate its indebtedness at a \$500 annual fee. Mr. Thune said the board is now looking at the possibility of becoming involved in extensive disciplinary proceedings on another matter so the board may be forced to continue collecting the higher fee for some time. He said due to the pending proceedings, it is not possible to estimate when the board could look at reduction of the annual fee.

Representative Skarphol asked whether anything could be done to avoid or reduce the high cost of disciplinary actions. Mr. Thune said it is necessary for the board to examine and investigate any complaint filed with the board. He said these proceedings can become very time-consuming and expensive.

Senator Tomac asked how the \$500 annual license fee compares with fees charged in other professions. Mr. Thune said he is not certain and has not conducted a specific license fee comparison. He said the board represents a relatively small group of professionals so large costs of disciplinary proceedings cannot be spread over a large number of licensees as in other professions. Senator Tomac asked whether the board has considered merging with another group to gain the advantage of a larger membership. Mr. Thune said consideration has been given to merging with another medical group but the board hopes to

remain independent and represent only doctors of podiatry.

Representative Koppelman asked whether the board has considered removing the fee from the administrative rules to allow the board to adjust the fee within statutory limits without rulemaking. Mr. Thune said the board had a rulemaking proceeding that needed to be addressed with regard to other matters so it was not undertaken only for the fee change. He said perhaps the board would consider in the future whether to remove the fee amounts from administrative rules.

Senator Stenehjem asked whether written testimony was received from any licensees during the rules process. Mr. Thune said no written testimony was received but numerous oral comments were received.

Senator Tomac said it is unfortunate that all licensees must bear the cost for an administrative action. He asked whether the board has authority to assess a fine or costs in a disciplinary action. Mr. Thune said the board has authority to assess a fine but did not have authority to assess attorney's fees in a disciplinary proceeding. He said 1997 legislation was passed allowing the board the authority to recover attorney's fees in disciplinary proceedings.

Chairman Bernstein called on Mr. Bill Zuger for comments on the Board of Podiatric Medicine rules. Mr. Zuger said he is an attorney and represents an individual who has been the subject of complaints filed with the board and was the subject of disciplinary proceedings. He said he wants the committee to understand that many of these complaints have been initiated by competing licensees rather than patients.

SECURITIES COMMISSIONER

Chairman Bernstein called on Mr. Syver Vinje, Securities Commissioner, for comments relating to January 1998 rules of the commissioner. Mr. Vinje said he was appointed as Securities Commissioner after the rulemaking proceeding leading to adoption of these rules. He introduced Mr. Harold Kocher to present testimony relating to these rules. A copy of Mr. Kocher's testimony is attached as Appendix H.

STATE SEED DEPARTMENT

Chairman Bernstein called on Mr. James Swanson, State Seed Department, for a presentation of testimony regarding December 1997 rules of seed testing and labeling of bagged agricultural seed. A copy of Mr. Swanson's testimony is attached as Appendix I.

Representative Bernstein asked whether the department received any objection to the fee increases in these rules. Mr. Swanson said the department did not receive any objection. Representative Axtman said perhaps the department should consider removing inspection fees from administrative rules.

It was moved by Representative Nottestad and seconded by Representative Axtman that the December 1997 Seed Department rules be carried over to the subsequent committee meeting for consideration. Representative Nottestad said carrying the rules over for consideration would allow the committee and the department to examine the issue of eliminating fees of the Seed Department from administrative rules.

In response to questions raised by Senator Tomac and Representative Skarphol, committee counsel reviewed a letter to State Seed Commissioner Douglas Johansen from the Attorney General regarding Seed Commission rules. Committee counsel said the committee raised a question at its previous meeting regarding a potato grade inspection fee increase in which the administrative rule was changed after the commission began collecting an increased fee. He said the committee was concerned that administrative rule changes relating to fees should be made before the increased fees are collected. He said the letter reviews applicable statutory provisions and concludes that the Seed Commission is not required to use administrative rules to establish fees. However, he said, the letter also states that if fees are established by rule, the commission is bound by the rules and may not increase fees without repealing or amending the rules.

Chairman Bernstein called on Ms. Carmen Miller, Assistant Attorney General, for review of the letter from the office of the Attorney General to Seed Commissioner Douglas Johansen. Ms. Miller said the letter has been described by committee counsel and she agrees with the description that the letter concludes that the Seed Commission is not required to establish rules for its fees but, once the commission has established rules, any rules must be amended before the fees collected are changed.

Representative Koppelman asked what is the role of the office of the Attorney General in advising agencies about what is an appropriate subject for rulemaking. Ms. Miller said the relationship of agencies and the office of the Attorney General varies depending on the extent of agency reliance on the staff of the office of the Attorney General in rulemaking activity. She said some agencies perform rulemaking activities with little

contact with the Attorney General's staff and other agencies rely extensively on assistance from the office of the Attorney General. She said the extent of involvement of the Attorney General's staff also varies depending on statutory authority of an agency.

Representative Nottestad withdrew his motion and Representative Axtman withdrew his second. Senator Stenehjem said he would prefer to see the Seed Commission keep fees in administrative rules rather than adjusting them from time to time without any formal notice to the public.

DEPARTMENT OF HUMAN SERVICES

Chairman Bernstein called on Mr. Blaine Nordwall, Department of Human Services, for a presentation relating to November 1997 and January 1998 rules of the department. A copy of Mr. Nordwall's report is attached as Appendix J. Mr. Nordwall reviewed the materials relating to the rule changes for aid to families with dependent children and ratesetting for nursing home care.

Chairman Bernstein asked whether committee members have questions for department representatives regarding the rules carried over for consideration from the previous meeting on low-intensity outpatient treatment or review of child abuse and neglect assessments. Senator Tomac asked why it is provided by rule and whether legislation would be more appropriate for the low-intensity outpatient treatment provisions. Mr. Don Wright, Department of Human Services, said the low-intensity outpatient rules were redone a couple of years ago. He said it was intended at the time that private practice would regulate itself. He said the department found from a communication from the Attorney General's office that the department has a statutory duty to regulate programs for low-intensity outpatient treatment. Senator Tomac said there appears to be a question of overlapping licensing requirements for the Board of Addiction Counseling Examiners and the department's low-intensity outpatient treatment rules. He asked why the department could not simply recognize the private practice license issued by the board. Mr. Wright said the board licenses individual professionals and the department licenses programs. He said the department is required to license programs and there has been some discussion of consolidating functions. He said licensing of individuals is based on education and qualifications while licensing of programs is based upon other factors. Senator Tomac asked what would happen if the low-intensity outpatient

treatment rules were voided. Mr. Wright said it appears to him the department would be in conflict with its statutory directive to perform licensing and this would raise questions of the status of licensees under the law.

Mr. Tom Wirtz, Department of Human Services, said it appears there is confusion between licensing of low-intensity outpatient treatment programs and the licensing of individuals in private practice. He said there is also a private practice registration, which is not the same as a private practice license. He said the licensing for low-intensity outpatient treatment programs is a protection for the public that will apply to those who may not be licensed elsewhere.

Chairman Bernstein called on Mr. John Wieglanda, Heart River Alcohol and Drug, Dickinson, for comments on the rules. Mr. Wieglanda said low-intensity outpatient treatment is basically a new program. He said intensive outpatient treatment was not appropriate for all clients because they needed something that would fit their work schedules or they would be forced to withdraw from treatment. He said in his experience low-intensity outpatient treatment has been successful. He said without licensing by the Department of Human Services there would be no standards of quality that programs must meet.

WORKERS COMPENSATION BUREAU

Chairman Bernstein called on Mr. Reagan Pufall, Chief Operating Officer, Workers Compensation Bureau, for a presentation relating to Workers Compensation Bureau December 1997 rules on the workers' compensation scholarship program. A copy of Mr. Pufall's testimony is attached as Appendix K.

Chairman Bernstein asked whether the bureau provided each eligible family mailed notice of the existence of the scholarship program. Mr. Pufall said the bureau provides this notice to each family and at some point in the future the bureau may provide them with a form that they can return if they wish to opt off the mailing list.

TAX COMMISSIONER

Chairman Bernstein called on Ms. Donnita Wald, Assistant Attorney General, Office of State Tax Commissioner, for presentation of a request by the Tax Commissioner to remove an Administrative Rules Committee objection to NDAC Section 81-03-09-38 which was filed in 1992. A copy of Ms. Wald's testimony is attached as Appendix L.

Committee counsel said the 1992 objection was due to concerns expressed by representatives of broadcasters. He asked whether those broadcasters presented any concerns to the Tax Commissioner during hearings on the recent rules changes to NDAC Section 81-03-09-38. Ms. Wald said broadcasters did not raise objections during the hearings and they did not provide any written comments on the proposed rules.

Ms. Wald also distributed copies of a letter from Tax Commissioner Rick Clayburgh requesting an extension of time to adopt rules pursuant to 1997 legislation revising financial institutions taxation. A copy of the letter is attached as Appendix M. She said rulemaking has proven to be very complex and the Tax Commissioner wants to be certain that good rules are developed.

It was moved by Representative Skarphol, seconded by Representative Koppelman, and carried on a voice vote that the Administrative Rules Committee approve an extension of time to August 1, 1998, for the Tax Commissioner to adopt rules under the new financial institutions tax.

It was moved by Representative Skarphol, seconded by Representative Kempenich, and carried on a roll call vote that the Administrative Rules Committee remove the objection to NDAC Section 81-03-09-38. Voting in favor of the motion were Representatives Bernstein, Axtman, Christopherson, Kelsh, Kempenich, Koppelman, Nelson, Nottestad, Skarphol, and Wardner and Senators Andrist, Stenehjem, and Tomac. There were no "nay" votes.

BISON PROCESSING

Chairman Bernstein said Representative Skarphol requested placing on the agenda discussion of State Department of Health rules on game animal processing and sale. Representative Skarphol said his involvement in raising bison led him to investigate rules of processing of bison. He said the rules in question were considered by the committee at its July 1997 meeting.

Chairman Bernstein called on Mr. Kenan Bullinger, Division of Food and Lodging, State Department of Health, for comments on game animal processing and sale rules. A copy of Mr. Bullinger's comments is attached as Appendix N.

In response to a question from Representative Nelson, Mr. Bullinger said there are two facilities qualified for bison processing in the state. He said the department cannot bypass public health concerns to qualify additional facilities. He said

perhaps a state inspection program could help this situation.

In response to a question from Representative Skarphol, Mr. Bullinger said since 1976 an approved source was required for processing all meat. He said that was clarified in recent rules by following federal code provisions and this change did not actually create a new requirement for inspection of bison meat.

Chairman Bernstein called on Dr. Jeffrey Legg, United States Department of Agriculture (USDA), for comments on bison processing. Dr. Legg said he would address questions of committee members. In response to a question from Representative Skarphol, Dr. Legg said the USDA has been mandated to reduce its regulations and has moved into prevention of diseases in meat products rather than the traditional followup method of discovering and investigating diseased meat products. He said regulated producers must have a written plan and adequate records to show that they follow the written plan. He said this is intended to prevent introduction of diseased meat products to the public. He said bison processors are eligible to apply for approval from the USDA and he is confident they would be eligible if they follow protocol for seeking approval.

Chairman Bernstein called on Mr. Doug Earl, Siouxland Buffalo, for comments on the topic. Mr. Earl said his operation was established in 1982. He said he is required to deal with seven different agencies in his operation. He said the inspections being discussed could cost him \$300 per animal. He said with regard to the suggestion of a state inspection program, he would not recommend it because South Dakota inspection has not eliminated contaminated meat. He requested that something be done to alleviate inspection problems so his operation can be successful and be passed on in his family.

Chairman Bernstein called on Ms. Cathy Ulland, Big Sky Buffalo Ranch, for comments on the topic. Ms. Ulland said her ranch gets bison processing from a processor in Bottineau, which she does not believe is USDA inspected. Senator Tomac asked how the bison product is sold without inspection. Ms. Ulland said the First District Health Unit, Minot, has jurisdiction in the area and it appears the health unit has approved the facility.

Chairman Bernstein called on Mr. Fred DuBray, Director, Pte Hca Ka, Inc., for comments on the topic. Mr. DuBray said use of a mobile slaughter facility for bison in his area came about because of the same concerns he has heard raised at the meeting today. He said bison are naturally disease resistant. He said as you put

bison through the same confinement and other processes as domesticated animals, it may weaken the natural disease resistance of bison. He said the desire to avoid confinement of bison led to the solution of using a mobile slaughter facility. He said the objective is not to avoid inspection or diminish safety but to meet the considerations and desire to provide a better product and healthier animals.

Chairman Bernstein thanked those present for their comments. He said the committee has no jurisdiction of this subject and he suggested that interested parties seek a solution to the problems through legislation if that is deemed appropriate. Senator Andrist said perhaps the situation described can be resolved without legislation. Representative Mickelson said it seems there needs to be communication within the industry to find out what others are doing and to examine the processing possibilities that exist under current law.

SECRETARY OF STATE

Chairman Bernstein called on Mr. Al Jaeger, Secretary of State, for presentation of a request for an extension of time regarding rules to govern methods of signing, subscribing, or verifying documents filed by electronics means. A copy of a letter from Mr. Jaeger is attached as Appendix O.

In response to a question from Senator Tomac, Mr. Jaeger said he could report progress on rule-making activity to the Administrative Rules Committee at its last meeting this interim.

It was moved by Senator Tomac, seconded by Representative Wardner, and carried that the Administrative Rules Committee approve an extension of time to August 31, 1998, for the Secretary of State to adopt rules relating to signing documents filed by electronic means.

INDUSTRIAL COMMISSION

Chairman Bernstein called on Mr. Wesley Norton, Director, Oil and Gas Division, Industrial Commission, for testimony on December 1997 Industrial Commission rules relating to oil production report filing and seismic or geophysical exploration bonding, permitting, notification, drilling, and plugging requirements. A copy of Mr. Norton's testimony is attached as Appendix P.

Representative Skarphol said requiring witnesses of signatures can be bothersome for small companies filing reports. He said the 1997 legislation on this topic did not require signatures to be witnessed. Mr. Norton said if there are

problems and a court action regarding reports, a witnessed signature is more dependable evidence.

It was moved by Representative Skarphol and seconded by Senator Andrist that the Administrative Rules Committee carry over consideration of Industrial Commission amendments to NDAC Chapter 43-02-03, relating to production report signature requirements. Senator Tomac said it seems to be a futile effort to lay this issue over because voiding the amendment would return the rule to requiring a notarized signature. Committee counsel said it is correct that the rule would revert to a requirement of notarizing signatures but the 1997 statutory change provided that notarization is not required and the statutory provision would control over a conflicting provision in the rules. Senator Tomac said the industry did not mention any objections during hearings on the rules and he does not believe the industry is concerned with this requirement. Representative Skarphol said many companies subject to this requirement are located out of state and are small companies unable to participate in the hearing process. Mr. Norton said producing oil companies are aware of the requirement of the rule but are still filing notarized reports by choice. **The question was called and the motion carried on a roll call vote.** Voting in

favor of the motion were Representatives Axtman, Kelsh, Kempenich, Koppelman, Nelson, Nottestad, and Skarphol and Senators Andrist, Stenehjem, and Tomac. Voting "nay" were Representatives Bernstein, Christopherson, Mickelson, and Wardner.

STATE DEPARTMENT OF HEALTH

It was moved by Representative Koppelman, seconded by Senator Stenehjem, and carried on a voice vote that the Administrative Rules Committee carry over consideration of State Department of Health immunization rules in NDAC Chapter 33-06-05.

It was moved by Representative Skarphol, seconded by Senator Stenehjem, and carried on a voice vote that the meeting be adjourned.

Chairman Bernstein adjourned the meeting at 5:00 p.m.

John Walstad
Code Revisor

ATTACH:16