

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday, April 21, 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, William R. Devlin, 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 Stenehjem

Member absent: Senator Steven W. Tomac

Others present: See Appendix A

Committee counsel said a motion of the committee from its meeting on January 28, 1998, was incorrectly recorded in the minutes to extend time for adoption of rules by the Secretary of State to August 31, 1998, and should have been recorded as an extension to October 31, 1998. **It was moved by Representative Nelson, seconded by Representative Christopherson, and carried that the minutes of the January 28, 1998, meeting be amended by substituting October 31, 1998, for August 31, 1998, in the motion recorded on page 6 of those minutes. It was moved by Representative Axtman, seconded by Representative Koppelman, and carried that the minutes of the previous meeting be approved as amended.**

DEPARTMENT OF PUBLIC INSTRUCTION

Chairman Bernstein called on Mr. Joe Linnertz, Department of Public Instruction, for a briefing on activities of the department under its rulemaking authority as amended by 1997 Senate Bill No. 2336. Mr. Linnertz distributed copies of the notice of intent to adopt rules which was distributed by the Department of Public Instruction for a public hearing to be held on May 5, 1998. He said this is to be the first of public hearings on various rulemaking activity of the department under North Dakota Century Code (NDCC) Section 15-21-22 as amended in 1997.

Mr. Linnertz said consideration will be given in the first hearing to obtaining and holding credentials in the professional fields of driver education,

elementary principal, elementary and secondary reading, library media, school counselor, secondary principal, and superintendent. He said the initial hearing will also include consideration of rules establishing objectives, application requirements, timelines, program evaluation, and duration of the modified public school calendar. He said the notice was published as required by law and provided to the Legislative Council for mailing on April 1 with its monthly mailing of notices.

Representative Skarphol asked who received direct mailing of notice from the department. Mr. Linnertz said direct mailing of notices was provided to superintendents, principals, each school district, and statewide organizations representing persons with an interest in public education. Representative Skarphol said he talked to local officials in his district and they said they did not receive notice of the hearing. Mr. Linnertz said the department has mailed the notice, but not copies of the rules, to each school district in the state. He said the notice advises people of how they can obtain a copy of the rules for review. He said the department can try e-mail to school districts in an attempt to increase awareness of the public hearing.

Mr. Linnertz distributed copies of proposed rules to committee members. Representative Axtman said there has been controversy in the past about the status of a credentialed counselor who does not have a degree and he asked whether that is addressed in these rules. Mr. Linnertz said that situation is addressed and there is an exception in these rules for credentialing of a counselor who does not have a degree.

Representative Nottestad said he is concerned with a policy for granting waivers to certain rural school districts. Dr. Wayne Sanstead, Superintendent of Public Instruction, said department officials are currently discussing that issue with the interim Education Finance Committee. Representative Nottestad asked that the department take great care that the credential process is not weakened by the granting of waivers. Dr. Sanstead said that is a concern of the department and the objective is to establish a proper balance between

requiring credentials in appropriate circumstances and the granting of waivers without weakening the process. He said a strength of North Dakota law is a 1974 provision that allows teachers to work only in their major or minor areas of study. He said this is a useful tool in promoting competence and enthusiasm.

In response to a question from Representative Skarphol, Dr. Sanstead said in the rules that are being undertaken, the department intends to reduce the amount of statutory material governing education to allow coverage of more of the material through rules to allow greater flexibility. In response to another question from Representative Skarphol, Dr. Sanstead said he anticipates that significant statutory changes will be made in education law in the 1999 legislative session and then rule changes would occur as needed after the legislative session.

Mr. Willis Heinrich said he has been retained as a consultant by the Department of Public Instruction to work on the rulemaking process. He said the plan at this time is that hearings on rules will occur in May, in the fall of this year, and in the spring of 1999. He said the rulemaking proceedings will overlap the legislative session. He said this will allow areas of rulemaking that are dependent upon the outcome of 1999 legislation to be held for consideration until after the 1999 legislative session.

Senator Andrist said he believes there should be some form of waiver in all requirements for school districts and school officials so that if someone can make a case that a waiver would be appropriate to their situation it could be granted. He said it is disappointing to see bureaucracy operate in such a fashion that common sense actions that would be appropriate in some circumstances are prohibited by bureaucratic rules. Mr. Heinrich said he is not certain how the rules will ultimately address this issue. He said accreditation of schools will probably be the last rulemaking that occurs and would be the area in which waivers are addressed.

In response to a question from Representative Skarphol, Dr. Sanstead said accreditation is voluntary and is a defined process of evaluation of a school program. He said specialists in each area of education evaluate programs based on minimum standards established by law.

BOARD OF ANIMAL HEALTH

Chairman Bernstein called on Dr. Larry Schuler, State Veterinarian, for presentation of a request for an extension of time to adopt rules. A

copy of a letter from Dr. Schuler is attached as Appendix B.

It was moved by Representative Skarphol, seconded by Senator Stenehjem, and carried that the Administrative Rules Committee approve an extension of time to July 31, 1998, for the Board of Animal Health to adopt rules relative to primates, wolves, and wolf hybrids pursuant to a 1997 amendment of NDCC Section 36-01-08.4.

COMMISSIONER OF AGRICULTURE

Chairman Bernstein called on Mr. Barry Coleman, Manager, Plant Industries Division, Department of Agriculture, for testimony relating to anhydrous ammonia rules as adopted by the department. A copy of Mr. Coleman's testimony is attached as Appendix C.

Representative Devlin asked why the rules require notification of the Commissioner of Agriculture before making a transfer of anhydrous ammonia from a cargo tank to a nurse tank. Mr. Coleman said this notice was suggested by several parties in attendance at the rule hearings.

Representative Skarphol said the notice requirements of the rules are extensive and asked what penalty would apply if he fails to notify the board of county commissioners, Commissioner of Agriculture, and county emergency manager of a transfer of anhydrous ammonia. Mr. Coleman said the department has authority to impose a monetary penalty of up to \$5,000 for violations and there is a minimum monetary penalty of \$150.

Senator Andrist said the summary of comments of persons in attendance at the hearing as prepared by the Department of Agriculture in its testimony is very helpful. He said agencies should be urged to provide this kind of information in the future.

CREDIT REVIEW BOARD

Chairman Bernstein called on Mr. Elwood Barth, Chairman, Credit Review Board, for testimony regarding April 1998 rules of the board. A copy of Mr. Barth's prepared testimony is attached as Appendix D.

BOARD OF COSMETOLOGY

Chairman Bernstein called on Mr. Doug Bahr, Office of the Attorney General, for comments on rules adopted by the Board of Cosmetology. A copy of Mr. Bahr's testimony is attached as Appendix E.

Representative Bernstein asked why the rules ban aquariums in salons. Mr. Bahr said the rule prohibits the presence of pets on the premises.

He said he inquired with the board as to whether this would include fish in aquariums. He said he was not present during discussions but it appears the decision was to ban all pets.

Representative Skarphol asked whether these rules affect care provided for homebound persons or persons confined to nursing homes. Mr. Bahr said these rules apply only to care provided in a salon.

Representative Koppelman asked whether the rules are redundant in requiring compliance with applicable building codes, because there are already penalties for noncompliance. Mr. Bahr said the rules overlap with building code enforcement provisions but if compliance with building codes is not required in these rules, the board would have no authority to act against a license granted by the board.

Representative Axtman said a business with which he is familiar is providing cosmetology services to individuals confined to homes or nursing homes. He asked whether there are exceptions to the sanitation requirements for treatment provided to persons in such situations. Mr. Bahr said there are rules that were not addressed in the rulemaking presently under consideration and those rules relate to treatment outside of a salon. He said those rules contain sanitation and inspection requirements for those special situations. Ms. Bert Knell, President, Board of Cosmetology, said she inspected the operation described by Representative Axtman. She said the rules applied to inspection of that operation are rules that were not part of this rulemaking proceeding and which relate only to services provided outside a salon.

INDUSTRIAL COMMISSION

Chairman Bernstein called on Mr. Wesley Norton, Director, Oil and Gas Division, Industrial Commission, for testimony relating to February 1998 rules of the commission. A copy of Mr. Norton's prepared testimony is attached as Appendix F.

DEPARTMENT OF LABOR

Chairman Bernstein called on Mr. Ron Gumeringer, Department of Labor, for comments on minimum wage and working condition rules adopted by the Commissioner of Labor. A copy of testimony prepared by Mr. Ron Ness, Department of Labor, is attached as Appendix G. Mr. Gumeringer said he is presenting the testimony because Mr. Ness was called away on family business.

Senator Andrist said compensatory time can be a significant issue in employment, and he

asked whether the Department of Labor has done anything to address compensatory time. Mr. Gumeringer said there has been discussion of compensatory time issues and there has been discussion but no action at the federal level and nothing is now pending in Congress. He said under North Dakota labor laws, compensatory time is not allowed and overtime must be paid in money based on each weekly work period. He said an exception is provided for employees of political subdivisions, who are allowed to accumulate compensatory time. He said the department would bear this suggestion in mind.

Representative Skarphol asked whether farm laborers are required to be paid the minimum wage rate. Mr. Gumeringer said farm laborers are required to be paid a minimum wage rate but are exempt from overtime provisions.

In response to questions from Representative Kelsh and Senator Stenehjem, Mr. Gumeringer said it is an administrative rule in North Dakota that overtime must be paid in money and that compensatory time may not be accumulated. He said the rule applies to weekly pay periods.

Representative Kelsh asked whether there is a penalty for allowing compensatory time to employees. Mr. Gumeringer said there is a possibility of a penalty for an employer allowing compensatory time if a claim is filed.

BOARD OF NURSING

Chairman Bernstein called on Ms. Ida Rigley, Executive Director, Board of Nursing, for comments on Board of Nursing rule changes. A copy of Ms. Rigley's testimony is attached as Appendix H.

Representative Kempenich asked why the requirements of the rules are more detailed than previous rules. Ms. Rigley said including more specific information in rules helps to clarify issues. She said the board has received a great deal of positive feedback on the rules after these changes. She said including more details in the rules helps to eliminate gray areas that may have caused problems before.

PESTICIDE CONTROL BOARD

Chairman Bernstein called on Mr. Barry Coleman, Manager, Plant Industries Division, Department of Agriculture, for testimony on minor use pesticide rules adopted by the Department of Agriculture. A copy of Mr. Coleman's testimony is attached as Appendix I.

Representative Skarphol asked where the funding source is for the Pesticide Control Board.

Mr. Coleman said funding comes entirely from the environmental and rangeland protection fund.

PUBLIC SERVICE COMMISSION

Chairman Bernstein called on Mr. Chuck Johnson, Legal Counsel, Public Service Commission, for testimony relating to March 1998 rules of the commission. A copy of Mr. Johnson's prepared testimony is attached as Appendix J.

DEPARTMENT OF HUMAN SERVICES

Chairman Bernstein called on Mr. Blaine Nordwall, Department of Human Services, for comments on February and March 1998 rules of the department. A copy of Mr. Nordwall's prepared testimony is attached as Appendix K.

Mr. Nordwall said he was requested at the January 28, 1998, committee meeting to provide information about benefits eligibility of Job Corps participants who receive temporary assistance for needy families benefits. A copy of a letter responding to this question is attached as Appendix L.

BOARD OF SOCIAL WORK EXAMINERS

Chairman Bernstein called on Mr. Tom Tupa, North Dakota Board of Social Work Examiners, for comments on rules of the board effective April 1998. A copy of Mr. Tupa's prepared testimony is attached as Appendix M.

BOARD OF COUNSELOR EXAMINERS

Chairman Bernstein called on Mr. Doug Bahr, Office of Attorney General, for comments on rules adopted by the Board of Counselor Examiners. A copy of Mr. Bahr's prepared testimony is attached as Appendix N.

OFFICE OF ADMINISTRATIVE HEARINGS

Chairman Bernstein called on Mr. Allen Hoberg, Director, Office of Administrative Hearings, for comments on rules adopted by the office. A copy of Mr. Hoberg's prepared testimony is attached as Appendix O.

STATE DEPARTMENT OF HEALTH

Chairman Bernstein called on Mr. Dana Mount, State Department of Health, for comments on air pollution control rules adopted by the department. A copy of Mr. Mount's prepared testimony is attached as Appendix P.

INDUSTRIAL COMMISSION

Chairman Bernstein called on Mr. Norton to address questions of committee members

relating to rules carried over from the previous committee meeting relating to required signatures on oil and gas production reports filed with the Industrial Commission.

Representative Skarphol asked how many times false reports have been filed with the Industrial Commission. Mr. Norton said the commission has had many corrected reports and one instance of intentionally false reports by a pumper engaged in theft.

In response to a question from Representative Skarphol, Mr. Norton said in the most recent reporting period there were only six companies that did not notarize the reports they filed. Representative Skarphol said he believes the reason few reports are filed without notarization is that most companies are not aware that the reports do not have to be notarized. Mr. Norton said the commission has notified companies of the new rule requirement. Representative Skarphol said he has contacted companies that are not aware of the requirement.

Representative Skarphol asked Chairman Bernstein for authority to question Tax Commissioner Rick Clayburgh with regard to oil and gas tax filings. Mr. Clayburgh said he was requested by Representative Skarphol to attend the committee meeting and is present only to answer questions with regard to oil and tax gas filings. Representative Skarphol asked whether the Tax Department is required to furnish information on sales of oil and gas when disputes arise among royalty owners and producers. Mr. Clayburgh said the Tax Department furnishes information in these situations. Representative Skarphol asked whether the Tax Department requires notarization of signatures on any tax reports from oil and gas production. Mr. Clayburgh said notarized signatures are not required on oil and gas tax filings or any other tax forms filed with the Tax Department. He said forms advise the person signing the form that inaccurate reporting is subject to Class A misdemeanor penalties.

Representative Devlin and Senator Andrist asked Mr. Clayburgh why the Tax Department cannot force the United States Postal Service to collect sales taxes on sales made through the mail to purchasers in North Dakota. Mr. Clayburgh said he could provide information on this issue to the committee in the future if requested.

Representative Skarphol said he thinks the Industrial Commission should not require by rule notarizing or witnessing of signatures on oil and gas production reports. He asked whether the Industrial Commission could accept signature of reports by designated individuals if the company would provide the commission with a list of

signatures for comparison purposes. Mr. Norton said the Industrial Commission is of the opinion that this is an important issue. He said the Tax Department does not require notarizing or witnessing for signatures, but the Industrial Commission has been advised by legal counsel that the position of the Industrial Commission would be weakened in a prosecution if there is no witness to a signature on a production report.

Mr. Clayburgh said he would like to correct a misstatement. He said the Tax Department does not seek to protect the interests of royalty owners. He said the Tax Department looks only to its duty of administering tax returns under the oil and gas tax laws. He said royalty owners' interests are subject to protection by the Industrial Commission.

It was moved by Representative Skarphol and seconded by Senator Andrist that North Dakota Administrative Code Sections 43-02-03-52 and 43-02-03-52.1 be amended to eliminate the requirement that a person's signature is witnessed.

Senator Stenehjem asked committee counsel whether the committee has statutory authority to amend agency rules without agreement of the agency. Committee counsel said the authority of the Administrative Rules Committee to agree to amendment of rules applies only when the adopting agency and committee agree on the amendment.

Representative Skarphol asked whether the Industrial Commission would approve of the amendment under the pending motion. Mr. Norton said the Industrial Commission has shown no inclination to agree to the amendment.

Representative Skarphol withdrew his motion and Senator Andrist withdrew his second.

It was moved by Representative Skarphol and seconded by Senator Andrist that the Administrative Rules Committee find the amendments of the Industrial Commission to North Dakota Administrative Code Sections 42-02-03-52 and 42-02-03-52.1 to be void on the grounds that the rules are arbitrary and capricious.

Representative Skarphol said he questions whether this motion would accomplish the objective of eliminating the requirement of witnessing signatures. After some discussion, committee counsel said it appears that the effect of voiding the amendments would be to return the rules to their previous form that required notarization of signatures. This form of the rule would be in conflict with the statutory provision of NDCC Section 38-08-04 as amended in 1997. He said the statutory provision provides that an oil and gas production report need not be notarized but

must be signed by the person submitting the report. He said the rule, being in conflict with the statutory provision, would yield and the statutory provision would be the controlling authority. He said because the statutory provision does not require witnessing of signatures, the effect would be that only a signature would be required on oil and gas production reports.

Representative Nelson asked Mr. Norton whether there was discussion during the 1997 Legislative Assembly about the requirement of witnessing signatures on oil and gas production reports. Mr. Norton said this issue was discussed and the Industrial Commission staff believed the statute gave authority to the commission to adopt rules imposing requirements on the verification of report signatures, including authority to require witnessing.

The question was called and the motion failed. Voting in favor of the motion were Representatives Devlin, Kempenich, Koppelman, and Skarphol and Senators Andrist and Stenehjem. Voting in opposition of the motion were Representatives Bernstein, Axtman, Christopher-son, Kelsh, Mickelson, Nelson, Nottestad, Oban, and Wardner.

BILL DRAFTS

Chairman Bernstein called on Representative Skarphol to review three bill drafts Representative Skarphol had prepared by the Legislative Council staff for committee consideration. Representative Skarphol said the bill drafts are based on bills considered during the 1997 legislative session. He said one draft provides that rules will sunset at various times, depending upon when they were originally adopted. He said the bill draft would allow an agency to obtain designation of a rule as procedural or interpretive by the Administrative Rules Committee and the rule would remain in effect. He said for rules that do not receive this designation, rules adopted before August 1, 1978, become void on August 1, 2001; rules effective after July 31, 1978, and before August 1, 1999, would become void 15 years after the original effective date of the rule or August 1, 2003, whichever is later; and any rule originally effective after July 31, 1999, would become void on August 1 after the next regular session of the Legislative Assembly after the effective date of the rule. He said the objective is to reduce the volume of material contained in the Administrative Code and to require that provisions be reviewed by the Legislative Assembly and established as statutory law if they are important enough.

Senator Andrist said he believes agencies should seek legislation rather than rules. He said his question is whether the Administrative Rules Committee would have the ability and time to administratively review all of the administrative rules that would be required under this legislation. Representative Bernstein said he wonders how many rules are on the books that would have to be considered by the committee under this bill draft.

Representative Skarphol said another bill draft would allow the Administrative Rules Committee to call existing administrative rules up for review upon 30 days' prior notice to the adopting agency. He said when a rule is called up for review, it would be subject to the authority of the committee regarding voiding of rules. He said the objective of the bill draft is similar to the objective of the bill draft on sunseting of rules. He said the bill draft would allow the committee to review rules of agencies that may have become stagnant, obsolete, or of no significance.

Representative Skarphol said the third bill draft is an amendment to an existing provision of law relating to rules adopted from federal environmental guidelines. He said existing law prohibits the Department of Health from adopting environmental rules that are not relevant to state regulatory programs. He said the amendment eliminates the limitation of the application of the law so that the law would apply to all agencies adopting rules based on federal requirements and would not be limited to only environmental rules.

DEPARTMENT OF LABOR

Representative Skarphol said he was informed during the break by a representative of the Department of Labor that the department would like the committee to carry over consideration of department rules to a future meeting to allow attendance of the Labor Commissioner or assistant labor commissioner to discuss the issue of compensatory time.

It was moved by Representative Skarphol, seconded by Senator Stenehjem, and carried on a voice vote that the committee carry over consideration of the Department of Labor rules considered by the committee at today's meeting.

COMMITTEE DISCUSSION

Senator Andrist said he would like the committee to spend some time discussing its role and perceptions of committee members on the status of existing law regarding administrative rules review. He said scheduling discussion time for the committee late in the day does not seem to generate adequate discussion. He said committee discussion should be scheduled early in the day so that these issues can be fully discussed by committee members.

The meeting was adjourned by Chairman Bernstein at 4:00 p.m.

John Walstad
Code Revisor

ATTACH:16