

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday and Wednesday, July 28-29, 1998
Roughrider Room, State Capitol
Bismarck, North Dakota

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

Chairman Bernstein said since the last committee meeting Representative Bill Oban, who was a member of the committee, died from automobile accident injuries. Chairman Bernstein said Representative Oban was liked and respected by legislators from both political parties and will be missed.

Members present: Representatives LeRoy G. Bernstein, Chris Christopherson, William R. Devlin, Scot Kelsh, Keith Kempenich, Kim Koppelman, Stacey L. Mickelson, Jon O. Nelson, Darrell D. Nottestad, Bob Skarphol; Senators John M. Andrist, Bob Stenehjem, Steven W. Tomac

Members absent: Representatives Charles Axtman, Rich Wardner

Others present: See Appendix A

It was moved by Representative Nottestad, seconded by Senator Stenehjem, and carried that the minutes of the April 21, 1998, meeting be approved as mailed.

COMMITTEE CONSIDERATION OF BILL DRAFTS

Chairman Bernstein said committee members have received a copy of a bill draft that would provide for sunseting of administrative rules according to a designated schedule. He said the bill draft was prepared at the request of Representative Skarphol, and he asked Representative Skarphol to comment on the bill draft. Representative Skarphol said he sponsored a bill on this topic during the 1997 legislative session. He said the bill failed to pass, apparently due to concerns about increasing the workload of the Administrative Rules Committee because of the necessity of reviewing rules set for expiration under the bill. He said the objective of the bill draft is to necessitate review of administrative rules on a regular basis to identify unnecessary or obsolete provisions. He said administrative rules should be temporary in nature and, if a subject is important enough, legislation should be developed to bring the matter before the Legislative Assembly.

Chairman Bernstein said another bill draft prepared at Representative Skarphol's request has been distributed which would allow the Administrative Rules Committee to call up existing administrative

rules for review. He asked for comments from Representative Skarphol. Representative Skarphol said he introduced similar legislation during the 1997 legislative session which was approved by the Legislative Assembly but vetoed by the Governor. He said the bill draft would allow the Administrative Rules Committee to call up for review any administrative rule. He said current law allows the committee to review only those rules brought before the committee when being amended or created by an administrative agency. He said it is important to allow the committee to call rules up for review because concerns of constituents could be addressed in this manner that otherwise would be beyond the committee's jurisdiction. He said the Administrative Rules Committee should have jurisdiction over all administrative rules, not just those being amended.

Chairman Bernstein said Representative Skarphol had requested preparation of a bill draft limiting authority to adopt administrative rules based on federal guidelines. He requested comments from Representative Skarphol on the bill draft. Representative Skarphol said legislation was adopted in 1995 to limit the authority of agencies to adopt environmental rules based on federal requirements and thus eliminate adoption of rules on subjects that would have no application in North Dakota. He said it makes sense to him that North Dakota not adopt extensive rules that are not relevant, such as having rules on smelters when there are no smelters in North Dakota. He said this bill draft would extend the concept from covering only environmental rules to cover any administrative rule based on federal guidelines that have no relevance to situations in North Dakota.

Chairman Bernstein said Representative Koppelman had a bill draft prepared and distributed to committee members which would restrict agency rule-making authority. He asked for comments from Representative Koppelman. Representative Koppelman said the bill draft is similar to one he sponsored during the 1997 legislative session to limit rulemaking authority of administrative agencies to those areas in which the agency has been specifically required or authorized to adopt rules under state or federal law or federal rules. He said he believes it is important for the Legislative Assembly to more clearly define when

rulemaking is desired and to eliminate the broad discretionary authority agencies have under existing law to adopt administrative rules on any topic relating to laws administered by the agency.

Senator Andrist said the committee should examine the list of statutory reasons for which the committee can find rules to be void. He said another consideration that seems worthwhile to explore would be to allow the committee to add a sunset date to an administrative rule and direct the agency to submit appropriate legislation to the ensuing legislative session for consideration.

Representative Kempenich agreed with the suggestion of Senator Andrist. He said approving rules with a sunset provision would be a better procedure in some instances than voiding a rule. He said this would allow the agency adequate time to prepare legislation for consideration in the next legislative session.

Senator Andrist said the bill introduced during the 1997 legislative session which would have required sunseting for all administrative rules failed to pass due to concerns about the substantial increase in the workload for the Administrative Rules Committee to review all existing rules over a limited period of time. He said it appears it may be more useful to provide for prospective application and that all administrative rules changes adopted in the future would sunset after one legislative session, to allow the agency to introduce legislation on the subject.

Representative Skarphol said he agrees that administrative rules should be in effect for no more than two years, and if the subject matter is significant enough, it should be brought before the Legislative Assembly for consideration.

Senator Tomac said he understands the desire to limit the effect of administrative rules but said there would be situations where administrative rules are appropriate. He said if environmental rules of great length and complexity are presented, he questions whether they would receive adequate consideration in the form of legislation.

Senator Stenehjem said the Legislative Assembly established the Administrative Rules Committee to act on its behalf when it cannot act. He said agency rules are made in a manner far less visible and with less public input than legislative action. He said when matters are brought to the Legislative Assembly for consideration, they are subject to a greater level of public debate and consideration than in rulemaking, and issues are subject to votes by elected members of the Legislative Assembly. He said concerns about delegation of legislative authority and that the committee acts for the entire Legislative Assembly also exist with regard to actions of other groups exercising authority delegated by the Legislative Assembly, such as the Emergency Commission.

Senator Tomac said he does not favor administrative rules, and the Legislative Assembly should adopt complete laws that would not require administrative

rules to fill in areas not covered by the law. He said there are agencies that exceed the intent of legislation, but most do not. He said he is concerned that if agencies become convinced that rules will be overruled by the Administrative Rules Committee these agencies will stop working to improve rules. He said he questions whether it would be good government to establish an environment in which agencies do not wish to make administrative rules.

Representative Koppelman said Senator Tomac makes good points. He said there is a necessity to balance the interests of agencies and the Legislative Assembly. He said it is important to remember that government by citizens is the objective, and law and rules should be geared to serving that objective.

Senator Andrist proposed a bill draft be prepared similar to the bill draft considered earlier on sunseting of administrative rules but which would apply only to rules adopted after July 31, 1999. Representative Skarphol said he would also like to consider such a bill draft. Representative Bernstein requested the Legislative Council staff to prepare such a bill draft for consideration at the next committee meeting. Senator Andrist said the bill draft should be similar to subsection 3 of the section created in the bill draft on sunseting which was already considered by the committee.

Representative Nelson said he has gotten the impression from talking to people in his district that administrative rules have not had input from citizens because they are not aware that the rules exist until rules affect them, or rulemakers do not give due regard to concerns of citizens expressed in the rule-making process.

Representative Bernstein said he is concerned with regard to notice to the public of administrative rulemaking activity. He said most people do not read legal notices in newspapers, so there is very little actual notice provided to the public unless an agency goes beyond the minimum efforts required to notify people of rulemaking activity.

Senator Andrist said when he receives rulemaking notices, he reviews them, and if he receives a notice about State Board of Nursing rulemaking activity, he gives that notice to a nurse for review. He said he finds it helpful to have a friend in an affected profession check out the rulemaking activity.

Representative Nottestad said organizations and associations representing statewide interests are missing the ball if they do not keep their membership up to date on rulemaking activity of interest to their membership.

STATE DEPARTMENT OF HEALTH

Chairman Bernstein called on Ms. Darlene Bartz, State Department of Health, for comments on May 1998 health facilities rules. A copy of her prepared testimony is attached as Appendix B.

Chairman Bernstein called on Mr. Curt Erickson, State Department of Health, for comments on May

1998 revisions to hazardous waste rules. He said these rules changes were in the nature of technical corrections. He said these resulted in correction of typographical errors, punctuation changes, and similar nonsubstantive changes that were pointed out to the department after an inventory of state rules on this topic by the United States Environmental Protection Agency.

Chairman Bernstein called on Mr. Dana Mount, State Department of Health, for testimony on radiological health rules changes. A copy of Mr. Mount's prepared testimony is attached as Appendix C.

In response to a question from Representative Skarphol, Mr. Mount said there are three permanent sites for disposal of radioactive waste in North Dakota. He said these sites are a site of the University of North Dakota at Emerado, a site of North Dakota State University at the experiment farm south of Minot, and a site of the United States Department of Agriculture near the Mandan research center.

Representative Skarphol said it appears the rules cover commercial waste disposal sites, and he asked whether any application has been filed for commercial waste disposal. Mr. Mount said no application has been filed. He said the United States Nuclear Regulatory Commission requires coverage of this topic in state rules, but the North Dakota Legislative Assembly has not approved commercial waste disposal sites, and such sites could not be established without prior legislative approval.

In response to a question from Representative Skarphol, Mr. Mount said Amerada-Hess has requested specific rules for naturally occurring radioactive materials from oil production and exploration. He said the rules proposed by Amerada-Hess were not covered by the notice of public hearing provided by the department, so the department did not deal with that topic. He said that topic will be addressed in the next revision of radiological health rules.

BOARD OF FUNERAL SERVICE

Chairman Bernstein called on Mr. Douglas Bahr, Assistant Attorney General, representing the State Board of Funeral Service, for comments on rules changes adopted by the board. A copy of Mr. Bahr's prepared testimony is attached as Appendix D.

TEACHERS' FUND FOR RETIREMENT

Chairman Bernstein called on Ms. Fay Kopp, Teachers' Fund for Retirement, for comments on rules changes relating to fund administration. A copy of Ms. Kopp's prepared testimony is attached as Appendix E.

PRIVATE INVESTIGATIVE AND SECURITY BOARD

Chairman Bernstein called on Ms. Francine Johnson, Executive Director, Private Investigative and Security Board, for comments on board rules. A copy

of Ms. Johnson's prepared testimony is attached as Appendix F.

In response to a question from Representative Kelsh, Ms. Johnson said there are 53 private investigators in 25 agencies in North Dakota which are licensed by the board.

STATE SEED DEPARTMENT

Chairman Bernstein said the State Seed Department has not made an appearance at the meeting and distributed copies of a letter from the State Seed Commissioner. A copy of the letter is attached as Appendix G. He asked what the committee wishes to do regarding the State Seed Department rules.

Representative Skarphol said he is not comfortable with the rules becoming effective without an appearance by a representative of the State Seed Department.

It was moved by Representative Koppelman, seconded by Representative Mickelson, and carried on a voice vote that the committee carry over consideration of the July 1998 State Seed Department rules to allow a representative from the department to attend the next meeting of the committee.

STATE GAMING COMMISSION

Chairman Bernstein called on Mr. Chuck Keller, Attorney General's office, for presentation of testimony prepared by Mr. James P. Wang, Chairman, State Gaming Commission, relating to gaming rules adopted effective May 1998. A copy of the prepared testimony, without attachments, is attached as Appendix H.

Senator Tomac complimented the Attorney General's office on preparation of the summary of comments received relating to the rules. He said this presents comments in a way that allows committee members to easily review each comment and the effect of the comment on the rules as ultimately adopted.

Senator Andrist said the Attorney General's office did a good job staying true to legislative intent in these rules from his observation and experience with a study of gaming laws a few years ago.

In response to a question from Representative Nelson, Mr. Keller said of 50 gaming sites in the state with more than one table for twenty-one, a State Gaming Commission survey concluded that many tables are unused or unnecessary. He said it appears that some bar owners may be forcing organizations to pay rent for extra, unnecessary tables in their locations. He said the State Gaming Commission will be considering these arrangements to determine an appropriate course of action. He said complaints will be issued to six sites where a twenty-one table has not been used at all and for which rent has been collected. He said he anticipates the State Gaming Commission will offer corrective legislation during the 1999 legislative session.

DEPARTMENT OF TRANSPORTATION

Chairman Bernstein called on Mr. Keith Magnusson, Driver and Vehicle Services Director, Department of Transportation, for testimony relating to the June 1998 rule of the Department of Transportation. A copy of Mr. Magnusson's prepared testimony is attached as Appendix I.

Mr. Magnusson said the rule relates to the penalty for violating an out-of-service order issued for the driver of a commercial motor vehicle found to have been driving with alcohol in the person's system or to have refused an alcohol test. Mr. Magnusson said it appears that a publication error was made in subsection 3 of North Dakota Administrative Code (NDAC) Section 37-10-01-02. He described the error and committee counsel said the correction would be made.

In response to a question from Representative Skarphol, Mr. Magnusson said the amended rule applies to out-of-service orders for alcohol offenses and not for equipment violations. He said equipment offenses are covered by a separate rule.

COMMITTEE DISCUSSION

Chairman Bernstein said law requires notices of administrative rulemaking proceedings to be published in 10 daily newspapers, and he questions whether that provides adequate notice to the entire state. He asked Senator Andrist how many newspapers are published in the state. Senator Andrist said there are approximately 90 newspapers in the state, only 10 of which are published on a daily basis. He said there are 53 official county newspapers, and the 10 daily newspapers are among the official county newspapers.

Representative Nelson said holding hearings in locations outside Bismarck is helpful to the public when rulemaking is a matter of general public interest. He said agencies should be encouraged to hold hearings in more than one location in appropriate circumstances.

Representative Skarphol said he has attended rulemaking hearings and was somewhat surprised by the way the hearings are conducted. He said agency personnel conducting the hearing receive testimony but do not discuss or respond to issues raised by those presenting comments. He said he was of the impression that there was dialogue between the agency and the public at rulemaking hearings. He said he believes examination is required of how rulemaking hearings are conducted.

Representative Christopherson asked whether it would be possible to provide notice of rulemaking hearings on the Internet site maintained by the Legislative Council. Senator Stenehjem said this might be a useful public service. Representative Devlin said another possibility would be to provide a monthly mailing on rulemaking notices to the North Dakota Newspaper Association, and they could write up articles on hearings if they choose to do so.

COMMISSIONER OF INSURANCE

Chairman Bernstein called on Mr. Chris Edison, General Counsel of the Insurance Department, for testimony relating to June and July 1998 rules of the Insurance Department. A copy of Mr. Edison's prepared testimony is attached as Appendix J.

Mr. Edison said one set of the rules was adopted to meet the provisions of 1997 House Bill No. 1168, implementing the minimum requirements under the federal Health Insurance Portability and Accountability Act of 1996 (HIPAA). He said the other rules changes incorporate in rules a matter of department policy that health maintenance organization insurance agents are subject to the same requirements as agents soliciting business for indemnity insurers.

In response to a question from Representative Skarphol, Mr. Edison described two areas where there may be some question of whether the rules could be interpreted to exceed federal minimum requirements, but he believes the rules, even in these instances, do not exceed minimum federal requirements under HIPAA.

TAX COMMISSIONER

Chairman Bernstein called on Mr. Bob Wirtz, Legal Counsel, Tax Department, for testimony relating to rules changes adopted by the Tax Commissioner. A copy of Mr. Wirtz's prepared testimony is attached as Appendix K.

PROTECTION AND ADVOCACY PROJECT

Chairman Bernstein called on Mr. David Boeck, Legal Counsel, Protection and Advocacy Project, for testimony relating to rules adopted by the project effective July 1998. A copy of Mr. Boeck's prepared testimony is attached as Appendix L.

DEPARTMENT OF HUMAN SERVICES

Chairman Bernstein called on Mr. Lloyd Suhr, Legal Counsel, Department of Human Services, for testimony on six sets of administrative rules adopted by the department.

Because of the large volume of testimony presented, the written testimony is not attached as an appendix. A copy of the department testimony is on file in the Legislative Council office.

Mr. Suhr reviewed the written testimony on the basic care facility ratesetting rules.

Senator Tomac asked whether a representative of the Long Term Care Association expressed any views regarding these rules. Ms. Barb Fischer, Department of Human Services, said the association submitted numerous comments that are summarized in the attachments to the department testimony. She said the department did not agree with all concerns of the association but has discussed these issues with the association, and she does not anticipate any opposition from the association regarding these rules at this time.

Chairman Bernstein called on Mr. Suhr to review prepared testimony of the department regarding child care rules. Mr. Suhr said many of the provisions contained in the five chapters of rules on child care issues are substantially similar. He said review of these provisions would familiarize committee members with the contents of much of each of the chapters, and subsequent comments on the remaining four chapters would be confined to areas of difference from the provisions relating to family child care homes in NDAC Chapter 75-03-08. He reviewed the report of the department relating to Chapter 75-03-08. Department of Human Services representatives also distributed to the committee materials listing public comment opportunities under the rulemaking proceedings of the department from August 15, 1995, through July 20, 1998. Mr. Suhr said original child care rules were done in 1979 and revised in 1990. He said the 1990 version of the rules is what is now in effect and would be amended by the proposed changes. Mr. Suhr reviewed in detail the testimony of the department relating to early childhood care homes rules.

Chairman Bernstein called on Ms. Rebecca L. Lawler, child care provider, Fargo, for comments on the rules adopted by the Department of Human Services. Ms. Lawler presented written testimony, a copy of which is on file in the Legislative Council office. She described her concerns with the administration of the rulemaking proceeding and specific issues under the rules with which she is concerned.

Chairman Bernstein called on Ms. Amy Clark, who said her two-year-old son died four years ago from asphyxiation at a day care facility. She said the death most likely resulted from propping a bottle for her son and leaving him unattended. She said in the four years since her son's death, nothing has been done to improve the rules on child care to address situations like the one in which her son lost his life. She said committee members may believe there are too many administrative rules and that rules on child care are not necessary. She said she is not of that opinion and the safety of children is worth the trouble to establish workable rules for a minimum level of compliance with safety concerns by child care providers. She said she resides in Breckenridge, Minnesota, but she had enrolled her son for child care in Wahpeton, North Dakota, because there were no providers on the Minnesota side of the border with available room to care for her son.

Senator Andrist asked whether Minnesota has rules on day care and suggested that perhaps too many rules exist in Minnesota and that is why there is a shortage of providers in Breckenridge. Ms. Clark said she does not believe that is the case, and there are more providers in Breckenridge and more demand for care from providers in Breckenridge than in Wahpeton. She said she believes the level of care in Breckenridge is better as a result of the rules in place in Minnesota.

Chairman Bernstein called on Ms. Vonnie Hansen who presented written testimony to the committee. A copy of her testimony is attached as Appendix M. She also distributed to the committee copies of letters from Ms. Michelle Shereck and Ms. Rose Wise. Copies of these letters are on file in the Legislative Council office.

Chairman Bernstein called on Ms. Linda Jones, Fargo, who distributed copies of two letters to the committee. Copies of these letters are on file in the Legislative Council office. Ms. Jones said providers have had some input in the rules process, but many additions were made to the rules after the public hearings. She believes further hearings should have been held to consider these changes. Ms. Jones distributed copies of letters from Ms. Joyce Johnson, Ms. Tami Freitag, and Ms. Dorothy Rose regarding attempts to obtain copies of the rules during the rulemaking process. Copies of these letters are on file in the Legislative Council office.

Chairman Bernstein called on Representative Wanda Rose, Bismarck, for testimony relating to the child care rules. A copy of her prepared testimony is attached as Appendix N.

Senator Andrist said it appears to him that there is excessive regulation in the child care rules and asked Representative Rose's opinion. She said she believes establishing minimum standards is important, but she cannot address the issue of whether there is excessive regulation, and she hopes that the rules as written are clear enough to provide suitable standards.

Senator Stenehjem said he has heard constituents comment that the Administrative Rules Committee must either approve or void the rules in their entirety. He said he does not believe that is correct and asked for a review of the statutory options of the committee. Committee counsel said the options available to the committee include taking no action which would allow the rules to become effective as drafted, voiding the rules in their entirety, voiding the rules in part, or agreeing with the department that amendments to the rules are necessary. He said if an agreement is made to amend the rules, the amendments can be made and can be substantive in nature.

Chairman Bernstein called on Ms. Gail Reiten, family child care provider, Minot, for comments on the child care rules. A copy of her testimony is attached as Appendix O.

Chairman Bernstein said it would not be fair to concerned citizens or the department for the committee to act rashly in making a decision on these important issues. He said the size of the crowd and the amount of testimony submitted indicates a substantial level of interest in the outcome of these deliberations. He said it appears clear that this issue will have to be carried to a future meeting, and he would set aside a full day in September, if necessary, to deal with this issue. He said it appears there is not adequate time to receive or digest all of the testimony

to be offered at today's meeting, and he would dispense with further testimony, and the committee would receive written comments for distribution at this meeting or the next meeting of the committee. Committee counsel received and distributed to committee members copies of written submissions regarding the child care rules from Ms. Carol Hansen, Ms. Roberta Schieck, Ms. Pamela Schumaker, Ms. Earleen Friez (two separate letters), Grand Forks Home Day Care Association, Mr. and Ms. Todd and Peggy Simonson, Ms. Judy Milavetz, Ms. DeNae Kautzmann, Ms. Marie Tweed, North Dakota Child Care Providers, Inc., Child Care Association of Minot, Dr. Melissa M. Moilan, Mr. Kevin D. Stewart, Ms. Marvel Schaefer, Ms. Mary Jagim, Ms. Alicia Myer, Ms. Luci Huseby, Ms. Rhonda Breuer, Ms. Tammy Kelly, Ms. Mary Trett, Ms. Linda Reinicke, and Ms. Shirley Johnson.

Representative Kempenich said he agrees that another meeting will be necessary to fully consider the issues raised. He said he thinks the next meeting should deal with specific suggestions for changes to rules rather than the process by which rules were considered. He said he hopes that the department and providers can provide a list of considerations for consideration by the committee because presenting complaints that the committee has already heard would not be useful.

Representative Koppelman said one area of concern would be with the time the rules are scheduled to take effect. Committee counsel said the rules as submitted are effective August 1, 1998. Representative Koppelman asked whether there is a way to avoid having the rules take effect before the next meeting of the committee. Committee counsel said the rules can be amended by agreement of the department and the committee. **It was moved by Representative Koppelman and seconded by Representative Nottestad that the Department of Human Services, with agreement of the committee, amend the effective date of the rules adopted under NDAC Chapters 75-03-08, 75-03-09, 75-03-10, 75-03-11, and 75-03-11.1 to make these rules effective October 1, 1998.** Chairman Bernstein asked Ms. Carol Olson, Executive Director, Department of Human Services, whether the department would agree with this change. Ms. Olson said the department wants to work through these issues with providers and the committee and would agree to the amendment to delay the effective date of these rules.

Representative Devlin said he would not look forward to another day of airing complaints from providers about the rules. He said it would be much more productive for the concerned parties and department representatives to meet before the next meeting and bring the committee a condensed list of issues on which there is agreement or disagreement.

Senator Andrist said he agrees with Representative Devlin. He said at least if discussions are held

between concerned parties and department representatives, they can identify areas of dispute. He said perhaps complete agreement on all issues is not possible, but the effort is worthwhile and should narrow the areas of consideration for the committee.

The question was called and **the motion carried on a roll call vote.** Voting in favor of the motion were Representatives Bernstein, Christopherson, Devlin, Kelsh, Kempenich, Koppelman, Mickelson, Nelson, Nottestad, and Skarphol and Senators Andrist and Stenehjem. There were no "nay" votes.

Chairman Bernstein recessed the meeting at 6:00 p.m. and reconvened the meeting at 9:00 a.m. on Wednesday, July 29, 1998.

STATE WATER COMMISSION

Chairman Bernstein called on Ms. Julie Krenz, Legal Counsel, State Water Commission, for testimony on rules adopted by the State Water Commission effective June 1998. A copy of Ms. Krenz's testimony is attached as Appendix P.

AERONAUTICS COMMISSION

Chairman Bernstein called on Mr. Gary Ness, Director, Aeronautics Commission, for comments on July 1998 rules of the commission. A copy of his testimony is attached as Appendix Q.

Representative Nottestad asked whether these rules would impact the flight school at the University of North Dakota. Mr. Ness said these rules would not apply to the flight school but apply only to aerial applicators.

DEPARTMENT OF BANKING AND FINANCIAL INSTITUTIONS

Chairman Bernstein called on Mr. David Clinton, Assistant Commissioner, Department of Banking and Financial Institutions, for testimony relating to rules of the department effective July 1998. A copy of Mr. Clinton's prepared testimony is attached as Appendix R.

PUBLIC SERVICE COMMISSION

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

Senator Stenehjem asked whether the Public Service Commission will still certify portable truck weighing scales. Mr. Al Moch, Director, Public Service Commission Weighing and Testing Division, said portable scales will still be used and must be checked monthly by the commission staff. He said wheel load weighers are certified by the Public Service Commission staff or by law enforcement officers trained by the Public Service Commission staff. He said these weighers are certified and are to be

used only for law enforcement purposes and not for commercial uses.

RETIREMENT BOARD

Chairman Bernstein called on Mr. Sparb Collins, Executive Director, Public Employees Retirement System, for comments on July 1998 rules of the Public Employees Retirement System Board. A copy of his testimony is attached as Appendix T.

WORKERS COMPENSATION BUREAU

Chairman Bernstein called on Mr. Reagan Pufall, Chief Operating Officer, Workers Compensation Bureau, for presentation of testimony relating to a proposed new medical fee schedule for workers' compensation purposes and other rules changes that became effective May 1998. A copy of an outline of Mr. Pufall's testimony is attached as Appendix U. Mr. Pufall also distributed copies of full responses relating to the May 1998 rules and a memorandum on the 1998 amnesty program. Copies of these materials are on file in the Legislative Council office.

In response to questions from Senator Tomac, Mr. Pufall said the revised fee schedule is for medical fees only and hospital fee schedule provisions are under consideration for revision. He said the medical fees under the new schedule will be comparable to fees that would be paid from any other source of payment. He said the new schedule adopts a St. Anthony relative values schedule that is a more modern and flexible approach than the previous schedule and is in use in other states.

In response to a question from Representative Nelson, Mr. Pufall said he is not certain how many states' workers' compensation fee schedules use the St. Anthony relative values schedule. Mr. Jeff Bitz, Workers Compensation Bureau, said this schedule would put North Dakota on the same basis of reimbursement as is used in South Dakota, Montana, Wyoming, and several other states.

Committee counsel said the workers' compensation hospital and medical service fee schedules are the only kind of rules that require prior review by the Administrative Rules Committee. He said the department is working on revision of a hospital fee schedule, and it may be significant to bureau plans that the Administrative Rules Committee will probably not meet between October and June because of the legislative session. Mr. Pufall said that should not interfere with bureau planning because it is anticipated that the hospital fee schedule revisions will be completed after the 1999 legislative session.

Senator Andrist asked whether the Workers Compensation Bureau is considering legislative changes that would allow greater flexibility in medical and hospital fee schedules. Mr. Pufall said that issue is being considered. He said statutory changes would be necessary to allow the bureau more flexibility in revising medical and hospital fee schedules, which

require prior review by the Administrative Rules Committee before they may be revised.

Senator Tomac said the fee schedule as revised shows different fees for the two Bismarck hospitals for the same service. He said it appears the cost-to-charge ratios differ for these facilities, and he asked whether there is a reason for the difference. Mr. Pufall said this variation is a remnant of the current fee schedule. He said it is outdated but no one really understands why it was originally established at different ratios. He said this difference is being considered for revision.

Chairman Bernstein said that without objection the bureau medical fee schedule would be deemed approved.

DEPARTMENT OF PUBLIC INSTRUCTION

Chairman Bernstein called on Mr. Joe Linnertz, Department of Public Instruction, for a briefing on rulemaking activity being conducted by the department. Mr. Linnertz said he was requested to provide information on attempts to provide public notice of the May 1998 public hearing conducted by the department. He distributed a copy of a schedule showing public notification information and costs, a copy of which is attached as Appendix V.

Mr. Linnertz said the rules that were the subject of the May hearing are now at the Attorney General's office for consideration and were the subject of some changes after the public hearing and public comment periods. He said when the rules are approved by the Attorney General as to legality, they will be filed with the Legislative Council for publication and will subsequently come before the Administrative Rules Committee.

Representative Koppelman said the schedule distributed indicates that a mailing of notice was conducted on April 23, which was two days after the last meeting of the Administrative Rules Committee at which the notice was described as having been mailed before the meeting. Mr. Linnertz said that is correct, and he had completed work on the letter and believed it to be done before the meeting of the Administrative Rules Committee on April 21, but the actual mailing was not completed until April 23.

In response to a question from Representative Devlin, Mr. Linnertz said access to notice of hearings is not available on the Internet and would be available to interested parties only by mailing or via e-mail.

Representative Skarphol asked about the status of the department's other rulemaking topics. Mr. Linnertz said the department thinks there will be another set of rules ready for public hearing this fall.

Senator Stenehjem asked how many sets of rules will be done by the department. Mr. Linnertz said rules will probably be done in three sets. He said accreditation of schools will be the biggest set of rules and will probably be subject to hearings during the summer of 1999.

LABOR COMMISSIONER

Chairman Bernstein called on Mr. Craig Hagen, Labor Commissioner, for comments on rules carried over from the April 21, 1998, meeting of the Administrative Rules Committee.

Mr. Hagen said he was unable to attend the previous meeting of the committee and is not certain why it was requested that these rules be carried over for consideration.

Representative Skarphol said compensatory time for employees was the issue, and there is some question about application of the federal prohibition of providing compensatory time for employees in the private sector.

Mr. Hagen said North Dakota Century Code Section 34-06-04.1 gave state government and political subdivisions the authority to provide compensatory time for employees. He said it is not an option for state law to make a similar provision for employees in the private sector because federal law prohibits use of compensatory time for employees in the private sector, except in very limited instances.

Representative Skarphol asked whether there is any pending legislation on this topic in the federal arena. Mr. Hagen said bills are always being introduced and considered in Congress, and there are two bills pending, but he thinks these bills will not be acted upon before Congress adjourns.

Senator Andrist said it would be beneficial to private sector employees allowed by federal law to have the benefit of compensatory time availability and asked why North Dakota does not allow this benefit to those who are eligible under federal law. Mr. Hagen said it would become extremely confusing to employers and employees to have rules for the benefit of some employees but not for other employees. He said the decision has been made to avoid this confusion, because it is impractical to offer compensatory time to the employees who would be eligible under federal law.

Representative Skarphol asked why hunting guides are exempt from minimum wage application.

Mr. Hagen said federal law exempts them and North Dakota law mirrors the federal provision.

COMMITTEE DISCUSSION

Chairman Bernstein said review of the September calendar indicates that September 29 and 30 might be available meeting dates. He said to plan to meet on September 29 and 30 if a two-day meeting is necessary.

Representative Koppelman said he is concerned that the Department of Public Instruction will have difficulty meeting the timetable for adoption of rules that was established under 1997 legislation. He inquired whether the committee should send a letter indicating this concern to the department. Representative Skarphol said the committee should express concern with meeting the deadline and that it would not be possible for the committee to grant an extension of time beyond the October 1999 deadline. **It was moved by Representative Skarphol, seconded by Representative Koppelman, and carried that the chairman request permission from the chairman of the Legislative Council to send a letter to the Superintendent of Public Instruction indicating the concern of the committee with the timetable established for completing rulemaking by the Department of Public Instruction.**

It was moved by Representative Skarphol, seconded by Senator Stenehjem, and carried that the meeting be adjourned subject to the call of the chairman. Chairman Bernstein adjourned the meeting at 11:48 a.m.

John Walstad
Code Revisor

ATTACH:22