

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday and Wednesday, September 29-30, 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, Bob Skarphol, Rich Wardner; Senators John M. Andrist, Bob Stenehjem, Steven W. Tomac

Others present: See Appendix A

It was moved by Representative Devlin, seconded by Senator Stenehjem, and carried that the minutes of the July 28-29, 1998, meeting be approved as mailed.

COMMITTEE DISCUSSION OF INTERNET POSTING OF RULES

Representative Skarphol said he received from Representative Francis J. Wald a copy of correspondence from Dickinson attorney Ronald A. Reichert, suggesting that it would be beneficial to the citizens of North Dakota if all proposed agency rules were posted on the Internet and interested parties would be able to comment upon the proposed rules and view other comments addressing the proposed rules. Representative Skarphol said this seems to him to be a good suggestion that should be considered by the Administrative Rules Committee.

Committee counsel said although it may be beneficial to provide an Internet posting for proposed agency rules, initial questions concerning feasibility include whether all agencies would have the ability to post rules on the Internet or whether a central source would be required. He said the Legislative Council would have difficulty handling posting of rules because rules are not provided by agencies in an electronic format and the computer system currently used is not compatible with other systems to allow electronic filing of rules. He said scanning is unreliable at this time so rules would have to be keyed into the system for posting, which would probably require additional staff and equipment since it is virtually a full-time position to do the final versions of rules at the present time. Chairman Bernstein said the cost of Internet posting would be a significant consideration but is an unknown amount at this time.

Senator Andrist said Internet posting of rules would be useful, but it is more important to the public that actual notice of rulemaking activity be received. He said a barber would not scan the Internet to find out whether rules were being proposed by the Barber Board. He said mailing of notices to occupational licensees should be required with regard to any rulemaking affecting their licenses. He said once notice is received, inclusion in the notice of reference to an Internet site to view rules would be useful.

Representative Koppelman said another way to benefit the public with regard to rulemaking activity is to provide Internet posting of rulemaking notices. Committee counsel said Internet posting of notices was suggested at the previous committee meeting and the Legislative Council web site now has added administrative rulemaking notices.

Representative Skarphol said it would be helpful to Administrative Rules Committee members to receive a copy of proposed rules at the time rulemaking notices are received. Committee counsel said agencies are not required by law to file a copy of proposed rules with the rulemaking notice. He said the law requires an agency to provide in its rulemaking notice a statement of how an interested person can obtain a copy of rules. He said if the Legislative Council is to provide copies of rules to committee members, it would be necessary to request copies from agencies each month.

BOARD OF DENTAL EXAMINERS

Chairman Bernstein called on Mr. Jerry Kettleson, Board of Dental Examiners legal counsel, for testimony regarding August 1998 rules of the board. A copy of Mr. Kettleson's prepared testimony is attached as Appendix B.

DEPARTMENT OF BANKING AND FINANCIAL INSTITUTIONS

Chairman Bernstein called on Mr. David Clinton, Department of Banking and Financial Institutions legal counsel, for comments regarding August 1998 rules of the department. Mr. Clinton said he did not receive notice of the meeting and had not prepared written testimony. He said the department rules arose from concerns raised in consideration of an earlier set of rules. He said the rules relate to credit union loan

limitations and concerns about the 30 percent limitation on credit union aggregate loans. He said this provision is repealed by these rules. He said the rules also make an adjustment to mortgage loan requirements to raise from \$10,000 to \$20,000 the mortgage loan limitation. He said this change will allow easier documentation for smaller loans of less than \$20,000.

Representative Skarphol asked how these requirements compare with requirements for banks. Mr. Clinton said the regulations covered by these rules relate only to credit unions and do not apply to banks. He said the requirements for banks are different.

Senator Tomac asked whether these limitations will have to be readjusted in the near future. Mr. Clinton said he hopes this is adequate for some time for credit union lending.

In response to a question from Representative Nottestad, Mr. Clinton said the North Dakota Association of Credit Unions supported these rules changes and, in fact, had initiated the process.

BOARD OF ANIMAL HEALTH

Chairman Bernstein called on Dr. Larry A. Schuler, State Veterinarian, for comments on October 1998 rules of the Board of Animal Health. A copy of Dr. Schuler's prepared testimony is attached as Appendix C.

STATE DEPARTMENT OF HEALTH

Chairman Bernstein called on Mr. Murray G. Sagsveen, State Health Officer, for comments on State Department of Health September and October 1998 rules. Mr. Sagsveen said the department adopted four sets of rules effective September and October 1998 and that testimony on each set of rules would be presented by the appropriate officer from the affected division of the department.

Mr. Dana Mount, State Department of Health, presented prepared testimony on air pollution control rules, a copy of which is attached as Appendix D.

Senator Stenehjem inquired how the new rules compare to federal rules. Mr. Mount said the ambient air standard is actually a loosening of state rules to be equivalent to the federal standard. He said the other standards require simply meeting federal rules, and he could obtain estimates from the federal government on the fiscal effect.

Senator Andrist said the Dakota Resource Council has stated that there are already measurable results of increased air pollutants from these rules changes, and he asked whether emissions have changed since the rules were adopted. Mr. Mount said emissions have not changed significantly and the statement from the Dakota Resource Council related to one reading of a high level of sulfur dioxide, but after investigation it was determined that that reading did not result from increased emissions but from unique conditions that

existed at the time of the reading. He said the conditions include terrain, meteorological, and stack height factors that combined to result in a higher than normal reading.

Mr. Sagsveen said he visited the refinery with Mr. Mount after receiving the Dakota Resource Council letter. He said they were told by the manager of the facility that emissions from the facility have not been increased even though the standards have been relaxed.

Senator Andrist said the Canadian power plant at Estevan is a concern regarding air pollution. He asked whether that facility and its emissions have any impact on measuring of air quality for North Dakota plants. Mr. Mount said computer modeling has been used to try to assess whether that facility has an impact on air pollution monitoring in North Dakota. He said the Estevan plant emissions are very high compared to emissions from North Dakota facilities. He said the Estevan facility is undertaking an upgrading of emissions control equipment over the next five years or so, but the emissions still will not be quite as low as United States emissions standards.

Ms. Darleen Bartz, Division of Health Facilities, presented prepared testimony relating to licensing rules for basic care facilities. A copy of her prepared testimony is attached as Appendix E.

Ms. Bartz also presented written testimony relating to nurse aides' rules. A copy of her prepared testimony is attached as Appendix F.

Mr. Kenan Bullinger, State Department of Health, presented written testimony relating to lodging establishment rules. A copy of his prepared testimony is attached as Appendix G.

Representative Skarphol asked for comments on State Department of Health views of posting rule-making notices on the Internet with copies of rules. Mr. Sagsveen said that is an excellent idea that would be of benefit to the public. He said the State Department of Health is putting much more information on its web site and would consider inclusion of rulemaking information.

REAL ESTATE APPRAISER QUALIFICATIONS AND ETHICS BOARD

Chairman Bernstein called on Mr. Joe Ibach, President, Real Estate Appraiser Qualifications and Ethics Board, for comments on October 1998 rules of the board. A copy of Mr. Ibach's prepared testimony is attached as Appendix H.

STATE SEED COMMISSION

Chairman Bernstein called on Mr. Doug Johansen, State Seed Commissioner, for comments on July 1998 rules of the State Seed Department. A copy of Mr. Johansen's written testimony is attached as Appendix I.

DEPARTMENT OF HUMAN SERVICES

Chairman Bernstein called on Mr. Blaine Nordwall, Department of Human Services legal counsel, for comments on September 1998 rules on residential treatment centers for children. A copy of Mr. Nordwall's prepared testimony is attached as Appendix J.

After the luncheon recess, Chairman Bernstein called on Ms. Carol K. Olson, Director, Department of Human Services, for comments relating to rules on licensure of child care facilities, carried over for consideration from the July 28-29, 1998, meeting of the Administrative Rules Committee. A copy of Ms. Olson's prepared testimony is attached as Appendix K. Ms. Olson said the department undertook a mediation process relating to 39 issues identified as areas of discussion in hopes that disagreements could be resolved. She said the mediation process was successful in resolving 27 issues, 10 of the issues were considered to be outside the scope of the rulemaking activity of the department, and only two areas remain in which agreement was not reached among participating parties. Ms. Olson attached a chart to her testimony summarizing the identified areas of consideration.

Ms. Olson introduced Mr. Lloyd Suhr, Division of Legal Advisory Services, Department of Human Services, who reviewed the issues identified on the chart of items for consideration in the mediation process.

Chairman Bernstein called on Ms. Barb Arnold-Tengesdal, North Dakota Association for the Education of Young Children, for comments on the child care licensing rules. A copy of Ms. Arnold-Tengesdal's prepared testimony is attached as Appendix L. Ms. Arnold-Tengesdal said there are several areas in which the association disagrees with the rules of the department, even after the mediation. She said the association is concerned about the agreed rules relating to carecheck, minimum caregiver age, liability and medical insurance coverage, and provisions for special needs, but despite these concerns the association supports the approval of the rules as the Department of Human Services has now submitted them.

Representative Bernstein said he is concerned about the restrictions governing water temperature in child care facilities. He said the options of tempering valves or turning down water heaters do not seem to present an adequate alternative. He asked how many children in child care facilities have been scalded by hot water. Ms. Corinne Bennett, Department of Human Services, said she has knowledge of some instances of scalding of children in child care facilities but does not know a specific number of instances of such injuries.

Chairman Bernstein called on Mr. Ron Lawler, President, North Dakota Child Care Providers, Inc., for testimony relating to the child care provider rules. A copy of Mr. Lawler's prepared testimony is attached as Appendix M. Mr. Lawler said not all areas of the

rules are completely in agreement among all concerned parties but that is the nature of compromise. He said one area of concern is with the definition of medication, which would apparently require that all use of included substances must be recorded. He said he is concerned that the definition would be too broad and include application of things like insect repellent or sunscreen to children. Senator Andrist said regarding the medication definition, the phrase "drug or remedy" to him would not seem to cover insect repellent or sunscreen because that would not be a remedy but a preventive application.

Chairman Bernstein called on Ms. Linda Jones, child care provider from Fargo, for comments on the child care licensing rules. Ms. Jones said she is a member of a local association that is also concerned with the rules requirements for documentation of medication. She said the requirement seems excessive because of the definition covering so many treatments. She said she keeps a record of anything she gives to children orally, but external applications should not be required to be recorded unless they are prescription substances.

Ms. Jones said she is also concerned about tempering valves and requirements regarding water temperature. She said it is not inexpensive to obtain a tempering valve. She said she believes the best alternative is to teach children to respect hot water and to provide supervision for children using faucets.

Representative Nelson asked whether Ms. Jones believes these licensing rules will increase the number of unlicensed providers. She said she believes the rules will increase unlicensed providers because increased regulations make it more difficult for people to become licensed and they will seek the easy alternative of providing care without licensing.

Chairman Bernstein called on Ms. Earleen Friez, child care provider from Hettinger, for comments on the child care provider licensing rules. Ms. Friez said she has been a child care provider for 25 years. She said she has followed the development of the child care provider licensing rules closely and has some concerns but generally supports the rules. She said the antiscalding devices are difficult to find. She said the only place she has been able to find them is at Menards. She said she asked Menards for the telephone number of the manufacturer and called the manufacturer and was informed that the device is only available through Menards. She said the price of the item is \$5.99. She said she would like to ask the Department of Human Services to inform providers where they can obtain this device.

Ms. Friez said the tempering valve that is an option for water temperature control under the rules is not a workable solution. She said she has discussed the tempering valve with plumbers and has been told that it will not work properly in a water heater in a home where a large amount of water is drained from the water heater in a single usage.

Ms. Friez said the antiscalding device attaches to a faucet and cuts off water from the faucet at 114 degrees or higher. She said the device has a button that can be pushed to resume the flow of water. She said antiscalding faucets do not shut off water at high temperature. She said she was frustrated with the antiscalding device when she initially installed it a couple of years ago. She said the device would shut off water and children would just not finish washing their hands. She said she had made adjustments in the waterlines below the faucet and the device now works fairly well.

Senator Andrist said he has concerns about the rules as written being literally enforced. He asked Ms. Olson whether the Department of Human Services is bound by these rules or whether there is any "wiggle room" in enforcement. Ms. Olson said that is a difficult question. She said the department stands by the rules as written. She said as far as enforcement is concerned, that is another issue and the department would try to fairly administer the rules.

Senator Andrist asked whether the department conducts inspection of child care provider facilities. Ms. Bennett said inspections are provided at the county level. She said county inspections now provide two visitations per year for each facility so there will not be any added cost of inspections. She said the Department of Human Services will need to provide training for county staff, but additional inspections will not be required.

It was moved by Representative Mickelson, seconded by Representative Nottestad, and carried on a roll call vote that the Administrative Rules Committee go on record as agreeing with the Department of Human Services on the amendments as contained in the rules as resubmitted by the department to accomplish the changes described in the chart prepared by the department. Voting in favor of the motion were Representatives Bernstein, Axtman, Christopherson, Devlin, Kelsh, Kempenich, Koppelman, Mickelson, Nelson, Nottestad, Skarphol, and Wardner and Senators Andrist, Stenehjem, and Tomac. There were no negative votes.

Chairman Bernstein requested comments on the two rules issues on which agreement has not been reached. Ms. Bennett said one area in which agreement has not been reached is with regard to provisional licensing of child care providers. She said the department believes this provision should be retained. She said the department has given provisional licenses pending qualification under educational requirements. She said in rural areas this can be important because there may not be an adequate supply of child care providers and a provisional status may be needed until someone is able to qualify.

Mr. Lawler said his association no longer objects to the provisional license rule. Chairman Bernstein said the committee does not need to take action on

the provisional licensing rule and it will remain as proposed by the department.

Ms. Bennett said the other area of disagreement is with regard to fire safety rules. She said family care providers are not required to have fire inspections, but the rules have requirements that are consistent with the requirements for group care providers.

Mr. Lawler said his association believes local fire codes should prevail. He said the rules establish requirements that exceed local fire codes in some areas. He said you have to follow the fire code if there is one locally and if there is no local fire code, you must follow the state fire code. He said having a specific number of fire extinguishers and locations for extinguishers and fire detectors in the rules is the reason for the objection of the association. He said this rule is inflexible and local rules are more responsive to input from local citizens.

Ms. Jones said the rule requires that one fire extinguisher be available on each level of a home. She said this can be excessive if a home has several levels. She said there is no requirement regarding the size of extinguishers and having a small extinguisher on each level may not be as useful as having a single large extinguisher available to put out a fire.

Ms. Bennett said a representative is present from the State Fire Marshal's office who could comment on the fire safety rules.

Mr. John Elstad, Deputy, State Fire Marshal's office, said local fire codes are equivalent to or more stringent than the state fire code. He said jurisdictions that do not have a local fire code use an inspection form developed by a committee formed by the State Fire Marshal to include minimum fire safety standards. Mr. Elstad said the Uniform Building Code lists day care facilities as an educational occupancy. He said fire safety requirements for that category of building would be too stringent for day care facilities and the requirements have been reduced to avoid certain burdens of the rules such as requirements of enclosed stairways, separated building levels, and other requirements that would be too difficult to meet for homeowners and day care facilities.

In response to questions from Senator Tomac, Mr. Elstad said the fire safety standards in the rules can exceed local fire standards in some situations.

Ms. Arnold-Tengesdal said she is not concerned with the fire safety rules. She said she believes it would be a good idea to have a fire extinguisher on each level of a home because she would not want to have to leave kids alone to go get an extinguisher. She said she supports the rule in the form submitted by the department.

In response to a question from Representative Nelson, Mr. Elstad said the cost of an extinguisher rated at the required level under the rules would be approximately \$12 to \$15. Representative Mickelson distributed a copy of a letter from Ms. Gail Reiten, Child Care Association of Minot, supporting the rules

as suggested for amendment by the department. A copy of the letter is attached as Appendix N.

In response to a question from Senator Tomac, Mr. Elstad said he does not think the rule of the department will cause confusion or require that extinguishers now being used will have to be replaced if they are qualified under existing codes. He said some additional extinguishers may be needed.

Chairman Bernstein said the only issue remaining for consideration is the fire safety rule, and he would prefer to act on the rule at this time if the committee wishes to do so. He said if no action is taken, the rule will stand as submitted by the department. Representative Skarphol said he thinks substantial effort has gone into developing and compromising the rules. He said the legislative session is approaching and if changes are required, they could be accomplished legislatively. He said it appears the rules are acceptable in the form submitted.

ADMINISTRATIVE RULEMAKING STATISTICS

Chairman Bernstein called on committee counsel to review a memorandum entitled *Administrative Rule-making Statistics*. Committee counsel said the memorandum was prepared to compare the number of Administrative Code sections affected by rule-making activity from November 1996 through October 1998 with comparable statistics for preceding two-year periods. He said the appendix to the memorandum shows the number of sections affected for each agency that has conducted rulemaking activity during this time period. He said the most recent two biennial periods had over 400 fewer administrative rules sections affected in each period than in the two-year period ending October 1994. He said there is no evidence as to why the number of sections affected has decreased, but the decrease coincides with the authority of the Administrative Rules Committee to void rules.

COMMITTEE CONSIDERATION OF BILL DRAFTS

Chairman Bernstein called on committee counsel to review two bill drafts providing for sunseting of administrative rules. Committee counsel said the first bill draft was prepared at the request of Representative Skarphol and provides that beginning August 1, 2001, administrative rules adopted before August 1, 1999, will begin to become void on a cycle of approximately 15 years after the original effective date of the rules. He said the bill draft provides that for rules originally effective after July 31, 1999, the rules become void on August 1 after the next regular legislative session convening after the effective date of the rules. He said the bill allows a rule to remain indefinitely in effect if the rule is designated as a procedural or interpretive rule by the Administrative Rules Committee. He said the second bill draft was

prepared upon request of the committee at its previous meeting and provides for sunseting of administrative rules only for administrative rules originally effective after July 31, 1999. He said for those rules a scheduled sunset becomes effective August 1 after the next regular legislative session following the effective date of a rule. He said this bill draft also allows rules to remain indefinitely effective upon designation by the Administrative Rules Committee as procedural or interpretive rules.

Representative Skarphol said his intent in requesting the bill draft is that policymaking matters should not be done by rule but should be forced into legislative consideration. He said sunseting administrative rules that are not procedural or interpretive will require that these matters be brought before the Legislative Assembly for consideration rather than remaining in administrative rules indefinitely.

It was moved by Representative Kempenich and seconded by Senator Andrist that the bill draft relating to sunseting of administrative rules, including all administrative rules presently in effect, be approved and recommended to the Legislative Council.

Senator Tomac said the fiscal impact of this bill draft is a concern to him and this is a very ambitious task. He said not only is the Administrative Rules Committee faced with reviewing an enormous volume of administrative rules, but the bill draft would ask agencies to devote several staff people to reviewing administrative rules to determine which ones should be retained as procedural or interpretive and which ones should be the subject of legislation.

Representative Bernstein said he has problems with supporting this concept. He said there are undoubtedly many obsolete administrative rules. He said agencies should bear the responsibility of reviewing their rules for obsolete provisions and the Governor has made statements to this effect in the past. He said he thinks a review process should be set in motion by requesting agencies to review their administrative rules and report to the Administrative Rules Committee on their findings.

Senator Andrist said his concern with administrative rules is that the ones that establish policy should be brought for consideration to the Legislative Assembly. He said a review by agencies to identify obsolete rules would not identify those that contain policy considerations that the Legislative Assembly should consider.

Senator Tomac said he does not support sunseting of administrative rules. He said one reason is that determining whether a rule is procedural or interpretive is entirely up to the Administrative Rules Committee.

The question was called and **the motion failed**. Voting in favor of the motion were Representatives Devlin, Kempenich, Koppelman, Skarphol, and Wardner and Senators Andrist and Stenehjem.

Voting in opposition to the motion were Representatives Bernstein, Axtman, Christopherson, Kelsh, Nelson, and Nottestad and Senator Tomac. The chairman declared the question lost for failure to obtain a majority vote.

It was moved by Senator Andrist, seconded by Senator Stenehjem, and carried on a recorded roll call vote that the bill draft relating to sunseting of administrative rules effective after July 31, 1999, be approved and recommended to the Legislative Council. In discussion of the motion, committee counsel said, in response to a question from Representative Koppelman, the bill draft would have no effect on administrative rules originally effective before August 1, 1999. Senator Andrist said this bill draft would allow the Administrative Rules Committee to direct agencies to bring policy matters before the Legislative Assembly for consideration when appropriate. Voting in favor of the motion were Representatives Axtman, Devlin, Kempenich, Koppelman, Nelson, Nottestad, Skarphol, and Wardner and Senators Andrist and Stenehjem. Voting in opposition to the motion were Representatives Bernstein, Christopherson, and Kelsh and Senator Tomac.

Chairman Bernstein called on committee counsel to review a bill draft allowing the Administrative Rules Committee to call up administrative rules for review. Committee counsel said under existing law the authority of the Administrative Rules Committee to void or object to an administrative rule only relates to rules as they are brought before the committee for consideration upon creation or amendment. He said the bill draft allows the Administrative Rules Committee to provide 30 days' notice to an adopting agency of a rule called up for review. He said the agency is to provide a response to expressed concerns of the committee and a rule called up for review is subject to the authority of the Administrative Rules Committee to file an objection or to void the rule.

Representative Koppelman said he supports the objective of allowing action on rules that cause problems.

Representative Bernstein said he could see some benefit to the concept in the bill draft, but possible problems may also result.

Representative Wardner said there are agency people who question what the Administrative Rules Committee is doing with its existing authority. He said he believes if the Administrative Rules Committee could call up a rule for review and possibly agree with an agency to an amendment to a rule without public hearings, that stretches the concept of administrative rulemaking. He said it is important that the Administrative Rules Committee retain its existing authority and pushing the authority too far may result in the loss of all authority the committee enjoys. He said he wants to avoid the loss of existing authority.

It was moved by Representative Axtman, seconded by Representative Skarphol, and carried on a roll call vote that the bill draft allowing the Administrative Rules Committee to call up existing administrative rules for review be approved and recommended to the Legislative Council. Voting in favor of the motion were Representatives Bernstein, Axtman, Christopherson, Devlin, Kelsh, Kempenich, Koppelman, Nelson, Nottestad, and Skarphol and Senators Andrist and Stenehjem. Voting in opposition to the motion were Representative Wardner and Senator Tomac.

Chairman Bernstein called on committee counsel to review a bill draft to provide that an agency may not adopt rules from federal guidelines which are not relevant to state regulatory programs and that an agency be required to repeal or amend any existing rule adopted from federal guidelines which is not relevant to state regulatory programs. He said current law provides that environmental rules are not to incorporate federal guidelines not relevant to North Dakota. He said the bill draft expands this concept to any agency adopting rules based on federal requirements. He said the existing law was adopted upon suggestion of the State Department of Health that certain federal rules have no application in North Dakota.

It was moved by Representative Wardner, seconded by Representative Koppelman, and carried on a roll call vote that the bill draft prohibiting rules based on federal guidelines which have no relevance to North Dakota be approved and recommended to the Legislative Council. 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 negative votes.

Chairman Bernstein called on committee counsel to review a bill draft to clarify rulemaking authority of administrative agencies. Committee counsel said the bill draft was prepared at the request of Representative Koppelman and provides that an agency may adopt an administrative rule only when the rule falls within an area in which the agency has been specifically required or authorized to adopt rules by state or federal law or federal rules. He said the bill draft also requires the Administrative Rules Committee to review the statutory authority of each administrative agency to seek to limit administrative rulemaking to areas in which specific requirement or authorization of rulemaking exists.

Representative Koppelman said he cannot offer specific examples of abuses, but concerns have arisen in the past about whether administrative rules have been adopted at the direction of the Legislative Assembly or have created policy by unilateral action of an agency. He said the intention of the legislation is that administrative agencies should make rules only

when specific legislative directives exist for rulemaking.

Representative Nottestad said it appears the bill draft would prohibit agencies from fixing rules that are bad or obsolete.

It was moved by Representative Skarphol, seconded by Senator Stenehjem, and carried on a roll call vote that the bill draft to clarify authority of administrative agencies to adopt administrative rules be approved and recommended to the Legislative Council. Voting in favor of the motion were Representatives Bernstein, Axtman, Christopherson, Kempenich, Koppelman, Nelson, Nottestad, Skarphol, and Wardner and Senators Andrist, Stenehjem, and Tomac. Voting in opposition to the motion was Representative Kelsh.

Chairman Bernstein called on Senator Andrist to review a bill draft relating to publication of notice of administrative rulemaking. Senator Andrist said the committee has discussed the problem of providing better notice to the public of administrative rulemaking hearings. He said the topic was discussed at a meeting of the North Dakota Newspaper Association and the bill draft was prepared at his request to require publication of a notice of administrative rulemaking in each official county newspaper, rather than in each daily newspaper. He asked that Ms. Denise Bjornson, Executive Director, North Dakota Newspaper Association, provide information to the committee regarding this proposal. Ms. Bjornson distributed a copy of a memorandum from Mr. Neal Shipman, President, North Dakota Newspaper Association. A copy of the letter is attached as Appendix O. Ms. Bjornson said the suggestion is that a simplified, standardized display notice of approximately three to four inches in depth be published in each official county newspaper, containing a headline showing the general topic, a statement that administrative rules relating to this topic are being considered, a telephone number to obtain a copy of proposed rules, and a listing of the time and place for public hearing. She said it appears the average cost of current notices is between \$800 and \$1,500 per hearing and notices reach a circulation of 186,261 subscribers. She said publishing these notices in official county newspapers would cost an average of \$2,234 and reach 274,258 subscribers.

Committee counsel said review of all administrative rules coming before the Administrative Rules Committee during this interim shows that 51 sets of administrative rules for which newspaper publication costs could be determined had an average cost of approximately \$717. He said several sets of rules did not separately identify newspaper costs and these were not included in determining the average.

Committee counsel said the bill draft was prepared with the understanding that the newspaper publication must include the text of the agency notice as required by current law. He said the proposal is for an

abbreviated version of the notice to be published in each county newspaper and the bill draft should be amended to reflect this intent.

It was moved by Senator Andrist, seconded by Representative Skarphol, and carried on a voice vote that the bill draft relating to publication of notice of administrative rulemaking be amended by requiring publication in a display-type format with one column of approximately two inches in width and a depth of from three to four inches, with a headline describing the general topic of the proposed rules and the address and telephone number to obtain a copy of the proposed rules and the time, date, and location of the hearing.

It was moved by Representative Skarphol, seconded by Representative Nelson, and carried on a roll call vote that the bill draft, as amended, relating to newspaper publication of notice of administrative rulemaking be approved and recommended to the Legislative Council. 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.

Chairman Bernstein said providing better notice to the public is worthwhile, but he is concerned with the potential increased cost of publication. He requested committee counsel to seek a fiscal note on the bill draft from the Office of Management and Budget.

Chairman Bernstein called on committee counsel to review a bill draft to repeal a provision of law relating to petitions for reconsideration of administrative rulemaking. Committee counsel said the bill draft was requested by Representative Skarphol after discussion of existing provisions of law relating to administrative rulemaking. Committee counsel said the provision being repealed in the bill draft allows any person substantially interested in the effect of an administrative rule to petition the agency for reconsideration of the rule or for amendment or repeal of the rule. He said the section provides that the agency may grant a public hearing on the petition for reconsideration. He said the problem with the section is that there are no accompanying provisions contained in law providing what an agency may do in response to a petition for reconsideration. He said it appears an agency would be bound by the provisions of existing law requiring initiation of a new rulemaking proceeding to make rules changes, with publication of notice and public hearings. He said the section appears to grant the public a right, but there appears to be no substance to the opportunity to petition for reconsideration. He said because an agency could do nothing to change rules that are in place without initiation of a new proceeding, it appears that a petition would accomplish nothing that could not be accomplished by informal contacts to the agency by letter.

Representative Koppelman said he sees the problem with the existing law, but perhaps rather than repealing the law an effort should be made to amend the law to provide a real opportunity for the public to seek reconsideration and to provide an agency with authority to take action in response to valid concerns that are raised in the process.

Representative Skarphol said anyone is free to ask an agency to consider changes to an administrative rule without this provision of law. He said this law adds nothing to existing rights of citizens to contact agencies.

Senator Andrist said he would rather see this bill draft amended into another bill, such as the bill draft allowing the Administrative Rules Committee to call up existing rules for review.

It was moved by Representative Skarphol, seconded by Representative Axtman, and carried on a roll call vote that the bill draft allowing the Administrative Rules Committee to call up existing administrative rules for review be amended by incorporating the provisions of the bill draft repealing North Dakota Century Code Section 28-32-04, relating to petitions for reconsideration of administrative rulemaking, and that the bill draft, as amended, be approved and recommended to the Legislative Council. Voting in favor of the motion were Representatives Bernstein, Axtman, Christopherson, Kelsh, Kempenich, Koppelman, Nelson, Nottestad, Skarphol, and Wardner and Senators Andrist and Stenehjerm. There were no negative votes.

Chairman Bernstein said if the bill drafts are adopted by the Legislative Council and introduced for consideration in the 1999 Legislative Assembly, he would call upon selected members of the Administrative Rules Committee to appear in support of one or more of the bill drafts.

BARBER BOARD

Chairman Bernstein called on Mr. Dean A. Somerville, President, State Barber Board, for testimony regarding August 1998 rules of the board. A copy of Mr. Somerville's prepared testimony is attached as Appendix P. Mr. Somerville said continuing education for barbers was supported by a vote at the most recent annual convention of the North Dakota Barbers Association. He said it is very important for barbers to be informed on current health issues, and he said HIV is an example of a health concern that barbers were not aware of 20 years ago.

In response to a question from Representative Kempenich, Mr. Somerville said barbers can obtain all necessary continuing education credit hours by viewing videotape if they wish.

Senator Andrist asked whether Mr. Somerville is satisfied that all barbers in the state are aware of the continuing education requirement. Mr. Somerville said notice of the rulemaking was provided in the

state association newsletter that has been sent to all licensed barbers. He said there is no reason a barber should not be aware of this rule.

SECRETARY OF STATE

Chairman Bernstein called on Secretary of State Al Jaeger for testimony relating to October 1998 facsimile filing rules adopted by the Secretary of State. A copy of Mr. Jaeger's prepared testimony is attached as Appendix Q.

In response to questions from Representative Skarphol, Mr. Jaeger said the rules provide for electronic signature filing either by facsimile or computer disk but not for transfers from computer to computer. He said it is possible that in the future filing of documents by transfer from computer to computer could be authorized but that would be the subject of further research, for security purposes. He said the committee formed to review this topic chose to go slowly. Representative Skarphol asked why agencies are allowed to opt in to use of electronic signature filing, and he suggested that agencies may need prodding to adapt to technology improvements. Mr. Jaeger said the committee considering the issue was sensitive to not forcing agencies into accepting electronic signatures until they are technologically ready. He said it seems better at this point to make use of the rules optional.

EDUCATION STANDARDS AND PRACTICES BOARD

Chairman Bernstein called on Ms. Deb Jensen, Assistant Director, Education Standards and Practices Board, for testimony relating to October 1998 rules of the board. A copy of Ms. Jensen's prepared testimony is attached as Appendix R.

Representative Axtman asked whether substitute teachers require certification. Ms. Jensen said substitute teachers do require certification but that is not covered in these rules. She said the board is working on preparation of some future rules that would allow retired teachers and others to substitute teach.

Representative Nelson said some schools are experiencing teacher shortages and asked how emergency certification of teachers can help schools fill vacant teaching positions. Ms. Jensen said by August 15, the deadline for seeking emergency certification, most teaching positions in the state were filled. In response to another question from Representative Nelson, Ms. Jensen said emergency certification status is available at the request of the school district and upon a commitment from the applicant that the applicant would take the teaching position.

Representative Skarphol said an issue has been brought to his attention regarding minor equivalencies for teachers. He said the Department of Public Instruction has no statutory authority to issue minor

equivalencies and distributed two letters relating to this topic.

DEPARTMENT OF PUBLIC INSTRUCTION

Chairman Bernstein called on Mr. Joe Linnertz, Department of Public Instruction, for comments on the status of rulemaking activity of the department. Mr. Linnertz distributed a copy of correspondence from Superintendent of Public Instruction Wayne Sanstead, a copy of which is attached as Appendix S.

Representative Skarphol asked whether at the conclusion of rulemaking by the Department of Public Instruction there will not be any standards imposed upon school districts except by law or administrative rule. Mr. Linnertz said that is correct.

Representative Skarphol asked whether the department would be willing to set the effective date of administrative rules after the Administrative Rules Committee has the opportunity to review the rules. Mr. Linnertz said the department would do so.

Senator Andrist said school accreditation will likely be a problem area. He asked that the department please include some good emergency provisions for accreditation for schools having problems with shortages of teachers and other difficulties. Mr. Linnertz said the department will be as flexible as it is allowed by legislation. He said the Legislative Assembly has passed law relating to foreign teacher certification that made it difficult in the accreditation field.

Representative Nelson said fingerprinting of teacher candidates is important but causes delays in filling teaching positions and he asked whether the department has suggestions. Ms. Jensen said recent meetings of the Education Standards and Practices Board have involved discussions about allowing provisional licensing during the delay while fingerprint records are scanned.

Representative Skarphol asked what violations have been found by review of fingerprint records of candidates. Ms. Jensen said there have been serious

criminal offenses discovered in background checks through fingerprint requirements, including violence and drug convictions plus some minor infractions such as driving under the influence and other less serious offenses.

COMMITTEE DISCUSSION

It was moved by Representative Christopher-son, seconded by Representative Nottestad, and carried that the chairman and the staff of the Legislative Council be requested to prepare a report and the bill drafts recommended by the committee and to present the report and recommended bill drafts to the Legislative Council.

Representative Koppelman said the committee has completed a substantial amount of work during the interim. He said one area still requiring attention is how to deal with existing rules that should be reviewed by agencies or by the Legislative Assembly. He said perhaps the committee should refer rules to the Legislative Assembly for review when the committee becomes aware of rules that are old or that establish policy that should be in law.

Representative Skarphol said the question of Internet usage for notice and publication of proposed administrative rules is significant. He said there are difficulties to overcome, but he hopes committee members will keep this issue in mind for future consideration.

Chairman Bernstein adjourned the meeting at 11:45 a.m.

John Walstad
Code Revisor

ATTACH:19