

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### ADMINISTRATIVE RULES COMMITTEE

Wednesday, March 24, 2004  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Representative William R. Devlin, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives William R. Devlin, LeRoy G. Bernstein, Duane DeKrey, Matthew M. Klein, Kim Koppelman, Jon O. Nelson, Dan J. Ruby, Sally M. Sandvig, Blair Thoreson, Dwight Wrangham; Senators John M. Andrist, Dennis Bercier, April Fairfield, Tom Fischer, Layton Freborg, Jerry Klein, Gary A. Lee, Rich Wardner

**Members absent:** Representatives Jeff Delzer, Rod Froelich, Alon Wieland

**Others present:** See Appendix A

**It was moved by Representative DeKrey, seconded by Representative Nelson, and carried on a voice vote that the minutes of the November 19, 2003, committee meeting be approved as distributed.**

Committee counsel said this committee meeting was delayed a month because a computer software problem made it impossible to print administrative rules adopted effective since December 2003.

#### ATTORNEY GENERAL LOTTERY RULES

Chairman Devlin called on Mr. Chuck Keller, Director, Lottery Division, for testimony relating to adoption of North Dakota Administrative Code (NDAC) Article 10-16, relating to participation in the multistate lottery. A copy of Mr. Keller's prepared testimony is attached as Appendix B. Copies of the regulatory analysis and economic impact statement prepared by the Lottery Division and the summary of public comments received on proposed rules related to the multistate lottery are on file in the Legislative Council office.

Mr. Keller described some of the most controversial issues that arose during the hearings and comments on the lottery rules. He said under the rules, use of credit cards for lottery ticket purchases is not allowed and it is left to the option of the retailer whether to accept checks and debit cards. He said the commission was urged to avoid allowing use of sites for lottery sales which are accessible to persons under 18 years of age. He said the commission chose not to include this limitation because supermarkets and convenience stores are the most attractive retail locations for location of lottery terminals. He said fuel dealers urged the commission to require issuance of a lottery terminal to any retailer who

requests one. He said the commission did not agree to this request and only approximately 400 lottery terminals are authorized in the state.

Senator Andrist requested a breakdown of the allocation of each dollar spent on lottery tickets. Mr. Keller provided the committee a breakdown, a copy of which is attached as Appendix C.

Representative Bernstein asked who bears the loss for nonsufficient funds checks. Mr. Keller said the retailer is responsible for any checks the retailer accepts.

Representative Ruby asked whether a charitable gaming organization could be a lottery terminal operator. Mr. Keller said a charitable gaming organization could have a lottery terminal. Representative Ruby expressed concerns about the rule adopted by the lottery commission which appears to automatically adopt future rules changes from the multistate lottery. Mr. Keller said North Dakota must comply with the rules of the multistate lottery under the contract entered for participation in the multistate lottery. He said the rulemaking process would not allow the commission to make rules on a timely basis to keep pace with changes by the multistate lottery. Representative Koppelman asked whether emergency rules would address the problem. Mr. Keller said he is not certain whether that would solve the problem.

#### STATE BOARD OF ACCOUNTANCY

Chairman Devlin called on Ms. Carol Mielke, State Board of Accountancy, for comments on December 2003 rules of the board. A copy of Ms. Mielke's prepared testimony is attached as Appendix D.

#### STATE WATER COMMISSION

Chairman Devlin called on Assistant Attorney General Matthew Sagsveen, representing the State Water Commission, for comments on April 2004 rules of the commission. A copy of Mr. Sagsveen's prepared testimony is attached as Appendix E. A copy of the State Engineer's consideration of comments on the rules and the small entity regulatory analysis prepared by the State Water Commission are on file in the Legislative Council office.

## STATE DEPARTMENT OF HEALTH

Senator Klein said State Department of Health food code rules were carried over for consideration from the previous committee meeting. He said he has discussed those rules with concerned organizations and there is no further concern regarding those rules so no action is necessary.

Chairman Devlin called on Mr. Tim Meyer, Director, Division of Emergency Medical Services, State Department of Health, for comments on air ambulance rules of the department carried over for consideration from the previous committee meeting. A copy of Mr. Meyer's prepared testimony is attached as Appendix F. Mr. Meyer said after further discussion regarding the air ambulance rules, the department has determined that it would be appropriate to further amend NDAC Sections 33-11-04-05 and 33-11-04-06. He distributed a copy of amendments to those sections proposed by the State Department of Health. A copy of the proposed changes is attached as Appendix G. Mr. Meyer said the changes were proposed after department representatives discussed the compliance of the rules with the legislative intent of 2001 House Bill No. 1202.

Chairman Devlin called on Representative Todd Porter, part owner of Metro Area Ambulance Service, Inc. Representative Porter said he believes the additional amendments suggested by the State Department of Health would adequately address the concerns he had regarding those rules fulfilling the legislative intent of 2001 House Bill No. 1202.

**It was moved by Representative DeKrey, seconded by Representative Klein, and carried on a roll call vote that the Administrative Rules Committee agree with the State Department of Health to further amend NDAC Sections 33-11-04-05 and 33-11-04-06 as suggested by the State Department of Health.** Voting in favor of the motion were Representatives Devlin, Bernstein, DeKrey, Klein, Koppelman, Nelson, Ruby, Sandvig, Thoreson, and Wrangham and Senators Andrist, Bercier, Fairfield, Fischer, Freborg, Klein, Lee, and Wardner. No negative votes were cast.

Chairman Devlin called on Mr. Curt Erickson, Division of Waste Management, State Department of Health, for testimony related to hazardous waste management rules that became effective December 2003. A copy of Mr. Erickson's prepared testimony is attached as Appendix H.

Representative Koppelman asked for an explanation of why such extensive rules are required at the state level. Mr. Erickson said for the state to continue to administer a hazardous waste management program instead of administration by the Environmental Protection Agency, the state must have rules in place that are substantially equivalent to federal requirements on specified subjects.

Chairman Devlin called on Mr. Larry Thelen, State Department of Health, for testimony relating to public water supply rules of the department. A copy of

Mr. Thelen's prepared testimony is attached as Appendix I.

Chairman Devlin called on Ms. Heather Weaver, State Department of Health, for testimony relating to school immunization rules adopted by the State Department of Health. A copy of Ms. Weaver's prepared testimony is attached as Appendix J.

## INSURANCE COMMISSIONER

Chairman Devlin called on Mr. Charles E. Johnson, General Counsel, Insurance Department, for testimony relating to March 2004 rules of the Insurance Commissioner. A copy of Mr. Johnson's prepared testimony is attached as Appendix K. Copies of comments on the rules and the regulatory analysis and small company regulatory analysis prepared by the Insurance Department are on file in the Legislative Council office.

## BOARD OF OCCUPATIONAL THERAPY PRACTICE

Chairman Devlin called on Mr. Tom Tupa, Board of Occupational Therapy Practice, for testimony relating to February 2004 rules of the board. A copy of Mr. Tupa's prepared testimony is attached as Appendix L.

## BOARD OF NURSING

Chairman Devlin called on Ms. Constance B. Kalanek, Executive Director, Board of Nursing, for testimony relating to April 2004 rules of the board. A copy of Ms. Kalanek's prepared testimony is attached as Appendix M. Ms. Kalanek said the continuing education requirements will be prorated for those who must relicense before two years of effectiveness of the continuing education rule. She said discussions with representatives of the State Board of Medical Examiners and the North Dakota Medical Association after adoption of the rules have caused the Board of Nursing to conclude that further amendments to the rules would be appropriate to address concerns of those groups. She said the board recommends the following additional amendments:

1. Section 54-05-03.1-03.1 - Remove the words "in an independent role" in the second paragraph.
2. Section 54-05-03.1-03.2 - In the introductory language in subsection 1, remove the words "means an independent and interdependent expanded scope of nursing practice and", and in subdivision i of subsection 1, remove the words "and make independent decisions in solving complex client care problems".
3. Section 54-05-03.1-09 - At the end of subsection 4 insert the language in Ms. Kalanek's prepared testimony beginning with the words "The affidavit must address all of the following areas".

4. Section 54-05-03.1-09 - At the end of subsection 6 insert the language in Ms. Kalanek's prepared testimony beginning with the phrase "The affidavit must address all of the following areas".

Chairman Devlin called on Mr. Rolf Sletten, Executive Secretary and Treasurer, State Board of Medical Examiners, for comments on the Board of Nursing rules. Mr. Sletten said the State Board of Medical Examiners supports the additional amendments to the rules as suggested by Ms. Kalanek. He distributed a copy of a letter to the committee conveying the concerns of the State Board of Medical Examiners. A copy of the letter is attached as Appendix N. He said adoption of the additional amendments would resolve any concern the State Board of Medical Examiners has regarding the Board of Nursing rules.

Chairman Devlin said 2003 House Bill No. 1245 requires changes in the Board of Nursing membership so that future appointments must maintain a majority of board members who are engaged in active inpatient nursing. He asked whether Ms. Kalanek is aware of the requirement and when terms of board members expire this year. Ms. Kalanek said the board is aware of that provision and recommendations to the Governor for appointments this year will recognize the requirement.

Chairman Devlin called on Senator Andrist who reviewed a letter he received from Ms. Brenda Lokken regarding the rules of the Board of Nursing. A copy of Ms. Lokken's letter is attached as Appendix O.

Chairman Devlin called on Mr. David Peske, North Dakota Medical Association, who said his association supports the additional amendments proposed by the Board of Nursing.

**It was moved by Representative Koppelman, seconded by Representative Klein, and carried on a roll call vote that the committee approve the additional amendments to the Board of Nursing rules as suggested by Ms. Kalanek.** Voting in favor of the motion were Representatives Devlin, DeKrey, Klein, Koppelman, Nelson, Ruby, Sandvig, Thoreson, and Wrangham and Senators Andrist, Bercier, Fairfield, Fischer, Freborg, Klein, Lee, and Wardner. No negative votes were cast.

### **SUPERINTENDENT OF PUBLIC INSTRUCTION**

Chairman Devlin called on Dr. Gary Gronberg, Department of Public Instruction, for testimony relating to the conflict between rules of the Superintendent of Public Instruction and teacher qualification authority under rules of the Education Standards and Practices Board. A copy of a letter from Superintendent of Public Instruction Wayne Sanstead is attached as Appendix P. Dr. Gronberg said the Department of Public Instruction recommends repeal of the rules listed in the attachment to the letter on the grounds the rules are obsolete because they conflict with the

authority of the Education Standards and Practices Board. Ms. Anita Decker, Director of School Approval and Accreditation of the Department of Public Instruction, said the department has consulted with the Education Standards and Practices Board on the transfer of all teacher accreditation authority to the board. She said that authority has been transferred and the rules in the letter from Dr. Sanstead are now obsolete.

**It was moved by Senator Fischer, seconded by Senator Freborg, and carried on a roll call vote that the Administrative Rules Committee agree with the Superintendent of Public Instruction on repeal of the rules listed in the letter from Dr. Sanstead on the grounds that the rules are obsolete and the authority for rulemaking in this area has been transferred to the Education Standards and Practices Board.** Voting in favor of the motion were Representatives Devlin, Bernstein, DeKrey, Klein, Koppelman, Nelson, Ruby, Thoreson, and Wrangham and Senators Andrist, Fairfield, Fischer, Freborg, Klein, Lee, and Wardner. No negative votes were cast.

Chairman Devlin called on Dr. Gronberg to present testimony relating to December 2003 rules of the Superintendent of Public Instruction. A copy of Dr. Gronberg's prepared testimony is attached as Appendix Q. A summary of comments on the rules prepared by the Department of Public Instruction is on file in the Legislative Council office.

### **AGRICULTURE COMMISSIONER**

Chairman Devlin called on Ms. Andrea L. Grondahl, State Meat Inspection Director, Department of Agriculture, for testimony relating to January 2004 rules of the Agriculture Commissioner. A copy of Ms. Grondahl's prepared testimony is attached as Appendix R. Ms. Grondahl said the rules relate to the operation of a poultry inspection service by the state in compliance with federal law.

Representative Nelson said he understood that providing for state poultry inspection would enhance the ability of state producers to move their products to retail. Ms. Grondahl said the primary benefit of state administration is that state government is more responsive to local needs. She said poultry processors selling their product across state borders require federal inspection.

In response to a question from Senator Klein, Ms. Grondahl said the department has 11 official state inspectors at poultry processing establishments and four field inspectors.

### **PUBLIC SERVICE COMMISSION**

Chairman Devlin called on Mr. Jim Deutsch, Public Service Commission, to present testimony relating to March 2004 rules of the commission. A copy of Mr. Deutsch's prepared testimony is attached as Appendix S.

## REAL ESTATE COMMISSION

Chairman Devlin called on Ms. Patricia M. Jergenson, Secretary Treasurer, Real Estate Commission, for presentation of testimony relating to February 2004 rules of the commission. A copy of Ms. Jergenson's prepared testimony is attached as Appendix T.

In response to a question from Senator Klein, Ms. Jergenson said up to six hours of continuing education for real estate professionals are available on Internet sources to help licensees in rural areas.

Chairman Devlin called on Ms. Jill Beck, North Dakota Association of Realtors, who said the association supports the rules changes as adopted by the commission.

## SECRETARY OF STATE

Chairman Devlin called on Mr. Alvin A. Jaeger, Secretary of State, for testimony relating to March 2004 rules of the Secretary of State. A copy of Mr. Jaeger's prepared testimony is attached as Appendix U.

## DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Ms. Melissa Hauer, Department of Human Services legal counsel, for presentation of testimony relating to two sets of rules of the department. A copy of Ms. Hauer's testimony relating to assisted living facility licensing is attached as Appendix V. A copy of Ms. Hauer's prepared testimony relating to Medicaid eligibility is attached as Appendix W. Copies of the summaries of comments, regulatory analyses, small entity impact statements, and takings assessments for rules are on file in the Legislative Council office.

Senator Fischer said he is concerned with Medicaid eligibility restrictions as they affect a constituent who is a self-employed individual. He said the individual is ineligible for Medicaid because the person has been injured and has sold assets to pay bills and the sale of assets creates income that disqualifies him from Medicaid eligibility. He asked whether people in that situation receive a referral to the children's health insurance program. Ms. Hauer said a referral to the children's health insurance program is made for individuals in similar situations.

Senator Andrist asked whether a sale of assets is counted as income for Medicaid eligibility purposes. Mr. Curtis Volesky, Department of Human Services, said sale of assets does not create income for Medicaid eligibility purposes except the extent of any interest received by the seller, such as in the case of a contract for deed.

Senator Bercier said he is concerned about the changes in the rules to reduce Medicaid expenditures by \$150,000. He asked how many Medicaid clients would be affected by these changes. Mr. Volesky said not that many clients would be affected.

Senator Fischer asked whether the department could track the impact of these rules changes and the \$100 rule for next year. Mr. Volesky said the department would look into that.

Senator Fischer said there should be a seamless transition between Medicaid and the children's health insurance program and asked if eligibility requirements are identical. Mr. Volesky said to make the programs identical would require some changes in rules.

Representative Sandvig said the reduction of \$150,000 of benefits to Medicaid clients is hard on those individuals. She asked whether the budget cut could have come somewhere else. Mr. Volesky said budget cuts were made in several areas of the Department of Human Services budget, but he cannot address how the decisions were made.

Senator Fairfield asked for an explanation of how these rules changes will affect individuals. Mr. Volesky said the effect on an individual depends on the level of medical bills. He said when the covered amount under the Medicaid program is exceeded, a bill would go out from the provider to the client for the difference.

Chairman Devlin called on Ms. Krista Andrews, Department of Human Services legal counsel, for testimony relating to three sets of rules of the department. A copy of her testimony relating to nursing home care ratesetting rules is attached as Appendix X. A copy of her testimony relating to family foster care homes is attached as Appendix Y. A copy of her testimony relating to licensing of group homes and residential child care facilities is attached as Appendix Z. Copies of summaries of comments, regulatory analyses, small entity regulatory analyses, and takings assessments relating to these rules are on file in the Legislative Council office.

Representative Koppelman inquired about the rule requiring locked gun cabinets or trigger guards for firearms in foster care facilities. He asked whether there have been injuries from firearms in foster care homes. Mr. Don Snyder, Department of Human Services Foster Care Administrator, said he is not aware of specific cases of injuries from firearms, but it is generally recognized to be safer to avoid unsecured firearms in home settings.

Ms. Andrews said the rule published as NDAC Section 75-03-15-04.1 was sent to the Legislative Council for publication by mistake and should not have been published. She said the rule has not proceeded through the proper rulemaking procedures. Committee counsel said the rule would be removed from the Administrative Code because it is invalid as it stands.

**It was moved by Representative Koppelman, seconded by Senator Bercier, and failed on a roll call vote that the committee carry over consideration of NDAC Section 75-03-14-03 relating to securing firearms in foster care facilities.** Voting in favor of the motion were Representatives Bernstein,

Klein, Koppelman, Sandvig, and Thoreson and Senator Bercier. Voting in opposition to the motion were Representatives Devlin and Nelson and Senators Fairfield, Fischer, Freborg, Klein, Lee, and Wardner. In discussion of the motion, Senator Klein said the state could be found liable for firearms injuries if this requirement is removed. He said he would not favor carrying over consideration of the rule while the committee awaits information relating to firearms injuries in foster care settings.

### **BOARD OF SOCIAL WORK EXAMINERS**

Chairman Devlin called on Mr. Tom Tupa, Board of Social Work Examiners, for testimony relating to February 2004 rules of the board. A copy of Mr. Tupa's prepared testimony is attached as Appendix AA.

### **STATE BOARD OF PHARMACY**

Chairman Devlin called on Mr. Howard C. Anderson, Jr., Executive Director, State Board of Pharmacy, for presentation of testimony regarding December 2003 rules of the board. A copy of Mr. Anderson's testimony is attached as Appendix BB.

### **PEACE OFFICER STANDARDS AND TRAINING BOARD**

Chairman Devlin called on Mr. Richard Bendish, Chairman, Peace Officer Standards and Training Board, for presentation of a request for an extension of time to adopt rules. A copy of the request is attached as Appendix CC.

**It was moved by Representative Nelson, seconded by Senator Bercier, and carried on a voice vote that an extension of time to adopt rules by the Peace Officer Standards and Training Board be approved.**

### **DEPARTMENT OF HUMAN SERVICES**

Senator Fairfield said the committee will await further information from the Department of Human

Services regarding the number of individuals affected by the changes to the Medicaid rules.

**It was moved by Senator Fairfield, seconded by Senator Bercier, and carried on a roll call vote that the committee hold over consideration of the Medicaid rules adopted by the Department of Human Services.**

In discussion of the motion, Representative Nelson said he has no problem with the committee obtaining further information about the number of individuals affected by the Medicaid rules changes, but he does not see how the committee could appropriately move to void those rules so it does not seem appropriate to carry over consideration of those rules.

Representative Koppelman said he supports carrying over consideration of the rules. He said it would not interfere with the effectiveness of the rule to carry over consideration of the rule while awaiting further information.

Senator Fairfield said one of the grounds to void administrative rules relates to the issue of legislative intent. She said cuts to the Department of Human Services budget could have been made in many areas and it would be appropriate to review whether there is evidence that the department followed legislative intent in making these decisions.

Voting in favor of the motion were Representatives Bernstein, Koppelman, and Sandvig and Senators Bercier, Fairfield, Fischer, Klein, and Lee. Voting in opposition to the motion were Representatives Devlin, Klein, Nelson, and Thoreson and Senators Freborg and Wardner.

The meeting was adjourned at 3:15 p.m.

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John Walstad  
Code Revisor

ATTACH:29