

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### ADMINISTRATIVE RULES COMMITTEE

Wednesday, November 19, 2003  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Representative William R. Devlin, Chairman, called the meeting to order at 1:00 p.m.

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

**Members absent:** Senators Dennis Bercier, Layton Freborg

**Others present:** See Appendix A

**It was moved by Representative DeKrey, seconded by Senator Fischer, and carried on a voice vote that the minutes of the July 15-16, 2003, committee meeting be approved as distributed.**

#### COMMITTEE UPDATE

Chairman Devlin called on committee counsel to update the committee on action pursuant to directives from the previous committee meeting. Committee counsel said the letter sent to agencies outlining questions to be addressed before today's Administrative Rules Committee meeting included a question, for the first time, on impact of rules on small entities under North Dakota Century Code (NDCC) Section 28-32-08.1, which was created by 2003 House Bill No. 1212, effective August 1, 2003. He said the new law applies to rules adopted after July 31, 2003, so it will not apply to all of the rules reviewed at this meeting. He said another provision of 2003 House Bill No. 1212 directed the Administrative Rules Committee to study the effects and operation of the new law requiring agency consideration of the effect of proposed administrative rules on small businesses, organizations, and political subdivisions. He said agencies have had little or no experience under the new law, so it is difficult to determine how to proceed with the study directive. Chairman Devlin said for the time being the committee will observe how agencies respond to the question regarding impact analysis for small entities. He said later in the interim the committee may request opinions from agencies on the operation of the new law.

Committee counsel said at the previous committee meeting the committee approved repeal of North

Dakota Administrative Code (NDAC) Section 75-02-02.1-30.1, amendment of NDAC Section 75-02-01.2-28.1, repeal of Section 92-01-02-21, and amendment of Sections 108-02-01-01, 108-02-01-04, 108-02-01-07, and 108-02-01-08. He said these repeals and amendments have now been incorporated in the North Dakota Administrative Code.

Committee counsel said the committee approved motions at the previous meeting to carry over consideration of rules adopted by the Superintendent of Public Instruction, Real Estate Appraiser Qualifications and Ethics Board, Workforce Safety and Insurance, and Department of Human Services. He said all these rules have been included for consideration on the agenda for this meeting.

Committee counsel said an opinion dated November 18, 2003, was issued by the Attorney General to the Superintendent of Public Instruction. He said the opinion relates to the impact on existing administrative rules of the Superintendent of Public Instruction after enactment of 2003 House Bill No. 1489. He said the 2003 legislation provided that the Superintendent of Public Instruction may not establish teacher qualification requirements that exceed those established by the Education Standards and Practices Board. He said the opinion of the Attorney General advised the Superintendent of Public Instruction to review existing administrative rules and amend or repeal those that establish teacher qualification requirements that exceed those established by law or rules of the Education Standards and Practices Board. He said it would be appropriate to seek information from the Superintendent of Public Instruction on how the Superintendent will proceed after issuance of the Attorney General's opinion. The chairman said an item should be added to the agenda for the next committee meeting to request the Superintendent of Public Instruction to update the committee on how the Superintendent of Public Instruction intends to bring existing administrative rules into compliance with 2003 House Bill No. 1489.

#### SUPERINTENDENT OF PUBLIC INSTRUCTION

Chairman Devlin called on Ms. Rosellen Sand, Department of Public Instruction legal counsel, for

testimony relating to rules of the Superintendent of Public Instruction carried over for consideration from the previous committee meeting.

Ms. Sand said the question raised at the previous committee meeting was whether coursework required by the rules for special education credentials are offered at North Dakota institutions of higher education. She distributed copies of a chart indicating which coursework is available at each institution of higher education. A copy of the chart is attached as Appendix B.

Representative Froelich said NDAC Section 67-11-17-03 requires a special education credential to include 20 semester hours of credit from coursework in each of the seven listed areas. He said this would total 140 semester hours at a minimum. He said he believes the language should have been similar to the language in Section 67-11-13-03, which indicates that credits must include coursework in each of the seven areas.

In response to a question from Representative Froelich, committee counsel said the language in question could be amended if the Superintendent of Public Instruction believes an amendment is appropriate and the committee approves the change. Chairman Devlin asked Ms. Sand to ask the Superintendent of Public Instruction whether he believes an amendment would be appropriate.

Ms. Sand said with regard to the opinion of the Attorney General suggesting a review of rules by the Superintendent of Public Instruction, the Superintendent requested the opinion because of concern that existing rules would exceed statutory authority after the 2003 legislative change. She said the Department of Public Instruction will be working with the Attorney General's office on necessary rules amendments to address the issues pointed out in the opinion.

### **REAL ESTATE APPRAISER QUALIFICATIONS AND ETHICS BOARD**

Chairman Devlin called on Mr. Bill Peterson, Assistant Attorney General and counsel to the Real Estate Appraiser Qualifications and Ethics Board, for presentation of testimony relating to rules of the board carried over from the previous committee meeting. A copy of Mr. Peterson's prepared testimony is attached as Appendix C.

Mr. Peterson said the board has proposed a suggested amendment to NDAC Section 101-03.1-03-01 which the board believes should address the committee's concerns regarding anonymous complaints against licensees.

**It was moved by Representative DeKrey, seconded by Representative Koppelman, and carried on a roll call vote that the Administrative Rules Committee agree with the Real Estate Appraiser Qualifications and Ethics Board**

**proposed amendment to NDAC Section 101-03.1-03-01.** Voting in favor of the motion were Representatives Devlin, Bernstein, DeKrey, Froelich, Klein, Koppelman, Nelson, Ruby, Sandvig, Thoreson, Wieland, and Wrangham and Senators Andrist, Fischer, Klein, Lee, and Wardner. No negative votes were cast.

### **WORKFORCE SAFETY AND INSURANCE**

Chairman Devlin called on Ms. Anne Jorgenson Green, Workforce Safety and Insurance staff counsel, for testimony relating to rules carried over for consideration from the previous committee meeting. A copy of Ms. Green's testimony is attached as Appendix D.

### **STATE DEPARTMENT OF HEALTH**

Chairman Devlin called on Ms. Arvy Smith, Deputy State Health Officer, for testimony relating to funeral service practitioner rules adopted by the State Department of Health. A copy of her prepared testimony is attached as Appendix E.

Chairman Devlin called on Mr. Kenan Bullinger, Director, Food and Lodging Division, State Department of Health, for presentation of testimony relating to food code rules amendments adopted by the State Department of Health. A copy of Mr. Bullinger's prepared testimony is attached as Appendix F.

Senator Klein inquired about industry representatives in attendance at the hearings on the food code rules. Mr. Bullinger said representatives of wholesale distributors, grocers, hospital food services, local health units, and others participated in the hearings. He said the federal food code is established with a great deal of input from affected industries and was the basis for the changes made to the department's rules.

Senator Klein asked whether the department rules just follow the federal Food and Drug Administration code. Mr. Bullinger said there are areas of difference but there is substantial uniformity.

Representative Wrangham asked about the automatic shutoff device required for vending machines under NDAC Section 33-33-04-21.2. Mr. Bullinger said most vending machines vending potentially hazardous food have an automatic shutoff device, so he believes most machines would comply with this rule.

Representative Delzer asked if the federal Food and Drug Administration has adopted these rules at the federal level, why does the state have to adopt the same rules. Mr. Bullinger said the federal rules are guidelines for state regulators and the state may use them, but is not required to do so.

Representative Koppelman said the Administrative Rules Committee needs to know when federal rules requirements are mandatory or optional. Mr. Bullinger said the food code rules are not mandatory but some federal rules, such as environmental rules, are mandatory.

Chairman Devlin called on Mr. Tim Meyer, Director, Division of Emergency Medical Services, State Department of Health, for testimony relating to emergency medical services rules and amendments adopted by the State Department of Health. A copy of Mr. Meyer's prepared testimony is attached as Appendix G.

Senator Lee inquired about the process to initiate these rules. Mr. Meyer said the department looked at rules from other states and tried to draw from their experience. Senator Lee said the air ambulance rules do not seem to have provisions that are as specific as the provisions governing ground ambulances regarding equipment that must be on board. Mr. Meyer said by definition an air ambulance must be equipped as an ambulance.

In response to a question from Representative Devlin, Mr. Meyer said air ambulance personnel must be emergency medical technicians as in specialty care transport ground services.

Senator Lee asked who makes the decision about what level of service and care is required for patients requiring medical emergency transportation. Mr. Meyer said it is the physician's choice usually.

In response to a question from Representative Delzer, Mr. Meyer said a pilot of an air ambulance is not trained as a medical service provider. In response to another question from Representative Delzer, Mr. Meyer said Medicare will reimburse patient transportation expenses for one person attending the patient in the back of an air ambulance and will reimburse at a higher level for two persons in the back of an air ambulance to provide services.

Chairman Devlin called on Representative Todd Porter, District 34, and part owner of Metro Area Ambulance Service, Inc. A copy of Representative Porter's prepared testimony is attached as Appendix H.

Representative DeKrey said it appears there are issues in the air ambulance rules in which it might be useful to have further discussion between the department and affected operators. **It was moved by Representative DeKrey, seconded by Representative Koppelman, and carried on a voice vote that the Administrative Rules Committee carry over consideration of the air ambulance service rules to allow the department and concerned parties further time for discussion of issues and possible recommendations for amendments.**

### STATE BOARD OF ANIMAL HEALTH

Chairman Devlin called on Dr. Larry Schuler, Executive Officer of the State Board of Animal Health and State Veterinarian, for testimony relating to brand inspection fee rules adopted by the board. A copy of Dr. Schuler's prepared testimony is attached as Appendix I. Dr. Schuler said the rules changes were made at the request of the North Dakota Stockmen's Association.

Senator Lee asked what percentage of cattle in North Dakota are branded. Mr. Wade Moser, Executive Director, North Dakota Stockmen's Association, said approximately 65 percent of cattle statewide are branded.

Senator Klein asked whether the brand recording fee increase was needed to keep the brand inspection program viable. Dr. Schuler said it appears from North Dakota Stockmen's Association records that there have been losses in administering the brand inspection workforce and functions and the fee increase was necessary to keep the program viable. Senator Klein said it appears the vote to approve the rules changes was 4-3 and asked whether this indicates a lot of discussion among board members. Dr. Schuler said there was extensive discussion of this issue before the vote to approve the rules.

### STATE BOARD OF MEDICAL EXAMINERS

Chairman Devlin called on Mr. Rolf P. Sletten, Executive Secretary and Treasurer, State Board of Medical Examiners, for presentation of testimony relating to rules changes adopted by the board. A copy of Mr. Sletten's prepared testimony is attached as Appendix J.

### PUBLIC SERVICE COMMISSION

Chairman Devlin called on Mr. Jon Mielke, Executive Secretary, Public Service Commission, for testimony relating to pipeline safety and weights and measures rules adopted by the commission. A copy of Mr. Mielke's prepared testimony is attached as Appendix K.

### DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Ms. Melissa Hauer, Department of Human Services attorney, for presentation of testimony relating to Department of Human Services rulemaking.

Ms. Hauer said the Administrative Rules Committee approved a motion to carry over consideration of rules considered at the July 2003 meeting. A copy of her testimony relating to the carried over rules is attached as Appendix L. Ms. Hauer proposed amendments in her testimony to NDAC Sections 75-02-02-10.2 and 75-02-06-02.2.

**It was moved by Representative DeKrey, seconded by Representative Klein, and carried on a roll call vote that the committee agree with the Department of Human Services on the proposed amendments to NDAC Sections 75-02-02-10.2 and 75-02-06-02.2 as suggested in the testimony presented by the department.** Voting in favor of the motion were Representatives Devlin, Bernstein, DeKrey, Delzer, Klein, Koppelman, Nelson, Ruby, Sandvig, Thoreson, Wieland, and Wrangham and Senators Andrist, Fairfield, Fischer, Klein, Lee, and Wardner. No negative votes were cast.

Ms. Hauer presented testimony from the Department of Human Services relating to child support guidelines rules amendments. A copy of her prepared testimony is attached as Appendix M.

Ms. Hauer presented a request from the Department of Human Services for approval by the Administrative Rules Committee of the repeal of NDAC Chapter 75-03-22, under the authority of NDCC Section 28-32-18.1, which allows for repeal of obsolete administrative rules. A copy of Ms. Hauer's prepared testimony is attached as Appendix N.

**It was moved by Representative Koppelman, seconded by Representative DeKrey, and carried on a roll call vote that the Administrative Rules Committee approve the proposed repeal of NDAC Chapter 75-03-22 under the authority of NDCC Section 28-32-18.1 on the grounds that the rules are obsolete and duplicative of federal law.** Voting in favor of the motion were Representatives Devlin, Bernstein, DeKrey, Delzer, Klein, Koppelman, Nelson, Ruby, Sandvig, Thoreson, Wieland, and Wrangham and Senators Andrist, Fairfield, Fischer, Klein, Lee, and Wardner. No negative votes were cast.

Chairman Devlin called on Ms. Diane Szudera, Home on the Range, for comments on Department of Human Services rules carried over from the June 2003 meeting. Ms. Szudera said she presented concerns of the Home on the Range to the amendments of NDAC Section 75-03-15-04 at the previous committee meeting. Ms. Szudera said the particular issue of concern to the Home on the Range is the removal of the cost-of-living adjustment, which she said imposes a great hardship on the operation of the Home on the Range. She said the Home on the Range is still concerned about the impact of this change.

Representative Delzer said the Appropriations Committee in the 2003 appropriation for the Department of Human Services approved a budget without a cost-of-living adjustment for the Home on the Range and similar facilities. He said he does not believe the Department of Human Services rule is in conflict with the 2003 legislation. He said there may be other options to provide funding for cost-of-living adjustments for the Home on the Range but the Administrative Rules Committee does not appear to have grounds to void the rule that was adopted.

Representative Nelson asked Ms. Hauer whether the Department of Human Services has budget flexibility to address cost-of-living increases for the Home on the Range. Ms. Hauer said she is not certain whether the budget has funding that could be used for that purpose. Representative Delzer said for this biennium the Department of Human Services budget contains authority for shifting of funds among programs without approval of the Emergency Commission or Budget Section. He said funding adjustment is not something the Administrative Rules Committee can do.

## BOARD OF SOCIAL WORK EXAMINERS

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

## SUPERINTENDENT OF PUBLIC INSTRUCTION

Chairman Devlin called on Ms. Sand for presentation of suggested amendments from the Superintendent of Public Instruction. A copy of the letter from the Superintendent of Public Instruction and attachments is attached as Appendix P. **It was moved by Senator Andrist, seconded by Senator Lee, and carried on a roll call vote that the Administrative Rules Committee agree with the Superintendent of Public Instruction on amendments to NDAC Sections 67-11-16-03 and 67-11-17-03, relating to clarification of the coursework requirements of those sections.** Voting in favor of the motion were Representatives Devlin, Bernstein, DeKrey, Delzer, Klein, Koppelman, Nelson, Ruby, Sandvig, Thoreson, Wieland, and Wrangham and Senators Andrist, Fairfield, Fischer, Klein, Lee, and Wardner. No negative votes were cast.

## COMMITTEE DISCUSSION

**It was moved by Senator Klein, seconded by Representative Klein, and carried on a voice vote that the Administrative Rules Committee carry over consideration of the food code amendments under NDAC Chapter 33-33-04 as adopted by the State Department of Health.**

Representative Koppelman said the information requested from agencies in reports to the committee on rulemaking contains an inquiry about whether the rules were related to federal requirements. He said that question should be made more specific to allow the committee to be informed whether rules are mandated or suggested by federal requirements. He said it appears there are different circumstances that exist with relations between federal law and rules and state agency rules. He said it is important for the committee to understand exactly how much discretion exists for state agencies in adoption of rules from federal standards.

No further business appearing, Chairman Devlin adjourned the meeting at 4:05 p.m.

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John Walstad  
Code Revisor

ATTACH:16