

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday, September 14, 2010
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Jerry Klein, Chairman, called the meeting to order at 9:00 a.m.

Members present: Senators Jerry Klein, John M. Andrist, Tom Fischer, Layton W. Freborg, Tracy Potter; Representatives Wesley R. Belter, Randy Boehning, Stacey Dahl, Jim Kasper, George J. Keiser, Kim Koppelman, Joe Kroeber, Blair Thoreson, Francis J. Wald, Dwight Wrangham

Members absent: Senator Joan Heckaman; Representatives Chuck Damschen, Duane DeKrey, Mary Ekstrom, Jon Nelson, Lonny Winrich

Others present: See [Appendix A](#)

It was moved by Representative Wald, seconded by Senator Fischer, and carried on a voice vote that the minutes of the previous meeting be approved as distributed.

CITIZEN COMMENTS

Chairman Klein said Ms. Sophia Preszler requested time to address the committee. He invited Ms. Preszler to share her concerns with the committee. A copy of Ms. Preszler's prepared testimony is attached as [Appendix B](#).

ATTORNEY GENERAL OPINION

Chairman Klein called on committee counsel to review a letter opinion ([Appendix C](#)) issued by the Attorney General's office in response to several questions raised by the Administrative Rules Committee.

Committee counsel said the opinion concludes that administrative agencies have no inherent authority to impose criminal or civil penalties but must obtain that authority through statute. He said the opinion determined that the Legislative Assembly may delegate authority to an administrative agency to define terms or elements of an offense subject to a statutory penalty. He said the Attorney General examined case law and determined that courts have generally upheld civil or criminal penalties even when an administrative rule defines the offense or designates the penalty.

Senator Andrist said he is concerned with the trend to allow civil penalties and amounts to be established by administrative rules. He said he believes the Legislative Assembly should be more restrictive in the authority it grants to agencies to designate civil penalties.

STATE GAMING COMMISSION

Chairmen Klein called on Mr. Keith Lauer, Director, Gaming Division, Attorney General's office, for comments on rules on the Gaming Commission carried over for consideration from the previous committee meeting. Mr. Lauer said the rules were carried over, and it appears the issue of concern to the committee is whether poker events may be conducted on multiple sites. He distributed copies of North Dakota Century Code (NDCC) Section 53-06.1-07.2 relating to conduct of poker by eligible organizations. He also distributed copies of North Dakota Administrative Code (NDAC) Chapter 99-01.3-09 relating to poker rules adopted by the Gaming Commission. He said the statutory provision provides that poker may be conducted on not more than two occasions per year. He said the administrative rules provide that an occasion for poker may include more than one authorized site. He said the rules also provide that tournament activity is defined to be an occasion that is not more than three consecutive calendar days of play.

Representative Kasper said poker tournaments that he has participated in may run over several weekends. He said these tournament activities are conducted in Minnesota. Mr. Lauer said the North Dakota rules governing poker are more restrictive than the rules governing Minnesota tournaments in which Representative Kasper has participated.

STATE DEPARTMENT OF HEALTH

Chairman Klein called on Mr. Tom Nehring, Director, Division of Emergency Services and Trauma, State Department of Health, for testimony ([Appendix D](#)) regarding rules carried over for consideration from the previous meeting.

Mr. Nehring said the Division of Emergency Services and Trauma contacted the ambulance services for Mandan and West Fargo. He said those services assured the division they have no difficulty meeting the nine-minute response times and would have no problems with inserting Mandan and West Fargo in the nine-minute response time category under NDAC Section 33-11-01.2-17(1)(b). He suggested committee approval of an amendment to accommodate that change.

Mr. Nehring said concern was raised about ambulance services' vehicles used in the emergency vehicle operations course. He said the new rules do

not require the driving portion of the emergency vehicle operations course and make this an optional part of the curriculum.

It was moved by Representative Koppelman, seconded by Representative Keiser, and carried on a roll call vote that the committee agree with the department on an amendment to add West Fargo and Mandan to the nine-minute response time category under NDAC Section 33-11-01.2-17(1)(b). Senators Klein, Andrist, Fischer, Freborg, and Potter and Representatives Boehning, Dahl, Keiser, Koppelman, Kroeber, Thoreson, Wald, and Wrangham voted "aye." No negative votes were cast.

Representative Boehning asked if there should be an exception for ambulance response times for winter weather conditions. Mr. Nehring said an exception already exists for weather conditions. He said the division looks at specific calls and decides if it is representative of ordinary circumstances before it is included in the sample used to compare response times.

Representative Wald asked if ambulances have a requirement for global positioning system locators, especially in rural areas. Mr. Nehring said use of these devices is an excellent suggestion. He said global positioning system locators are already in use by some services. He said this requirement would be a consideration for the Legislative Assembly and the State Department of Health if funding is available.

Representative Keiser asked if legislation should be enacted to add extenuating circumstances for response times. Mr. Nehring said the State Department of Health already follows this practice, but he is not certain whether the statutory provisions specifically require consideration of extenuating circumstances.

STATE BOARD OF EXAMINERS FOR NURSING HOME ADMINISTRATORS

Chairman Klein called on Ms. Bev Herman, Executive Director, State Board of Examiners for Nursing Home Administrators, for clarification of issues raised at the previous committee meeting. A copy of Ms. Herman's prepared testimony is attached as Appendix E.

It was moved by Representative Koppelman, seconded by Representative Wald, and carried on a roll call vote to approve amendment of NDAC Section 55-02-01-07(1) to retain the language requiring good moral character. Senators Klein, Andrist, Fischer, Freborg, and Potter and Representatives Boehning, Koppelman, Thoreson, Wald, and Wrangham voted "aye." Representatives Dahl, Kasper, Keiser, and Kroeber voted "nay."

MARRIAGE AND FAMILY THERAPY LICENSURE BOARD

Chairman Klein called on Reverend Larry J. Giese, President, Marriage and Family Therapy Licensure

Board, for testimony (Appendix F) relating to rules carried over for consideration from the previous committee meeting.

Representative Keiser asked if the code of ethics for marriage and family therapists covers drug abuse. Reverend Giese said the rules prohibit a therapist from practicing under the influence of alcohol or any controlled substance not lawfully prescribed.

STATE BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

Chairman Klein called on Mr. Clifford Keller, Executive Director, State Board of Registration for Professional Engineers and Land Surveyors, for testimony (Appendix G) regarding October 2010 rules of the board.

GAME AND FISH DEPARTMENT

Chairman Klein called on Mr. Greg Power, Fisheries Chief, Game and Fish Department, for testimony (Appendix H) relating to October 2010 rules of the department.

Mr. Power said the wrong version of the amendments to NDAC Section 30-03-01.1-05 was submitted for publication. He said a corrected version is attached to his testimony, which should be adopted.

Senator Potter asked if zebra mussels in the Red River would move into Devils Lake. Mr. Power said zebra mussels do not move upstream or over dams, so they will not move into Devils Lake from the Red River.

Representative Wrangham said constituents are not happy with the rule on draining live wells. He asked if it would be effective to allow taking fish home in a live well and prohibit putting a boat in the water with water in the live well. Mr. Power said that possibility was considered, but enforcement would be extremely difficult. He said enforcement is more feasible with the approach in the rules that moving a boat with water in the live well is an offense.

In response to a question from Representative Koppelman, Mr. Paul Schadewald, Chief, Administration Services Division, Game and Fish Department, said criminal penalties have been removed from the Game and Fish Department administrative rules unless specific statutory authority exists for the penalty.

It was moved by Representative Koppelman, seconded by Representative Boehning, and carried on a roll call vote that the committee agree with the Game and Fish Department on the suggested correction to NDAC Section 30-03-01.1-05. Senators Klein, Andrist, Fischer, Freborg, and Potter and Representatives Belter, Boehning, Dahl, Kasper, Keiser, Koppelman, Thoreson, Wald, and Wrangham voted "aye." No negative votes were cast.

STATE BOARD OF PHARMACY

Representative Dahl said copies of a district court decision from Cass County (Appendix I) were distributed to committee members. She said the decision relates to the substances that would be declared controlled substances under the rules of the State Board of Pharmacy. She requested committee counsel to summarize the district court decision. Committee counsel said District Judge Wickham Corwin issued an opinion dated September 8, 2010, stating his conclusion that the State Board of Pharmacy did not substantially comply with the notice requirement applicable to adoption of an emergency rule. He said Judge Corwin pointed out the statutory requirement that, as part of emergency rulemaking, the agency shall take appropriate measures to make interim final rules known to every person who may be affected by them. He said Judge Corwin reasoned that taking appropriate measures to make emergency rules known to affected persons is a flexible requirement, and because the consequences of this rule would include possible imprisonment, an elevated effort by the agency to provide public notice is required.

Committee counsel said the court decision creates a situation that has not been considered before by the Administrative Rules Committee. He said the committee has before it the rule adopted by the State Board of Pharmacy. He said the rule is accompanied by a letter of approval of emergency status signed by Governor John Hoeven and the letter from the Attorney General stating that the rule as submitted for publication is approved as to legality, meaning the Attorney General believes the requirements of NDCC Chapter 28-32 have been met. He said on the other hand, the committee has before it a decision of Judge Corwin concluding that the State Board of Pharmacy did not substantially comply with the notice requirement for adoption of an emergency rule. He said it appears the judge's decision means the rule was not valid at the time the defendants were charged with offenses but does not conclude that the rule would be invalid under the nonemergency timeline for rulemaking, which would make the rule effective October 1, 2010. He said out of deference to the district court decision, the committee could conclude that the effective date of the rule is October 1, 2010. To the contrary, he said, the committee could give deference to the opinion of the Attorney General that the State Board of Pharmacy met the requirements of Chapter 28-32, which would mean the effective date of the rule is February 26, 2010. He said the statutory provisions of Chapter 28-32 appear to make the conclusion of the Attorney General binding on the committee in regard to questions of procedural compliance. There is no mention in Chapter 28-32 of the significance of a district court decision. He said he does not believe the decision of a district court is binding upon other district courts, and there are pending cases in other district courts in which the effective date of the rule would be dispositive.

Chairman Klein called on Mr. Howard C. Anderson Jr., Executive Director, State Board of Pharmacy, for testimony (Appendix J) relating to rules adopted by the board.

Chairman Klein said it appears the intention of the rules is to add the listed substances to the statutory schedules of controlled substances. Mr. Anderson said that is correct.

Committee counsel asked if the State Board of Pharmacy intends to seek formal statutory placement of these substances on the controlled substance schedules by introducing legislation in 2011. Mr. Anderson said the board intends to introduce legislation to place these substances on statutory lists.

In response to a question from Representative Koppelman, Mr. Anderson said the board practice has been that when it is determined people are using potentially harmful substances that have no medical use and are not on the controlled substances schedule, the board adds the substance to the controlled substances schedule by rule until it is possible to obtain legislative approval for statutory changes. He said because the Legislative Assembly only meets every two years, it is necessary to act through administrative rules when new substances are determined to be potentially harmful to the public.

Senator Potter asked what scientific information was considered by the board in determining that these substances should be added to the controlled substances schedule. Mr. Anderson said evidence was made available indicating that people were being injured by using these substances, and there is no valid medical use for the substances.

Representative Koppelman asked if other states have listed these substances as controlled substances. Mr. Anderson said many states have done so and others will.

In response to a question from Senator Klein, Mr. Mike Mullen, Assistant Attorney General, Attorney General's office, said notice of rulemaking was properly given for these rules in the opinion of the Attorney General. He said a letter of approval of the rules to that effect was issued by the Attorney General and attached to Mr. Anderson's testimony.

Representative Koppelman said it appears from reading the district court opinion that evidence was not provided on publication of newspaper notices. Mr. Mullen said that perhaps that was the case, and the opinion seems to indicate that the judge believes that there is some kind of sliding scale of efforts to provide public notice depending on the severity of consequences of the rule. He said the Attorney General does not agree that there is a sliding scale of efforts to provide notice, and the Attorney General issued an opinion that the statutory notice requirements in this instance were met by the board.

Representative Keiser said it appears that the statutory provisions are not more specific for emergency rules on how to provide notice. He said he thinks the Legislative Assembly should examine refining the notice requirements for emergency rules.

Senator Potter asked if there was a taking of property in this instance because a product that was legal became illegal overnight. Mr. Mullen said there was not a taking in his view. He said the product became contraband.

Senator Potter asked if the committee would be validating emergency status of the rule by approving the rule. Mr. Mullen said that would be the case.

In response to a question by Representative Kasper, Mr. Mullen said Judge Corwin did not conclude that notice must be given to every affected party for emergency rules, but that appropriate measures must be taken to notify affected parties.

PUBLIC SERVICE COMMISSION

Chairman Klein called on Ms. Illona Jeffcoat-Sacco, general counsel, Public Service Commission, for testimony ([Appendix K](#)) relating to two sets of rules adopted by the Public Service Commission.

Ms. Jeffcoat-Sacco also distributed copies of a request ([Appendix L](#)) from the Public Service Commission requesting an extension of time for adoption of rules to implement 2009 Senate Bill No. 2140. She said the rules have been approved by the Attorney General but also must obtain approval from the federal Office of Surface Mining Reclamation and Enforcement prior to final adoption, and federal approval has not been finalized.

It was moved by Representative Dahl, seconded by Representative Wald, and carried on a voice vote that the committee approve the requested extension of time for adoption of reclamation rules by the Public Service Commission.

DEPARTMENT OF HUMAN SERVICES

Chairman Klein called on Mr. Jonathan Alm, legal counsel, Department of Human Services, for information on rules adopted by the department. Mr. Alm said at the June committee meeting, information was requested on illegal aliens applying for or receiving aid from the Department of Human Services. He distributed copies of information ([Appendix M](#)) on Department of Human Services programs and illegal alien status.

Mr. Alm distributed and reviewed copies of the report ([Appendix N](#)) of the Department of Human Services regarding level of care screening for nursing care services. He distributed and reviewed copies of the report ([Appendix O](#)) of the Department of Human Services regarding ratesetting for nursing home care rules.

Mr. Alm distributed and reviewed copies of the report ([Appendix P](#)) of the Department of Human Services regarding early childhood services rules.

Chairman Klein said it appears there were numerous comments submitted regarding the content of the early childhood services rules from child care providers. He asked how the Department of Human

Services addressed all of the comments. Mr. Alm said the department reviewed all comments received, and the comments and suggestions were screened by the advisory committee established for that purpose.

Representative Keiser asked why the department did not wait for the legislative session to seek legislative changes on these topics. Mr. Alm said 2009 House Bill No. 1472 required rules to be adopted and effective before January 1, 2011.

Chairman Klein invited comments of interested persons in attendance.

Ms. Linda Everts, Bismarck Child Care Connection, said she is appearing on behalf of several child care providers who are not able to be in attendance today because they are busy providing child care services.

Ms. Everts said NDAC Sections 75-03-10-24 and 75-03-10-25 are major concerns. She said these rules contain very specific requirements, such as checking on sleeping infants every 15 minutes. She said these specific restrictions are a possible basis for future lawsuits against providers because these requirements would now have the force of law. She said the rules in these sections should be guidelines if they are truly necessary. She said nitpicky regulations should not be law. She said providers have told her they will drop their licenses if these rules go into effect. She said some providers have been warned not to contact legislators with concerns about these rules.

Representative Koppelman said the report of warnings to providers not to contact legislators concerns him. He requested Ms. Everts to provide more information on this because legislators should be aware of such behavior.

Representative Dahl asked if the concerns of providers are restricted to the two sections of rules by Ms. Everts. Ms. Everts said these are the major concerns, but there are other issues with the rules as indicated in the comments submitted to the department.

Ms. Jennifer Barry, Early Childhood Services Administrator, Children and Family Services Division, Department of Human Services, said the department and advisory boards have had very substantial interaction on content of the early childhood services rules. She said department representatives have spoken with local associations of child care providers and had many positive comments. She said there was concern expressed about the provisions of NDAC Sections 75-03-10-24 and 75-03-10-25. She said with regard to the requirement of checking on sleeping infants every 15 minutes, there is an option of having a monitor in the room with the child. She said the use of the monitor was added by the department as suggested by comments received from providers.

It was moved by Representative Koppelman, seconded by Representative Keiser, and carried on a roll call vote that the committee carry over consideration of the rules in NDAC Article 75-03 relating to early childhood services. Senators

Klein, Andrist, Fischer, and Potter and Representatives Belter, Boehning, Dahl, Keiser, Koppelman, Thoreson, Wald, and Wrangham voted "aye." No negative votes were cast.

Representative Keiser said he hopes the department and concerned parties can agree on accommodation in the rules of concerns expressed.

RULEMAKING STATISTICS

Chairman Klein called on committee counsel for presentation of a memorandum entitled Administrative Rulemaking Statistics 2009-10.

Committee counsel said the number of sections and pages of rules reviewed by the Administrative Rules Committee substantially increased from the comparable amount for the previous biennial period.

COMMITTEE DISCUSSION

Representative Koppelman said that it would be useful to have a memorandum for the next committee meeting detailing the process that applies for emergency rulemaking.

Senator Potter said with regard to the pharmacy rules, he has some concerns about endorsing the procedure that was followed.

Representative Koppelman said that his belief is that the Administrative Rules Committee cannot inject itself between the judicial and executive branches

regarding the effective date of the rules. He said the Attorney General concluded that legality of the rulemaking procedure met statutory requirements. He said one district court found the notice inadequate for emergency rulemaking. He said he believes the committee should not foreclose further consideration in other district courts or the Supreme Court and should publish the rule with the emergency effective date in accordance with the Attorney General opinion.

Ms. Jeffcoat-Sacco provided a written response (Appendix Q) to a question asked of her earlier in the meeting regarding federal funding for the coal mining reclamation project

It was moved by Representative Koppelman, seconded by Representative Keiser, and carried on a voice vote that the chairman and the staff of the Legislative Council be requested to prepare a report of the committee to the Legislative Management.

No further business appearing, Chairman Klein adjourned the meeting at 2:15 p.m.

John Walstad
Code Revisor

ATTACH:17