

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

## ADMINISTRATIVE RULES COMMITTEE

Thursday, June 10, 2010  
Prairie 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, Tom Fischer, Joan Heckaman, Tracy Potter; Representatives Randy Boehning, Stacy Dahl, Chuck Damschen, Jim Kasper, George J. Keiser, Kim Koppelman, Joe Kroeber, Blair Thoreson, Francis J. Wald, Lonny Winrich, Dwight Wrangham

**Members absent:** Senators John M. Andrist, Layton W. Freborg; Representatives Wesley R. Belter, Duane DeKrey, Mary Ekstrom, Jon Nelson

**Others present:** Representative Lisa Wolf, member of the Legislative Management, was also in attendance.

See Appendix A for additional persons present.

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

### HUMAN RESOURCE MANAGEMENT SERVICES

Chairman Klein called on Ms. Laurie Sterioti Hammeren, Director, Human Resource Management Services, Office of Management and Budget, for testimony (Appendix B) relating to rules adopted by the division.

Ms. Sterioti Hammeren pointed out five bills enacted in 2009 that are implemented by changes to the rules adopted by the division. She said the statutory provisions relate to employer-paid tuition reimbursement required upon separation from employment within two years of receiving the tuition, state employee bonus payment eligibility, agency employee grievance procedures, exhaustion of internal grievance process procedures before commencing other action, and nonclassified employee reprisal claims.

Ms. Sterioti Hammeren described changes under the federal Fair Labor Standards Act and Genetic Information Nondiscrimination Act that required adjustment to state rule provisions.

Ms. Sterioti Hammeren said a summary and consideration of comments regarding comments received from the public is attached as an appendix to her testimony. She described the rules on which comments were received.

Representative Boehning asked how tuition reimbursement upon termination is collected from

employees. Ms. Sterioti Hammeren said tuition reimbursement may not be deducted from the last paycheck of an employee because that is prohibited by law. She said the procedure followed by agencies to determine an acceptable method of reimbursement usually results in the employee simply writing a check to the agency for the amount of the reimbursable prorated tuition paid by the employer.

### NORTH DAKOTA LOTTERY

Chairman Klein called on Mr. Randy Miller, Director, North Dakota Lottery, for testimony (Appendix C) relating to North Dakota Lottery rules.

Representative Kasper said the constitutional provision allowing a lottery in North Dakota appears to not authorize multiple lotteries. He said it appears the North Dakota Lottery has now implemented five different lottery games and asked if that complies with the constitutional provision allowing operation of a lottery. Mr. Miller said he believes the constitutional provision permits the state to join a multistate lottery. He said the games operated in North Dakota are under the jurisdiction of the Multi-State Lottery Association and are conducted in accordance with the rules of that organization. Representative Kasper asked if there is an official Attorney General's opinion written on that issue. Mr. Miller said he believes such an opinion exists and will provide copies to the committee.

In response to a question from Senator Klein, Mr. Miller said the Lottery Advisory Commission within the office of the Attorney General reviewed the proposed rules relating to addition of the Mega Millions game on January 15, 2010. He said notice of hearing was filed with the Legislative Council, and hearings were conducted. Senator Klein said the Attorney General approved the rules as to legality. Mr. Miller said that is correct.

Representative Koppelman asked if Mr. Miller sees any conflict of interest in being under the office of the Attorney General and adopting rules that must be reviewed as to legality by the office of the Attorney General. Mr. Miller said he does not believe there is a conflict. He said the Lottery Advisory Commission makes recommendations, but it is the final decision of the Attorney General that determines whether the rules have been adopted in accordance with established statutory requirements.

Representative Koppelman asked why the rush to implement another lottery game constitutes an emergency for rulemaking purposes to allow adoption of the rules prior to the review of those rules by the Administrative Rules Committee. Mr. Miller said North Dakota Century Code (NDCC) Chapter 53-12.1 permits the Attorney General to adopt emergency rules with regard to implementation of lottery games without the usual requirements for emergency rule adoption. He said the statutory provision was put in place by the Legislative Assembly.

Representative Wrangham asked if the Mega Millions game and the other games implemented by the North Dakota Lottery are multistate lottery games. Mr. Miller said each game conducted by the North Dakota Lottery is a multistate lottery game.

Representative Keiser said he questions the adoption of the additional game on an emergency basis. He said it appears there were approximately six months of deliberation involved, and there would have been time to issue notice of hearing and adopt rules to present to the Administrative Rules Committee for consideration before implementing the game. He said it would be better to plan ahead, and legislators may have concerns about potential abuse of emergency rulemaking authority. Mr. Miller said he does not believe the action was an abuse of emergency rulemaking. He said participating states arrived at a decision to implement the Mega Millions game on a very short timetable. He said when he became aware of the new game, he did not believe North Dakota would be able to implement the game on the timetable established by participating states.

Senator Potter asked if the state lottery considered the effect of the additional lottery games on charitable gaming organizations. Mr. Miller said he discussed that issue with Mr. Keith Lauer, Director, Gaming Division, Attorney General's office. Mr. Miller said the consensus is that lottery games do not result in takings from charitable organizations. He said there is little impact from the lottery on charitable gaming activity, and it is believed that the smoking ban in bars has had a larger negative impact on charitable gaming activity. He said lottery games and charitable gaming occur in different establishments, and there is no immediate gratification from participating in the lottery as there is in charitable gaming.

Representative Koppelman said there has been some concern with an increasing number of games operated under the voter-approved banner of multistate lottery. He said every time the Multi-State Lottery Association adopts a new game, North Dakota will almost be forced to also adopt a new game. Mr. Miller said this is a concern of his staff and the office of the Attorney General, and consideration has been given to rotating out one of the existing games if, in the future, an additional game is added.

In response to a question from Senator Klein, Mr. Miller said it is not expected or intended to continually increase lottery revenues. He said anticipated revenues of approximately \$12.4 million to

\$12.6 million for the biennium are reasonable. He said fiscal year 2009 ticket sales were approximately \$21.7 million, and in fiscal year 2010 there has been some cannibalization from other games.

Representative Thoreson asked whether the Multi-State Lottery Association is looking to add additional lottery games. Mr. Miller said the Multi-State Lottery Association is always seeking ways to expand lottery sales. He said there has been discussion of a nationwide lottery game and a world lottery association. He said he will submit updates to the Administrative Rules Committee and the Legislative Assembly as developments occur.

In response to questions from Representative Koppelman, Mr. Miller said lottery advertising expenses are approximately 2 percent to 3 percent of the proceeds and total about \$1.3 million per biennium. He said funding from lottery revenues for addiction services totals approximately \$200,000 per year.

## STATE DEPARTMENT OF HEALTH

Chairman Klein called on Mr. Tom Nehring, Director, Division of Emergency Medical Services and Trauma, State Department of Health, for testimony (Appendix D) relating to rules adopted by the department.

Mr. Nehring said two rules changes were required by statutory changes made in 2009. He said 2009 legislation established trauma center designation and amended provisions relating to quick response units. In addition, he said, the State Department of Health conducted meetings with the Emergency Medical Services Advisory Committee and State Trauma Advisory Committee which resulted in recommended rules changes.

Senator Klein asked what results from failure of an ambulance service to meet response times. Mr. Nehring said revocation of license status is possible. In response to a question from Representative Wrangham, Mr. Nehring said the rules apply to all North Dakota licensed ambulance services, including volunteer ambulance services. He said ambulance services can meet these requirements, and the most significant issue is staffing requirements.

Representative Keiser said it appears it may be appropriate for the State Department of Health to address several issues. He said rather than mentioning four major cities, description should be made of four metro areas to incorporate West Fargo and Mandan service with Fargo and Bismarck service. He said for rural areas a 90 percent requirement to meet response times should be relaxed to provide more flexibility based on unforeseen circumstances or other issues. He said he would encourage the department to review these issues.

Representative Boehning said he is opposed to the rules as presented. He said more information is required on response times. Mr. Nehring said the response times established for goals of ambulance

services in different categories were established on the basis of ambulance run report data. He said he believes the data supports the response time criteria established, and he will provide information to the committee.

Mr. Nehring provided a copy of information to the committee, attached as Appendix E. He recommended that the committee hold over the rules relating to major city response times relating to West Fargo and Mandan. He said ambulance services in those cities both stated that they would have no difficulty meeting the nine-minute response time standard. He also suggested that the committee carry over consideration of the response time rules for approval at a future date.

Chairman Klein called on Mr. David L. Glatt, Environmental Health Section Chief, State Department of Health, for testimony (Appendix F) relating to water quality standards rules adopted by the department.

Representative Wald said use of water for fracturing in oil wells within the Bakken Formation and the possibility of federal regulation are issues of concern in western North Dakota. He asked if Mr. Glatt anticipates federal regulation. Mr. Glatt said water for fracturing in Bakken Formation wells is not an issue in North Dakota because of the depth of Bakken Formation wells. He said the State Department of Health has formally advised the Environmental Protection Agency of its opinion that a national standard is not appropriate for wells in North Dakota. He said wells in North Dakota have not experienced the problems that have been experienced in other parts of the country.

Representative Keiser asked if there are any provisions in the water quality rules that were not required by federal law. Mr. Glatt said the only alteration from federal requirements relates to a change in sulfate levels for the Sheyenne River. Representative Keiser asked if the sulfate levels provision exceeds minimum federal requirements. Mr. Glatt said the change does not exceed federal minimum requirements.

### **BOARD OF MESSAGE**

Chairman Klein called on Ms. Karen Wojahn, Board of Massage, Beach, for testimony (Appendix G) regarding rules adopted by the board.

Representative Thoreson inquired about the comments received regarding the fee increase. Ms. Wojahn said the board has not changed this fee in many years, and the costs of administration by the board have increased.

Representative Wrangham said the rules provision relating to licensees whose licenses have expired is unclear. Ms. Wojahn said she does not believe a lapsed licensee would be required to retake the examination. Representative Wrangham said the rule requires passage of the current licensing examination, which would require payment of the testing fee. Ms. Wojahn said she would interpret the provision to

require previous passage of the license examination and documentation in the licensee's file of passage of that examination. Senator Klein said the word "current" in the amendment appears to require taking the examination again. Representative Boehning said the rules amendment overstrikes the number of hours required for continuing education. He said the change makes it unclear how many hours of continuing education will be required. He asked how the number of hours will be determined. Ms. Wojahn said in North Dakota Administrative Code (NDAC) Section 49-01-02-05(1), which overstrikes the 18-hour requirement, an amendment should have been included to insert 16 hours as the requirement for continuing education. She said the requirement should be for 16 hours every year or 32 hours every two years. Representative Boehning said this amendment should be incorporated to clarify the requirement.

In response to questions from Representative Wald, Ms. Wojahn said there are seven massage therapy schools in North Dakota. She said three of these schools will no longer offer training after this year.

**It was moved by Representative Boehning, seconded by Representative Koppelman, and carried on a roll call vote that the committee agree with the Board of Massage on an amendment to NDAC Section 49-01-02-05(1) to include a continuing education requirement of 32 hours of continuing education every two years.** Voting in favor of the motion were Senators Klein, Fischer, and Heckaman and Representatives Boehning, Dahl, Damschen, Kasper, Keiser, Koppelman, Thoreson, Wald, Winrich, and Wrangham. No negative votes were cast.

Representative Wrangham said he believes there is an issue for consideration of an amendment relating to the language in NDAC Section 49-01-02-03 relating to passing the current examination. Chairman Klein said the committee could hold over consideration of this provision if Ms. Wojahn would like to consult with the board regarding its intention on this provision. Ms. Wojahn said she would appreciate the opportunity to discuss the issue with the board.

**It was moved by Representative Koppelman, seconded by Representative Keiser, and carried on a roll call vote that the committee hold over consideration of the amendment language in NDAC Section 49-01-02-03(4), pending recommendation of the board regarding the intended examination requirement.** Voting in favor of the motion were Senators Klein, Fischer, Heckaman, and Potter and Representatives Boehning, Dahl, Damschen, Kasper, Keiser, Koppelman, Kroeber, Thoreson, Wald, Winrich, and Wrangham. No negative votes were cast.

Senator Heckaman said no testimony was received relating to the rules on the statewide trauma system. She said testimony must be received from the department regarding these rules. Chairman Klein

said he agrees and made a note that testimony should be obtained on the trauma system rules.

### **STATE BOARD OF EXAMINERS FOR NURSING HOME ADMINISTRATORS**

Chairman Klein called on Ms. Pam Cook, Executive Assistant, State Board of Examiners for Nursing Home Administrators, for presentation of testimony (Appendix H) provided by Ms. Bev Herman, Executive Secretary of the board. Ms. Cook said she is appearing on behalf of Ms. Herman, who is out of state attending a national association meeting.

Representative Boehning asked who will conduct the criminal record checks required by the rules. Ms. Cook said the board administers the record checks and forwards the documents for review by the Bureau of Criminal Investigation. Representative Boehning asked what is the cost of the investigation. Ms. Cook said she believes the charge for the record check is \$47.25 plus any additional costs if the applicant is required to submit to fingerprinting.

Representative Koppelman said he was interested in the elimination of the requirement of good moral character in NDAC Section 55-02-01-07. He asked if the board is aware that that requirement is included in the statutory provisions. Ms. Cook said the issue has been a topic of discussion by the board. She said the board removed the provision from the rules because in practical terms it is very difficult to determine what constitutes good moral character. She said she believes there may be more specific provisions within the rules of the board governing conduct that is subject to question with regard to the issue of character. She said she would prefer to defer consideration of that issue for Ms. Herman when she is available.

Representative Keiser asked for information on the current balance in the funds held by the board. Ms. Cook said she does not have information but will provide that information to the committee.

Representative Koppelman said in view of Ms. Cook's desire to allow Ms. Herman to comment on the rules change regarding moral character, the rules should be carried over for consideration at the next meeting.

**It was moved by Representative Koppelman and seconded by Representative Kasper that the committee hold over consideration of the rules adopted by the State Board of Examiners for Nursing Home Administrators relating to moral character.**

Representative Winrich said the moral character standard was difficult to administer, and a decision on substandard moral character would invite lawsuits for the board. He said he believes the new standard requiring criminal background information is more reliable and useful.

**The motion carried on a roll call vote.** Voting in favor of the motion were Senator Fischer and

Representatives Boehning, Damschen, Kasper, Keiser, Koppelman, Thoreson, and Wrangham. Voting in opposition to the motion were Senators Klein, Heckaman, and Potter and Representatives Dahl, Kroeber, Wald, and Winrich.

### **EDUCATION STANDARDS AND PRACTICES BOARD**

Chairman Klein called on Ms. Janet Welk, Executive Director, Education Standards and Practices Board, for testimony (Appendix I) for rules adopted by the board.

Representative Kroeber asked why rules are added that require teachers to return to school to obtain additional graduate credits. He said the same requirements are not imposed for other professions. Ms. Welk said the rules specify that either undergraduate or graduate credits satisfy the education requirements. She said for teachers, institutions of higher education provide the educational opportunities. She said without use of institutions of higher education, it would be necessary for the state to establish a continuing education program on its own. Representative Kroeber said the board should consider alternatives because the cost of higher education credits is a burden to teachers who are required to obtain additional educational credits.

Senator Heckaman said the requirements for education contained in the rules appear to be extremely difficult to administer for the board. She said numerous requirements apply at various levels of training, including qualifications of instructors and level of certification that applies. Ms. Welk said the standards are complex, but they are virtually identical to the standards used by institutions of higher education so the rules will incorporate the same standards for board purposes. She said the board will conduct evaluations of programs on a seven-year rotation, and most of the determinations will be administered by institutions of higher education subject to review by the board.

Representative Kasper said he has concerns that some aspects of the rules adopted by the board are going into the legislative arena.

### **STATE REAL ESTATE COMMISSION**

Chairman Klein called on Ms. Pat Jergenson, Executive Director, State Real Estate Commission, for presentation of testimony (Appendix J) relating to rules adopted by the commission.

### **PUBLIC SERVICE COMMISSION**

Chairman Klein called on Ms. Ilona Jeffcoat-Sacco, General Counsel, Public Service Commission, for presentation of a request (Appendix K) on behalf of the Public Service Commission for an extension of time for adoption of three rules.

**It was moved by Representative Koppelman, seconded by Representative Keiser, and carried**

on a roll call vote that the Administrative Rules Committee approve a 90-day extension of time for adoption of rules as requested by the Public Service Commission. Voting in favor of the motion were Senators Klein, Fischer, Heckaman, and Potter and Representatives Boehning, Dahl, Damschen, Kasper, Keiser, Koppelman, Kroeber, Thoreson, Wald, Winrich, and Wrangham. No negative votes were cast.

### BOARD OF MESSAGE

Ms. Wojahn requested an opportunity for Mr. Edward Erickson, Assistant Attorney General, to address the committee with regard to the action on the rules of the Board of Message.

Mr. Erickson said the issue regarding the taking of a current licensing examination under NDAC Section 49-01-02-03 applies for a license that has been expired for one year or more. He said NDCC Section 43-25-09(5) provides that the holder of an expired license may within one year from expiration have the license renewed upon payment of the required renewal fee. He said the statutory provision allows renewal within one year after expiration without taking the current examination. He said the implementation is that for a license expired for more than one year, the current licensing examination and any other requirements for new licensees will apply. He said that is why the rule provides for passing the current licensing examination for licensees expired more than one year.

Mr. Erickson said NDCC Section 43-25-09(3) was amended to require 32 continuing education hours submitted every two years for license renewal. He said because this provision is now in statute, the number of hours was removed from the rules provision.

**It was moved by Representative Koppelman, seconded by Representative Dahl, and carried on a roll call vote that the committee withdraw its motion to amend NDAC Section 49-01-02-05(1) and carry over consideration of Section 49-01-02-03(4).** Voting in favor of the motion were Senators Klein, Fischer, Heckaman, and Potter and Representatives Boehning, Dahl, Damschen, Kasper, Keiser, Koppelman, Kroeber, Thoreson, Wald, Winrich, and Wrangham. No negative votes were cast.

### PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chairman Klein called on Mr. Sparb Collins, Executive Director, Public Employees Retirement System, for a presentation of testimony (Appendix L) relating to rules adopted by the Public Employees Retirement System.

In response to a question from Representative Wald, Mr. Collins said the Public Employees Retirement System funded status according to the most recent actuarial report is 87 percent based on the actuarial value of assets. He said that figure is

determined by averaging five years of data, but there are several years more of losses to be amortized back into that status.

### STATE SEED DEPARTMENT

Chairman Klein called on Mr. Ken Bertsch, Seed Commissioner, Fargo, for presentation of testimony (Appendix M) relating to rules adopted by the State Seed Department.

### DEPARTMENT OF HUMAN SERVICES

Chairman Klein called on Ms. Julie Leer, Director, Legal Advisory Unit, Department of Human Services, who distributed copies of prepared testimony relating to questions raised by the committee at the March 2010 meeting (Appendix N), ratesetting for nursing facilities rules (Appendix O), nursing facility rate determinations (Appendix P), and eligibility criteria for aid for vulnerable aged, blind, and disabled individuals (Appendix Q).

Representative Kasper inquired about nursing home ratesetting increases in recent years and how rates are calculated. Ms. Leer said the department can provide information on rate changes in recent years. Ms. LeeAnn Thiel, Administrator, Medicaid Payment and Reimbursement Services, Medical Services Division, Department of Human Services, described the ratesetting procedure. She said each year each nursing home must submit a cost report to the department, which is analyzed to determine allowable costs, and each facility is allowed to receive 34 different rates for specific services.

In response to a question from Senator Fischer, Ms. Thiel said when a patient is admitted to a nursing home, an assessment is done to determine the level of services required and a determination is made into which of the 34 rate classifications the individual's situation falls. In response to a question from Senator Fischer, Ms. Thiel said the rate category classifications determined for individuals is audited by State Department of Health staff when reviewing nursing home rates.

In response to a question from Senator Klein, Ms. Thiel said Medicaid recipient residents of nursing homes account for 50 percent to 55 percent of residents.

Representative Kasper asked how illegal aliens applying for or receiving aid are identified and whether the department is required to report the illegal alien status to any other agency. Ms. Leer said she has not looked into that issue but will provide information to the committee. She said she does not know whether programs administered by the department capture information on illegal alien status, but she will provide information that is available.

### WORKFORCE SAFETY AND INSURANCE

Chairman Klein called on Ms. Jodi Bjornson, General Counsel, Workforce Safety and Insurance, for

testimony (Appendix R) relating to rules adopted by Workforce Safety and Insurance.

Ms. Bjornson said as a result of a comment received on the permanent impairment evaluations rule in NDAC Section 92-01-02-25(5)(c), Workforce Safety and Insurance sought expert advice on permanent impairment ratings and evaluations for depression or anxiety. She said as a result of expert advice, Workforce Safety and Insurance requests an amendment to replace paragraphs 1 through 3 of subdivision c with the language on Exhibit A attached to her testimony.

**It was moved by Representative Koppelman, seconded by Representative Dahl, and carried on a roll call vote that the Administrative Rules Committee concur and adopt the recommended amendment from Workforce Safety and Insurance substituting language in NDAC Section 92-01-02-25(5)(c) relating to permanent impairment rating for depression or anxiety and validity tests and evaluations.** Voting in favor of the motion were Senators Klein, Fischer, Heckaman, and Potter and Representatives Boehning, Dahl, Damschen, Kasper, Keiser, Koppelman, Thoreson, Wald, Winrich, and Wrangham. No negative votes were cast.

Ms. Bjornson said Workforce Safety and Insurance proposes for committee consideration an amendment to NDAC Section 92-02-01-01 as submitted. She said Workforce Safety and Insurance recommends replacement of the language in the section as submitted with the language as included in Exhibit B attached to her prepared testimony.

**It was moved by Representative Winrich, seconded by Representative Keiser, and carried on a roll call vote that the committee concur and adopt the amendment suggested by Workforce Safety and Insurance to amend NDAC Section 92-02-01-01 relating to adoption by reference of Department of Labor standards of safety and conduct for employers and employees effective July 1, 2010.** Voting in favor of the motion were Senators Klein, Fischer, Heckaman, and Potter and Representatives Boehning, Dahl, Damschen, Kasper, Keiser, Thoreson, Wald, Winrich, and Wrangham. No negative votes were cast.

#### **DEPARTMENT OF HUMAN SERVICES**

Ms. Leer said suggestions from committee members regarding improvement of the description contained in the caption of NDAC Section 75-02-06-02.5 were made. She said the Department of Human Services recommends an amendment to add language to the caption so the amended caption will read "Property Costs and Other Passthrough Costs." **It was moved by Representative Keiser, seconded by Senator Fischer, and carried on a voice vote that the Administrative Rules Committee concur with and approve the amendment proposed by the Department of Human Services to the caption of NDAC Section 75-02-06-02.5.**

#### **PRIVATE INVESTIGATIVE AND SECURITY BOARD**

Chairman Klein called on Ms. Francine Johnson, Executive Director, Private Investigative and Security Board, for testimony (Appendix S) relating to rules adopted by the board.

Representatives Koppelman and Keiser expressed concern about the \$50 per month fee for late renewal of licenses. They both suggested a maximum amount of late fees that could accumulate for a late renewal.

Representative Keiser said he would make a motion for an amendment to the late fee provision to limit the accumulated late fees to no more than \$100 per licensee if that limit would be acceptable to the Private Investigative and Security Board. After discussion of procedural issues, Ms. Johnson said she is confident the board would agree with that cap. **It was moved by Representative Keiser, seconded by Representative Koppelman, and carried on a roll call vote that the Administrative Rules Committee concur with and adopt an amendment to NDAC Section 93-02-03-06(2) to limit accumulated late fees per licensee to not more than \$100 for a late renewal.** Voting in favor of the motion were Senators Klein, Fischer, Heckaman, and Potter and Representatives Boehning, Damschen, Kasper, Keiser, Koppelman, Wald, Winrich, and Wrangham. No negative votes were cast.

#### **GAMING COMMISSION**

Chairman Klein called on Mr. Keith Lauer, Director, Gaming Division, Attorney General's office, for a presentation of testimony (Appendix T) relating to rules adopted by the Gaming Commission.

#### **CRIMINAL JUSTICE INFORMATION SHARING BOARD**

Chairman Klein called on Ms. Pam Schafer, Director, Criminal Justice Information Sharing Board, for testimony (Appendix U) regarding rules adopted by the board.

#### **MARRIAGE AND FAMILY THERAPY LICENSURE BOARD**

Chairman Klein called on Reverend Larry J. Giese, President, Marriage and Family Therapy Licensure Board, for testimony (Appendix V) relating to rules adopted by the board.

Senator Potter said there appear to be some duplications and inconsistencies in the rules. He said sexual contact between a therapist and employee is prohibited. He asked what happens if the therapist and employee are spouses. He said the rules provide a prohibition of sexual contact after two years, but sexual contact is also prohibited without any time restriction. He asked how these provisions will apply. Reverend Giese said marital partners would be exempt from the contact provisions. Senator Potter said the exemption does not appear to be stated in

the rules. He said the rules prohibit practicing as a therapist under the influence of alcohol. He said it is not explained what constitutes the influence of alcohol in the rules. Reverend Giese said he believes the legal limit for driving would apply. Senator Potter said that limit should be referenced in the rules.

Representative Wrangham said he agrees with Senator Potter that there appears to be a substantial amount of repetition and bulk in the rules. He asked for information on the source for the rules. Reverend Giese said standards used in other states were examined and drawn from in preparing these rules.

Representative Winrich said the rules contain an exemption from licensing for clergy. He said it is relatively easy for individuals to obtain a certificate as clergy from an Internet source. He asked if there are standards to determine what constitutes appropriately trained clergy for purposes of the exemption. Reverend Giese said it would be very difficult to determine what is a legitimate clergy designation and training. He said the board would probably have to rely on certification from the organization issuing the clergy designation. Representative Winrich said his concern is that clergy are not subject to licensing by the board, and there is no way for the board to know if unqualified individuals are practicing as therapists under the exemption for clergy.

### ATTORNEY GENERAL

Chairman Klein called on Mr. Thomas L. Trenbeath, Chief Deputy Attorney General, Attorney General's office, for comments on a committee request for an opinion from the Attorney General relating to issues relating to imposition of criminal and civil penalties by administrative rules.

Mr. Trenbeath said committee counsel and members of the Attorney General's staff have been in communication regarding formulation of appropriate questions to be addressed in the requested opinion. He said work on the issue will continue, and he understands that an opinion will result to provide formal guidance to agencies.

### SECURITIES RULES

Chairman Klein said Mr. Garry Pierce, Garry Pierce Financial Services, LLP, is in attendance and called upon him to update the committee on developments with regard to securities rules restricting real estate investor trusts investor eligibility. Mr. Pierce said he would suggest simply that a prospective from the Securities Department advise investors that the rules restrictions are not mandatory but should be considered in making investment decisions.

Senator Klein said his impression is that this is an issue for consideration by the Legislative Assembly as a body because it relates to a specific rule provision. He said he would suggest introduction of legislation to begin a full debate of the issue.

### COMMITTEE DISCUSSION

Representative Wrangham said after further discussion of the issue with the Attorney General's office staff, it appears unnecessary to hold over the rule in NDAC Section 49-01-02-03 relating to passing the current licensing examination. **It was moved by Representative Wrangham, seconded by Representative Koppelman, and carried on a voice vote to withdraw the motion to carry over consideration of the rule.**

Representative Koppelman said Mr. Nehring requested that NDAC Section 33-11-01.2-17 be held over for further consideration. **It was moved by Representative Koppelman, seconded by Representative Keiser, and carried on a voice vote that the committee carry over consideration of NDAC Section 33-11-01.2-17 relating to response times for ambulance services.**

**It was moved by Representative Boehning, seconded by Representative Wrangham, and carried on a voice vote that the committee carry over consideration of NDAC Section 33-11-01.2-21 relating to sanctions.**

**It was moved by Senator Klein, seconded by Representative Koppelman, and carried on a voice vote that the committee carry over consideration of the rule requiring ambulance services to use their own ambulances for training purposes.**

**It was moved by Representative Kasper, seconded by Representative Thoreson, and carried on a roll call vote that the committee hold over consideration of NDAC Section 99-01.3-09-02(3)(a).** Voting in favor of the motion were Senators Klein and Fischer and Representatives Boehning, Kasper, Keiser, Koppelman, Thoreson, Wald, and Wrangham. Voting against the motion were Senator Heckaman and Representatives Damschen, Kroeber, and Winrich. Representative Winrich said he believes the interpretation is incorrect, and that the answer provided earlier by Mr. Lauer was that poker tournaments on multiple sites would be considered one event.

**It was moved by Senator Heckaman, seconded by Representative Koppelman, and carried on a voice vote that the rules appearing on pages 100 through 156 be carried over because no testimony was provided by the agency.**

Representative Keiser said several issues merit committee consideration. He said a bill draft should be provided to prohibit agencies to include language in a rule which duplicates language in a statute. He said there appears to be potential for abuse of emergency rulemaking authority, and a statutory provision should be considered to require an agency anticipating emergency rulemaking to notify the chairman of the Administrative Rules Committee. He said with regard to implementing federal requirements by rule, if an agency implements any rule beyond a minimum federal requirement, the rule should be declared null and void. He said if it turns out rules

adopted are not required by federal law, those rules should also become null and void.

Representative Winrich said the rules adopted by the Marriage and Family Therapy Licensure Board are vague and repetitive and could be improved by further consideration by the board and the committee. **It was moved by Representative Winrich, seconded by Representative Wrangham, and carried on a voice vote that the committee carry over consideration of the rules of the Marriage and Family Therapy Licensure Board.** Representative Winrich said this would give the board some additional time to consider and clarify the rules.

No further business appearing, Chairman Klein adjourned the meeting at 4:50 p.m.

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John Waistad  
Code Revisor

ATTACH:22