

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Thursday, December 10, 2009
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, Joan Heckaman, Tracy Potter; Representatives Randy Boehning, Chuck Damschen, Duane DeKrey, Jim Kasper, George J. Keiser, Kim Koppelman, Joe Kroeber, Jon Nelson, Lonny Winrich

Members absent: Representatives Wesley R. Belter, Stacey Dahl, Mary Ekstrom, Blair Thoreson, Francis J. Wald, Dwight Wrangham

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 previous meeting be approved as distributed.

STATE DEPARTMENT OF HEALTH

Chairman Klein called on Mr. Larry Thelen, State Department of Health, for testimony ([Appendix B](#)) regarding public water supply system rules adopted by the department.

Mr. Thelen said the rules changes were made to conform North Dakota rules to federal rules adopted by the United States Environmental Protection Agency (EPA) under the federal Safe Drinking Water Act. He described the procedure followed by the department in the development and adoption of the rules. He said no comments were received by the department during consideration of the rules.

In response to a question from Representative Nelson, Mr. Thelen said required testing has been done and no surface water system will be required to implement additional water treatment. He said the federal rules changes would result in some increased testing requirements for water systems.

Representative Boehning asked what constitutes a flowing stream. Mr. Thelen said a flowing stream has a continuous year-round flow of water and this would not include areas that are inundated only part of the year, even though the water in the inundated area might be flowing.

Representative Keiser asked what would occur if the state refused to adopt the updated federal rules. Mr. Thelen said the rules would still be enforced in North Dakota, but the federal government would come into the state to enforce the rules and the state would lose enforcement authority. He said federal enforcement would probably be much more stringent,

and the State Department of Health would lose its capacity to work with communities to bring water standards up to required levels.

Representative Kasper said he questions the authority of the EPA to adopt and enforce environmental rules such as the rules that prompted adoption of these rules by the state. He asked Mr. Thelen if the State Department of Health can obtain from the EPA a statement tracing the authority for adoption of the federal rules from the United States Constitution through action of Congress and compliance with the requirements for adopting the federal rules.

Representative Koppelman asked whether adoption of EPA rules by reference in state rules would include adoption of any future changes to the federal rules. Mr. Thelen said he believes future changes to federal rules would be adopted if federal rules are adopted by reference.

Representative DeKrey said in regard to Representative Kasper's question, the EPA was created by an executive order of President Richard M. Nixon and has now been given statutory authority by act of Congress.

Committee counsel said future changes to EPA rules are probably not adopted by the rules of the State Department of Health. He said the reason is the Constitution of North Dakota substantially restricts the authority of the Legislative Assembly to provide for adoption of future federal law changes, except in the instance of federal income tax laws. He said the restriction would equally apply to agencies in adoption of rules. He said the reason would be that the Legislative Assembly may not delegate its lawmaking authority and agencies may not delegate rulemaking authority to another entity. He said adoption of future rules changes would be considered a delegation of rulemaking authority. He said he believes the adoption of federal rules by reference includes adoption of the federal rules in existence at the effective date of the state rules containing the adoption by reference. He said any future changes to the federal rules would have to be considered and adopted by the agency on or after the effective date of the future federal rules changes.

LABOR COMMISSIONER

Chairman Klein called on Ms. Lisa Fair McEvers, Commissioner, Labor Department, for testimony

([Appendix C](#)) relating to rules adopted by the Labor Commissioner relating to housing for elderly.

Ms. Fair McEvers said the rules were adopted to fulfill federal regulatory requirements to allow the Labor Department to qualify to conduct investigations on behalf of the United States Department of Housing and Urban Development under the federal Fair Housing Act of 1968. She said the rules are intended to be the substantial equivalent of federal rules to allow the Labor Department to qualify as a fair housing assistance program.

Representative Keiser asked what incentives exist for developers of housing for elderly. Ms. Fair McEvers said meeting the statutory rules requirement allows the owner to discriminate in renting or selling units to families with children. She said the sales contract to an individual for this type of property may impose restrictions on who the purchaser may sell the property to, which may be used to ensure the property continues to qualify for the exemption.

STATE BOARD OF MEDICAL EXAMINERS

Chairman Klein called on Mr. Duane Houdek, Executive Secretary, State Board of Medical Examiners, for testimony ([Appendix D](#)) relating to rules adopted by the board.

Mr. Houdek said North Dakota Administrative Code (NDAC) Section 50-02-14-01, as submitted, included the phrase "[c]ommencing with the July 2007 renewal cycle, and," which should have been deleted before submission of the rules. He said he notified committee counsel of this error and the phrase has been removed from the final version of the rule, but the phrase is included in the rules as prepared for the committee because the error was not noticed until after the committee copies were prepared.

In response to a question from Senator Heckaman, Mr. Houdek said dispensation of medications by a physician assistant must be within the guidelines of the supervising physician. Representative Nelson asked how far away can a supervising physician be from the physician assistant to qualify as supervising. He said the question is relevant to physician assistants performing duties in satellite clinics. Mr. Houdek said the physician is not required to be physically present at all times to supervise a physician assistant, such as performance of duties of physician assistants making rounds in hospitals or performing duties in satellite clinics. He said the requirement is that supervision by a physician requires that the physician assistant is capable of continuous contact with the supervising physician.

STATE BOARD OF PHARMACY

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

STATE HISTORICAL BOARD

Chairman Klein called on Mr. David Skalsky, Assistant Director, State Historical Society, for a presentation of a request from the State Historical Board. A copy of a letter to the members of the committee from Mr. Merl Paaverud, Director, State Historical Society, and Mr. Alvin A. Jaeger, Secretary of State, member of the State Historical Board, is attached as [Appendix F](#).

Mr. Skalsky said the request is for approval of the repeal of NDAC Chapter 40-01-01. He said the chapter is a nonsubstantive provision relating to organization of the State Historical Board. He said the provision is obsolete and redundant because it includes text of statutory provisions. He said the chapter contains information readily available from other sources, outdated names and contact information for board members and agency personnel, and descriptions that no longer comply with statutory provisions. He said the board is aware that a statutory provision states that an agency shall have an organizational rule, but he pointed out that the Administrative Rules Committee has twice approved elimination of organizational rules for the Department of Human Services and the Secretary of State.

It was moved by Senator Andrist and seconded by Representative DeKrey that the committee approve repeal of North Dakota Administrative Code Chapter 40-01-01 on the grounds that the provision is obsolete. In discussion of the motion, Representative Keiser said the statutory provision requires an agency to have an organizational rule. He said even if the rule is obsolete, compliance with the statute should be required. **The motion carried on a roll call vote.** Voting in favor of the motion were Senators Klein, Andrist, Fischer, Freborg, Heckaman, and Potter and Representatives Boehning, DeKrey, Koppelman, Kroeber, Nelson, and Winrich. Voting in opposition of the motion were Representatives Damschen, Kasper, and Keiser.

It was moved by Representative Keiser, seconded by Representative DeKrey, and carried on a voice vote that a bill draft be prepared for committee consideration to amend the statutory provision and make it optional for an agency to have an organizational rule.

SUPERINTENDENT OF PUBLIC INSTRUCTION

Chairman Klein called on Mr. Bob Marthaller, Assistant Superintendent, Department of Public Instruction, for testimony ([Appendix G](#)) relating to rules adopted by the Superintendent of Public Instruction relating to school construction approval and loans.

Mr. Marthaller said the rules change increases the threshold from \$25,000 to \$40,000 for school districts to obtain construction approval from the Superintendent of Public Instruction. He said the rules change reflects a legislative change in House

Bill No. 1400 (2009). He described the other rules changes relating to school construction approval. He reviewed the changes in school construction loan application and approval processes.

Representative Keiser asked whether there are monitoring provisions in place to prevent schools from breaking construction projects into Phase I, Phase II, Phase III, and so on, to keep the costs of each phase below the required amount for which approval must be obtained. Mr. Marthaller said the department views all parts of a project as a whole for purposes of construction approval.

Representative Winrich said the statutory provision increasing the cost of construction from \$25,000 to \$40,000 before approval is required is a temporary provision and asked if the department will have to amend the rule to reduce the amount if the law is not extended. Mr. Marthaller said it would be necessary for the department to amend the rules to match the law in place if the temporary increase is not extended.

Chairman Klein called on Ms. Gwyn Marback, Assistant Director of Approval and Accreditation, Department of Public Instruction, for testimony ([Appendix H](#)) relating to credentials and accreditation rules adopted by the Superintendent of Public Instruction.

Senator Heckaman observed there is not much information on the rules changes relating to alternative education programs. Ms. Marback said she will ask the director to provide more information on alternative education programs rules to Senator Heckaman.

Senator Klein asked Senator Freborg whether declining school enrollment is a factor in school construction applications as discussed during deliberations of House Bill No. 1400 (2009). Senator Freborg said he does not recall any discussion of the criteria to approve school improvements relating to stable enrollment.

PUBLIC SERVICE COMMISSION

Chairman Klein called on Mr. Alan Moch, Director of Testing and Safety Division, Public Service Commission, for testimony ([Appendix I](#)) relating to gas pipeline safety rules adopted by the commission.

Mr. Moch said the gas pipeline safety federal rules adopted by reference update the North Dakota gas pipeline safety rules to fulfill requirements of the federal-state gas pipeline safety agreement.

Representative Keiser asked what would happen if the state does not adopt the gas pipeline safety rules required by federal rules. Mr. Moch said failure of the state to adopt the federal changes would be a violation of the federal-state gas pipeline safety agreement and the state would not have enforcement authority, which means the federal authorities would regulate gas pipeline safety in North Dakota.

Chairman Klein called on Ms. Illona Jeffcoat-Sacco, General Counsel, Public Service Commission, for testimony ([Appendix J](#)) relating to a requested extension of time to adopt rules. **It was moved by Representative Nelson and seconded**

by Representative Koppelman that the committee approve the extension of time requested by the Public Service Commission in the three rules issues described in the testimony presented. It was moved by Representative Keiser, seconded by Representative Koppelman, and carried on a roll call vote that the approval of an extension of time is for a 90-day extension. Voting in favor of the motion on the amendment were Senators Freborg and Potter and Representatives Boehning, Damschen, Kasper, Keiser, and Koppelman. Voting in opposition to the motion on the amendment were Senators Klein, Andrist, and Heckaman and Representatives DeKrey, Nelson, and Winrich. **The motion as amended was approved on a voice vote.**

DEPARTMENT OF HUMAN SERVICES

Chairman Klein called on Ms. Julie Leer, Legal Advisory Unit, Department of Human Services, for testimony ([Appendices K, L, M, N, and O](#)) relating to several sets of rules adopted by the department.

STATE WATER COMMISSION

Chairman Klein called on Mr. Gerald R. Heiser, State Water Commission, State Engineer's office, for testimony ([Appendix P](#)) relating to rules adopted by the State Water Commission. Mr. Heiser distributed and reviewed a memorandum from Mr. Dale Frink, State Engineer.

Representative DeKrey said the rules adopted by the State Water Commission accurately implement House Bill No. 1286 (2009), which he introduced to increase the acreage requirements for domestic and irrigation use.

Senator Klein asked what constitutes navigable water under the sovereign lands rule and the determination of property ownership within the high-water mark on each side of navigable waters. Mr. Heiser said navigable waters are those waters of the state that were navigable at statehood.

Representative Nelson said he is concerned that navigable waters would now include any flowing river. Mr. Heiser said the state has asserted sovereign land status to certain rivers as navigable. In response to a question from Representative Nelson, he said these rules would not increase the number of rivers in the state which are considered navigable.

BOARD OF CLINICAL LABORATORY PRACTICE

Chairman Klein called on Mr. Bruce Pritschet, member of the Board of Clinical Laboratory Practice, for testimony ([Appendix Q](#)) relating to rules adopted by the board.

Mr. Pritschet said the rules establish a definition of unprofessional conduct for licensed laboratory professionals. He said the rules also establish a licensing exemption for individuals conducting a specific total protein test, which was added at the request of plasma donor centers.

Representative Keiser said that because of the complexity of secrecy laws regarding medical information, he would have preferred that the board require a serious violation in defining unprofessional conduct to include failure to comply with all laws regarding confidentiality. He said unintentional errors that cause no harm should not be subject to board action.

DEPARTMENT OF COMMERCE

Chairman Klein called on Mr. John Diem, Division of Community Services, Department of Commerce, for a presentation ([Appendix R](#)) of a request for an extension of time to adopt rules to implement a statutory change relating to energy conservation standards.

Mr. Diem said current plans call for extensive revisions of the State Building Code to be completed in the spring of 2010. He said adoption of updated energy conservation standards would require amendments to the current State Building Code followed quickly by additional changes in the 2010 update to the State Building Code.

Chairman Klein asked what the planned timeframe is for the requested extension of time to adopt rules. Mr. Diem said the plan is for having an updated State Building Code in place by January 2011, which would require approval of a seven-month extension of time.

It was moved by Senator Andrist, seconded by Representative DeKrey, and carried on a voice vote that the committee approve an extension of time, until January 2011, for adoption of energy conservation standards rules as part of the update of the State Building Code.

ADMINISTRATIVE CODE PUBLICATION FORMAT

Chairman Klein called on committee counsel for a presentation of information on the feasibility of the publication of the North Dakota Administrative Code in a CD-ROM format. Committee counsel said the issue was raised at the previous committee meeting, and the committee requested further information.

Committee counsel said the number of subscribers to the published Administrative Code has declined to 78 subscribers. He said 58 of these subscriptions are provided at no cost by the state to state officials and agencies, Supreme Court and district court judges, counties, and each member of the Legislative Assembly who requests a copy. He said there are only 20 paid subscriptions. He said subscribers pay \$460 for an initial set of the Administrative Code and pay \$260 per year for quarterly supplements. He said an initial subscriber currently pays \$720 for a set of the Administrative Code and one year of updates. He said the Administrative Code is available to the public at no charge on the Legislative Council website.

Committee counsel said the 2009-11 biennium budget contains \$41,913 for Administrative Code printing and \$3,744 for Administrative Code mailing

costs. He said the cost per subscriber to the state is \$292 per year for 78 subscribers and only 20 of those subscribers pay the fee of \$260 per year for updates. He said the net loss to the state is more than \$17,600 per year.

Committee counsel said the entire Administrative Code and the quarterly Administrative Rules Committee supplement could all be burned on a single CD-ROM at a cost of \$3.50. He said the mailing cost has not been precisely estimated, but even at a cost of \$1 per unit, the cost to the subscriber would be approximately \$18 per year. He said this would reduce the cost to the state of preparing and mailing Administrative Code subscriptions by more than \$42,000 per biennium.

Committee counsel said the cost to subscribers for an annual subscription could be reduced by \$50 to \$70, which would be a substantial savings to subscribers and the state would still save more than \$17,000 per year. He said this would allow subscribers to save approximately \$200 per year on paid subscriptions and receive a better product.

Senator Andrist said it appears the savings to the state justify eliminating paper publication of the Administrative Code. He said if subscribers want rules on paper, they will be able to print the portions of the Administrative Code they want from the CD-ROM.

It was moved by Representative Keiser, seconded by Representative Koppelman, and carried on a roll call vote that the Legislative Council cease publication of the North Dakota Administrative Code in a paper format and provide for publication in a CD-ROM format. Voting in favor of the motion were Senators Klein, Andrist, Freborg, Heckaman, and Potter and Representatives Boehning, DeKrey, Kasper, Keiser, Koppelman, Nelson, and Winrich. No negative votes were cast.

PENALTIES IN RULES STUDY Game and Fish Department

Chairman Klein called on Mr. Terry Steinwand, Director, Game and Fish Department, for a response on behalf of the Game and Fish Department to questions raised by the committee under the study of imposition of penalties by administrative rules. Mr. Steinwand thanked the committee and introduced Mr. Paul Schadewald, Game and Fish Department, for a presentation of the department response ([Appendix S](#)). Mr. Schadewald said the department will move one criminal penalty provision from the Administrative Code to statutory provisions. He said the department believes this is the only situation that needs to be corrected.

In response to a question from Senator Andrist, Mr. Schadewald said before rules can provide for a civil penalty, the authority to impose that penalty by rules must be provided by statute.

State Department of Health

Chairman Klein called on Ms. Arvy Smith, Deputy State Health Officer, State Department of Health, for testimony ([Appendix T](#)) relating to penalties imposed by rules of the department. Ms. Smith described the instances in which the State Department of Health enforces penalties imposed by rules. She said the department does not believe there is a need to transfer penalty provisions to statute at this time.

Representative Keiser said it appears there are instances in which rulemaking authority is not specific in statute. He said it may be worthwhile to consider statutory provisions relating to imposition of penalties by rule.

Representative Koppelman said there is a significant difference between criminal and administrative penalties. He said the processes differ in procedure, rules, and burden of proof. He said it is important that the Legislative Assembly distinguish conduct that should be subject to criminal penalties from conduct that may be subject to administrative penalties.

Chairman Klein called on Ms. Liz Brocker, Attorney General's office, who said a representative from the Attorney General's office was scheduled to brief the committee on penalties imposed by administrative rules. Ms. Brocker said the staff member had a conflict and is unable to attend the meeting. She asked if the committee would reschedule the presentation for the next committee meeting. Chairman Klein said the presentation would be rescheduled.

State Board of Pharmacy

Mr. Anderson said with regard to the imposition of penalties by rules, there are historical issues to consider. He said in prior times, a short statutory provision was adopted by the Legislative Assembly with the expectation that the agency administering the law would flesh out the statutory provisions by adoption of administrative rules. He said administrative rules provisions do not end up in criminal court. He said civil penalties, such as late filing fees, license revocation, and similar matters, are appropriate for administrative rules provisions if general statutory authority is provided.

Securities Commissioner

Chairman Klein called on Mr. Michael Daley, Deputy Securities Commissioner, Securities Department, for a response ([Appendix U](#)) from the department to questions asked by the Administrative Rules Committee relating to standards imposed on the securities industry that are not contained in federal or state law or rules.

Mr. Daley said the Securities Commissioner is given broad authority under North Dakota Century Code Section 10-04-08.1 to place such conditions, limitations, and restrictions on any approval or registration as may be necessary to carry out the purposes of Chapter 10-04 relating to supervision of

issue and sale of securities. He said if the Legislative Assembly determines that standards applied should be adopted as administrative rules, the Securities Department would comply, but the department believes it would be counterproductive.

Representative Koppelman said administrative rules properly enacted have the force of law and must be enforced by the courts. He asked whether it would be advisable to adopt administrative rules to give the policies applied by the Securities Commissioner the force of law. Mr. Daley said policies can be enforced in court but there is more flexibility of when to apply them.

Representative Keiser asked whether statutory provisions in place currently give the Securities Commissioner authority to adopt standards of the North American Securities Administrators Association (NASAA). Mr. Daley said statutory authority for adoption of rules by the Securities Commissioner is broad enough for adoption of standards by the Securities Commissioner.

Chairman Klein invited testimony from interested persons in attendance. Mr. Garry Pierce, Garry Pierce Financial Services, LLP, Bismarck, provided copies of prepared testimony ([Appendix V](#)), which he presented to the committee.

Mr. Roger Domres, INREIT, Minot, said he shares many of the concerns expressed by Mr. Pierce. Mr. Domres said real estate investment trust (REIT) investors would not have been able to invest in the real estate trust he established if the standards now contained in the NASAA policies would have been in place. He said the suitability standards imposed for investors, which they must meet before they are allowed to invest, are very restrictive and would not allow some small investors the opportunity to invest in a REIT.

Representative Kasper asked what Mr. Domres believes would be appropriate standards for investors to meet before being allowed to invest in a REIT. Mr. Domres said he does not believe net worth or income is an appropriate limitation because for small investors, investment in a REIT may be the best kind of investment in certain market conditions. He said investment decisions should be based on allocation of investment risks among investment types.

In response to a question from Senator Klein, Mr. Domres said he believes the Securities Commissioner has done a wonderful job protecting North Dakota investors, but the NASAA standards prohibit certain investors from REIT investments, which he does not believe is appropriate for North Dakota.

Representative Koppelman asked Mr. Domres how the Securities Commissioner could enforce guidelines on the regulated community. Mr. Domres said he does not have the answer to that legal question. He said NASAA guidelines have singled out REITs, but he believes the guidelines are not appropriate for REITs, which are one of the safest investments. He said his issue with the standards is that North

Dakotans have no input in NASAA standards, and he believes North Dakotans should have some input in standards applied to North Dakota companies.

Representative Keiser said legislation is probably the correct forum for this topic. He said on the national level, REITs have not been as safe as North Dakota REITs for investors and the NASAA standards reflect that national-level concern.

Mr. Jim Knutson, Executive Vice President, Dakota REIT, Fargo, said Dakota REIT has the same concerns expressed by Mr. Pierce and Mr. Domres. Mr. Knutson said Dakota REIT has lost potential investors due to the restrictive standards imposed for investors in REITs.

Mr. Daley said he appreciates the concerns of the REIT representatives. He said on the issue regarding restrictions on who may invest, some investors are not suitable. He said whether imposed by guidelines or rules, restrictions are necessary to protect the public.

Representative Kasper asked what standards are imposed in North Dakota for REIT investors. He said he would like the committee to receive a written explanation of the standards imposed and when those standards are applied in the investment business process.

Representative Keiser said it would be appreciated if Mr. Daley and the Securities Commissioner would have discussions with interested parties on whether the NASAA standards for REIT investors are appropriate standards for North Dakota REITs.

Superintendent of Public Instruction

Chairman Klein called on Dr. Gary Gronberg, Assistant Superintendent, Department of Public Instruction, for testimony ([Appendix W](#)) relating to standards not contained in state or federal law or rules. Dr. Gronberg said the Department of Public Instruction does not require compliance with any standards from other than state or federal law or rules.

Insurance Commissioner

Chairman Klein called on Ms. Melissa Hauer, General Counsel, Insurance Department, for testimony ([Appendix X](#)) relating to application of standards from other than state or federal law.

Ms. Hauer said the department does not require regulated individuals or entities to comply with standards from other than state or federal law or rules. She said some standards adopted as administrative rules by the Insurance Commissioner were drawn from sources other than state or federal law or rules, but the Insurance Commissioner has adopted any such standards as administrative rules.

Public Service Commission

Chairman Klein called on Ms. Jeffcoat-Sacco for testimony ([Appendix Y](#)) relating to imposition of standards from other than state or federal law or rules.

Ms. Jeffcoat-Sacco said the Public Service Commission does not impose standards that have not been formally adopted as law or rule.

COMMITTEE DISCUSSION

Senator Fischer said he would like to have a report from the Department of Human Services at the next meeting on policies or standards imposed by the department that are not contained in statutes or rules.

Senator Heckaman said the testimony provided on rules changes by the Department of Public Instruction was a little loose. She said no mention was made on the reason for repeal of the driver's education credential rules or the changes in the alternative education programs. **It was moved by Senator Heckaman, seconded by Representative Nelson, and carried on a voice vote that the committee carry over consideration of repeal of the driver's education instructor's credential rules in North Dakota Administrative Code Chapter 67-11-01 and the amendment to Section 67-16-01-04 relating to alternative education programs.**

It was moved by Senator Fischer, seconded by Representative Koppelman, and carried on a voice vote that the committee carry over consideration of the rules adopted by the State Water Commission, with the exception of the amendment to North Dakota Administrative Code Chapter 89-03-03. Senator Fischer said he would like additional information on the definition of navigable waters and how the determination was made of which waters were navigable at statehood. He said background documents should be provided on designation of sovereign lands by reference to navigable waters to identify the line of authority from the Constitution of North Dakota to the adoption of rules to determine what are navigable waters.

No further business appearing, the meeting was adjourned by Chairman Klein at 3:30 p.m.

John Walstad
Code Revisor

ATTACH:25