NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday, September 27, 2005
Roughrider Room, State Capitol
Bismarck, North Dakota

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

Members present: Representatives William R. Devlin, LeRoy G. Bernstein, Randy Boehning, Duane DeKrey, Pat Galvin, Ronald A. Iverson, Kim Koppelman, Margaret Sitte, Blair Thoreson, Dwight Wrangham; Senators John M. Andrist, Dennis Bercier, Richard L. Brown, April Fairfield, Tom Fischer, Jerry Klein, Gary A. Lee, Constance Triplett

Members absent: Representatives Mary Ekstrom, Rod Froelich, Jon O. Nelson, Sally M. Sandvig; Senator Layton W. Freborg

Others present: See Appendix A

It was moved by Representative DeKrey, seconded by Senator Lee, and carried on a voice vote that the minutes of the July 19, 2005, committee meeting be approved as distributed.

DEPARTMENT OF AGRICULTURE

Chairman Devlin said the committee approved a motion at its previous meeting to carry over consideration of rules of the Department of Agriculture relating to handling and storage of anhydrous ammonia. He called on Mr. Jeff Olson, Department of Agriculture, for comments on the concerns of the committee. Mr. Olson said inspection of anhydrous ammonia handling and storage facilities and procedures is within the jurisdiction of the Insurance Department. He introduced Mr. Robert Reetz, Chief Boiler Inspector, Insurance Department, to address the concerns raised by the committee.

Mr. Reetz said it appears that one of the concerns raised by the committee was the percentage of facilities in compliance with the anhydrous ammonia excess flow requirements. He said it appears from inspections that about 40 percent of facilities are not in compliance.

Mr. Reetz said another question raised by the committee was whether anhydrous ammonia dealers must get departmental approval to operate each year. He said dealers are not required to obtain annual approval but if a person directly loads anhydrous ammonia from a semi into a nurse tank, it will be necessary to obtain annual approval.

Mr. Reetz said the committee also questioned whether a lock cap or dome cap could be used on anhydrous ammonia tanks. He said that issue is not addressed by the rules adopted by the Department of Agriculture. He said lock caps for tanks are governed by legislation administered by the Insurance Department.

Mr. Reetz said the committee asked whether nurse tanks at farms could be inspected. He said the Insurance Department does inspections only at anhydrous ammonia storage facilities. He said if a farmer has a nurse tank, the dealer who sells the nurse tank is required by the rules to inspect the tank before the sale.

Senator Klein said committee members were under the impression that Snappy Joes were required before adoption of these rules. Mr. Reetz said a Snappy Joe is a shutoff device that is required to be on below a riser. He said there have been unfortunate incidents involving deaths and injuries when a nurse tank pulls away and transfer hoses break off. He said the Environmental Protection Agency (EPA) and Occupational Safety and Health Administration require excess flow protection on these transfers for safety purposes.

Senator Klein asked how these rules will impact western North Dakota producers who may have to tow their anhydrous ammonia nurse tanks up to 50 miles to be filled. Mr. Reetz said the rules will allow the producers to continue doing that but will make two changes, including notification of the county emergency manager and the Department of Agriculture so it is known where these transfers will occur and people are encouraged to use Department of Transportation-approved truck-trailer combinations, including an emergency shutoff in the truck cab. He said if the Department of Transportation has approved a tanker and the proper paperwork has been filed with the Department of Agriculture, use of the tanker is allowable.

Representative DeKrey asked whether he understands correctly that farmers would be allowed to have nurse tanks on their farms if they follow proper procedures and have the tanks inspected. Mr. Reetz said that is correct.

STATE BOARD OF ARCHITECTURE

Chairman Devlin said the committee approved a motion at its previous meeting to carry over

consideration of rules of the State Board of Architecture affecting landscape architects. He called on Mr. David Reich, Special Assistant Attorney General for the State Board of Architecture, for comments relating to the concerns of the committee. Mr. Reich introduced Mr. Richard Hester, President of the State Board of Architecture.

Mr. Reich said it appears the committee's concerns relate to limitations on forms of doing business for landscape architects. Mr. Reich said he discussed the issue with the assistant attorney general who reviewed these rules and they concluded that there is a broad statutory grant of authority to regulate the practice of landscape architects. He said the restrictions on doing business by landscape architects are the same as the restrictions that previously existed for architects. He said similar restrictions are imposed on other occupations and professions.

Representative Koppelman said other professions are governed by statutory provisions on doing business. He said the concern of the committee is whether the Legislative Assembly rather than the licensing board should decide issues relating to forms of doing business.

Mr. Reich said the rules allow the business to operate as a corporation, limited liability company, partnership, or other legal form of doing business but require that a licensed professional must own a majority of a business before the business may advertise as providing landscape architecture services.

Representative DeKrey asked whether he understands correctly that an unlicensed individual is allowed to advertise providing landscaping services but not allowed to advertise providing landscape architecture services. Mr. Reich said that is correct.

STATE BOARD OF FUNERAL SERVICE

Chairman Devlin said the committee approved a motion at its previous meeting to carry over consideration of rules of the State Board of Funeral Service because no one representing the State Board of Funeral Service appeared at the meeting to present the rules. He called on Mr. Greg Everson, State Board of Funeral Service, for comments relating to the rules. Mr. Everson said the rules make two changes approved unanimously by the State Board of Funeral Service. He said one change is to eliminate the prohibition in the rules on serving food in funeral homes. He said funeral homes would still be required to meet health requirements, which the board believes is the appropriate governing authority. He said the other change requires all funeral directors licensed by the board to obtain four hours of annual continuing education.

Senator Klein said he has had numerous calls regarding the continuing education requirements. He said some individuals who have contacted him are of the opinion that the Legislative Assembly should govern this area rather than the board. He said individuals who have contacted him have expressed concern about where licensees will be able to obtain continuing education. Mr. Everson said the board received only one expression of concern regarding the continuing education requirements. He said there is a state organization of funeral service directors that will provide continuing education opportunities. He said the board would honor continuing education credits from other states. He said licensees could access online continuing education to obtain credits.

Senator Klein said a funeral service director in a small town has little control over scheduling so attendance at continuing education sessions could be very difficult.

Representative Boehning asked how a licensee would demonstrate completion of online continuing education. Mr. Everson said there is no testing per se so it would be necessary for the board to rely on the licensee certifying completion.

Chairman Devlin requested Mr. Everson to provide the committee a copy of the complaint received by the board relating to the continuing education requirements.

Chairman Devlin called on Mr. Wes Burkart, Thompson-Larson Funeral Home, Minot, for comments relating to board rules. Mr. Burkart said his concern with the continuing education requirement is that continuing education courses must be approved by the board, which may be completely arbitrary because there are no written standards of what continuing education requirements will count.

In response to a question from Senator Klein, Mr. Burkart said he did not submit comments to the board during the hearing process. He said he favors continuing education but not without more guidance from the rules on what will be approved.

Chairman Devlin called on Mr. Mike Nathe, Bismarck Funeral Home, for comments on the rules of the State Board of Funeral Service. Mr. Nathe said there are several licensees of the board who are not members of the state association who would not have received direct notice of the rulemaking because direct notice was provided only through the association. He said he also is concerned with the lack of specific guidance on approval of continuing education under the rules. He said he favors continuing education and it is simply a good business decision for funeral directors to stay informed on matters affecting the profession. He said it appears the rules are intended to encourage licensees to become members of the state association.

STATE DEPARTMENT OF HEALTH

Chairman Devlin said the committee approved a motion at its previous meeting to carry over consideration of air pollution control rules of the State Department of Health because the rules contained references to nitric and sulfuric acid plants, copper and zinc smelters, and other facilities that do not exist

in North Dakota. Chairman Devlin called on Mr. Terry O'Clair, Air Quality Division Director, State Department of Health, for comments relating to the rules.

Mr. O'Clair said the updated rules incorporated federal requirements, which included references to facilities that do not exist in North Dakota. He said the existence of rules adopted by the State Department of Health is important to business and industry in North Dakota because the state enjoys a delegation of authority from the United States EPA in instances when the state has rules in place to govern facilities. He said if the state does not have rules, the EPA administers facilities under its authority and with its inspection. He said he believes North Dakota business and industry welcomes state administration and inspection of air pollution control rules.

Mr. O'Clair gave examples of North Dakota facilities that have been proposed or have been established which are governed by rules already in place. He said without rules in place, these facilities would be subject to EPA administration and inspection. He said a proposal under discussion would establish a sulfuric acid production facility associated with a coal production plant. He said the rules that have been adopted would apply to such a facility.

Mr. O'Clair said in the future the State Department of Health staff will carefully review environmental rules adopted from federal guidelines to delete references to facilities that appear unlikely to exist in North Dakota in the future.

BOARD OF MASSAGE

Chairman Devlin said the committee approved a motion at its previous meeting to carry over consideration of rules of the Board of Massage. He said the committee had concerns relating to additional rules amendments approved by the board after the original rules changes were approved by the Attorney General. He called on Mr. Edward E. Erickson, Special Assistant Attorney General representing the Board of Massage, for comments on the rules. A copy of Mr. Erickson's prepared testimony is attached as Appendix B.

Chairman Devlin said the committee does not disagree with the authority described by Mr. Erickson for the Board of Massage to adopt these rules. He said the committee's concerns related to the adoption of additional amendments after the public hearings on the rules were completed and after the rules changes were approved by the Attorney General.

Representative DeKrey said his concern is whether the proper procedures were followed in the adoption of the additional rules.

Representative Koppelman said with regard to the additional rules amendments, the request is for the Administrative Rules Committee to adopt these amendments by agreement with the board under North Dakota Century Code Section 28-32-18. He said the problem he sees with that approach is that the statutory provision requires the committee to find that the amendments are necessary to address any of the considerations for which the committee could find rules to be void. He said it does not appear that any of those considerations apply to these rules and that there has been no suggestion that the committee would void the rules as originally adopted by the board.

Mr. Erickson said the additional rules amendments were added in response to suggestions from a member of the Legislative Assembly. He said he believes the board adopted the additional amendments to avoid possible concerns that the committee may find the original rules to be of an arbitrary nature and subject to being voided. He said the board believes these changes could properly be adopted by the Administrative Rules Committee even though the board does not believe the original rules were arbitrary and capricious.

Representative Boehning said he requested that the board consider the additional amendments to respond to the concerns expressed to him by massage schools. He said he believed the additional amendments would improve the rules.

Representative Galvin said he does not support the additional amendments offered by the board.

Representative Koppelman said whether the person initiating the request is a legislator or not, a person could present concerns to the Administrative Rules Committee that could initiate amendments to be adopted by the committee. He said this situation is similar but the process that was followed short-circuits the process somewhat.

Senator Andrist said at the public hearings on the rules, the added changes were not under consideration and that concerns him with regard to adopting the additional changes.

It was moved by Representative Koppelman, seconded by Senator Andrist, and failed on a roll call vote that the Administrative Rules Committee agree with the Board of Massage on the additional amendments proposed by the board after the approval of the original amendments by the Attorney General. Voting in favor of the motion were Representatives Boehning, Koppelman, Thoreson, and Wrangham and Senators Andrist, Brown, Fischer, and Klein. Voting in opposition to the motion were Representatives Devlin, Bernstein, DeKrey, Galvin, Iverson, and Sitte and Senators Bercier, Fairfield, Lee, and Triplett.

Senator Andrist said perhaps the best course of action at this point is to void the original rules to allow the Board of Massage to restart the administrative rulemaking procedure. **It was moved by Senator Andrist and seconded by Representative Koppelman that the Administrative Rules Committee void the January 2005 rules of the Board of Massage.**

Senator Klein said he does not see any reason why the Administrative Rules Committee would reject the original rules. He said none of the reasons for voiding rules appears to apply.

Senator Andrist said his intention is to allow the Board of Massage to restart the administrative rulemaking process. He said he does not object to the rules content but to the process that was followed.

Representative Wrangham said he thinks the committee should resist the motion to void the rules and reconsider its approval motion for the additional amendments because it appears the additional amendments are in the best interest of the public.

Senator Andrist withdrew his motion to void the rules of the Board of Massage and Representative Koppelman withdrew his second.

It was moved by Representative Iverson, seconded by Representative Koppelman, and failed on a roll call vote that the Administrative Rules Committee agree with the Board of Massage on the additional amendments proposed by the board after the approval of the original amendments by the Attorney General. Voting in favor of the motion were Representatives Boehning, Iverson, Koppelman, Thoreson, and Wrangham and Senators Andrist, Brown, Fischer, and Klein. Voting in opposition to the motion were Representatives Devlin, Bernstein, DeKrey, Galvin, and Sitte and Senators Bercier, Fairfield, Lee, and Triplett.

It was moved by Senator Andrist, seconded by Representative Koppelman, and failed on a roll call vote that the Administrative Rules Committee void North Dakota Administrative Code Sections 49-01-01-01, 49-02-02-01, 49-01-02-02, 49-01-02-05, 49-02-02-02, 49-02-02-03, and 49-02-03-01 of the rules amendments adopted by the Board of Massage. Voting in favor of the motion were Representatives Boehning, Iverson, Koppelman, Sitte, and Wrangham and Senators Andrist, Brown, and Fischer. Voting in opposition to the motion were Representatives Devlin, Bernstein, DeKrey, Galvin, and Thoreson and Senators Bercier, Fairfield, Klein, Lee, and Triplett.

Chairman Devlin said it appears that concludes committee consideration of the rules of the Board of Massage and the rules as originally adopted by the board remain in effect and the additional rules amendments suggested by the board are not adopted.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Ms. Melissa Hauer, Department of Human Services legal counsel, for presentation of testimony regarding a request by the department for approval of the repeal of obsolete chapters of the Administrative Code. A copy of Ms. Hauer's prepared testimony is attached as Appendix C.

It was moved by Senator Fischer, seconded by Senator Brown, and carried on a roll call vote that the Administrative Rules Committee approve the request of the Department of Human Services for repeal of North Dakota Administrative Code Chapters 75-02-11 and 75-03-26 on the grounds that the rules are obsolete. Voting in favor of the motion were Representatives Devlin, Bernstein, Boehning, DeKrey, Iverson, Koppelman, Sitte, Thoreson, and Wrangham and Senators Andrist, Bercier, Brown, Fischer, Klein, Lee, and Triplett. No negative votes were cast.

Chairman Devlin said the economic assistance program rules of the Department of Human Services were carried over from the previous committee meeting. He said there have been discussions about changing language in the rules but it appears the rules simply restate what is provided by statute and he does not believe there are grounds to void the rules in question.

Representative Iverson said he has discussed his concerns with counsel for the Department of Human Services and those discussions have resolved the concerns he expressed at the previous meeting.

PRIVATE INVESTIGATIVE AND SECURITY BOARD

Chairman Devlin said the committee approved a motion at its previous meeting to carry over consideration of rules of the Private Investigative and Security Board which eliminate the option of licensees to provide a bond rather than errors and omissions insurance coverage. He called on Mr. Edward E. Erickson, Special Assistant Attorney General representing the Private Investigative and Security Board, for comments relating to these rules. A copy of Mr. Erickson's prepared testimony is attached as Appendix D.

Mr. Erickson said the Private Investigative and Security Board has voted to hold off on imposing new insurance requirements until new licenses are renewed.

Representative Wrangham said it has been suggested that the insurance requirement is for the protection of the public and asked from what the insurance would protect the public. Mr. Erickson said insurance coverage would cover negligent or intentional acts that injure persons or damage property and the public would be protected by assuring financial responsibility of licensees in those situations.

Representative Galvin said Mr. Hal Simons pointed out at the previous meeting that there have not been problems with lawsuits against private investigators. He said he believes having insurance in place could encourage more lawsuits.

Chairman Devlin called on Mr. Bill Butcher, a member of the Private Investigative and Security Board, for comments relating to the rules. Mr. Butcher said for 23 years the board has had errors and omissions insurance coverage as an option for licensees but bonds were allowed. He said

the board does not believe bonds provide adequate assurance of financial responsibility under current circumstances.

Chairman Devlin called on Mr. Hal Simons, private investigator, for comments relating to the rules. Mr. Simons asked if it is in the public interest to require errors and omissions insurance coverage for licensed private investigators, then why it is not in the public interest to require this insurance coverage for every occupation. He said in his experience this rule change results in a difference of from $44 for an annual bond to $500 for annual insurance premiums. He said it represents a large added cost for him for coverage that does not really provide him any greater coverage than he previously had because all of his work is done on behalf of attorneys.

AERONAUTICS COMMISSION

Chairman Devlin called on Mr. Gary Ness, Aeronautics Commission, for testimony relating to September 2005 rules of the Aeronautics Commission. A copy of Mr. Ness's prepared testimony is attached as Appendix E.

INSURANCE COMMISSIONER

Chairman Devlin called on Mr. Craig Burns, Department of Insurance legal counsel, for testimony relating to September 2005 rules of the Insurance Commissioner. A copy of Mr. Burns' prepared testimony is attached as Appendix F.

STATE BOARD OF FUNERAL SERVICE

Senator Klein said a letter to the committee from Mr. Nick J. Hertz was distributed to committee members. A copy of the letter is attached as Appendix G. Senator Klein said the letter reiterates concerns expressed by other licensees about the continuing education requirement imposed by the rules adopted by the State Board of Funeral Service. Senator Klein said he is concerned that the standards for the approval of continuing education classes require only that the board approve classes. He said he believe this could result in arbitrary approval standards. **It was moved by Senator Klein and seconded by Representative DeKrey that the Administrative Rules Committee void North Dakota Administrative Code Chapter 25-02-03, relating to continuing education for funeral practitioners and references in North Dakota Administrative Code Section 25-02-02-04, relating to references to continuing education requirements, on the grounds that the rules are arbitrary and capricious.**

In discussion of the motion, Representative Galvin said he would agree with eliminating the continuing education rules because there is no clear explanation of how approval for continuing education courses will be obtained and reviewed.

Senator Klein said he believes approval of continuing education is purely arbitrary and within the discretion of the board, and he believes it must be made more clear what is acceptable.

The question was called and the motion carried on a roll call vote. Voting in favor of the motion were Representatives Devlin, Boehning, DeKrey, Galvin, Iverson, Koppelman, Sitte, and Wrangham and Senators Andrist, Bercier, Fairfield, Fischer, Klein, Lee, and Triplett. Voting in opposition to the motion were Representative Thoreson and Senator Brown.

Chairman Devlin said the next meeting of the Administrative Rules Committee will be December 13, 2005.

No further business appearing, Chairman Devlin adjourned the meeting at 12:30 p.m.

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John Walstad
Committee Counsel

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John D. Olsrud
Director

ATTACH:7