

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### ADMINISTRATIVE RULES COMMITTEE

Wednesday, June 11, 2008  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Senator Tom Fischer, Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Senators Tom Fischer, John M. Andrist, Layton W. Freborg, Jerry Klein, Tracy Potter; Representatives Chuck Damschen, Duane L. DeKrey, David Drovdal, Mary Ekstrom, Rodney J. Froelich, Chris Griffin, Kim Koppelman, Jon Nelson, Louise Potter, Blair Thoreson, Dwight Wrangham

**Member absent:** Representative Randy Boehning

**Others present:** Kari L. Conrad, State Representative, Minot

Representative Merle Boucher, member of the Legislative Council, was also in attendance.

See [Appendix A](#) for additional persons present.

**It was moved by Representative Nelson, seconded by Representative Koppelman, and carried on a voice vote to approve the minutes of the March 12, 2008, meeting of the committee.**

#### CONSIDERATION OF BILL DRAFTS

Chairman Fischer said copies of bill drafts relating to the Racing Commission were distributed to committee members. He said one bill draft [\[90152.0100\]](#) would eliminate the Racing Commission and transfer its functions to the Attorney General and the other bill draft [\[90153.0100\]](#) would require return of breeders' fund money that was transferred to supplement purses. He said he believes it would be appropriate for the committee to carry over consideration of the bill drafts pending completion of an audit report on Racing Commission activities. He asked Representative Nelson about the pending audit report. Representative Nelson said as he was gathering information on issues relating to Racing Commission rulemaking and statutory provisions, he discussed the Racing Commission with the State Auditor. He was informed that an audit report on Racing Commission activities will be completed in the near future and he believes the committee should not take action regarding the bill drafts until the audit report becomes available.

**It was moved by Representative Nelson, seconded by Representative DeKrey, and carried on a voice vote that the Administrative Rules Committee defer consideration of the bill drafts relating to the Racing Commission until the committee has reviewed the report of the State Auditor regarding Racing Commission activities.**

Chairman Fischer said, although the committee will not be acting on the bill drafts relating to the Racing Commission, several people are in attendance at the meeting relating to Racing Commission issues and asked whether any of them would like to address the committee.

Chairman Fischer called on Ms. Heather Benson, General Manager, North Dakota Horse Park, for comments on racing issues. Ms. Benson distributed copies of written materials ([Appendix B](#)). She said the information is provided for committee members to consider while awaiting release of the audit report.

Ms. Benson said she came to North Dakota from South Dakota and North Dakota currently has much better administration of horse racing. She said South Dakota previously had a substantial racing industry but, after elimination of the South Dakota Racing Commission, racing has diminished to two racing meets per year and horse breeding activity in South Dakota has diminished.

Ms. Benson said it is important to recognize that horse breeders, racing participants, and fans have a substantial positive impact on the state and local economies. She asked committee members to review the printed material she provided and consider all facets of racing issues during committee deliberations.

Representative Froelich said the Administrative Rules Committee's experience has been frustration that the Racing Commission does not follow statutory guidance in rulemaking. Ms. Benson said there should be ways to address those concerns without elimination of the Racing Commission. She said the Racing Commission provides stability for horse racing in North Dakota and options should be explored to preserve the Racing Commission and address the concerns of legislators.

Representative Nelson said another aspect of legislative frustration with the Racing Commission is that racing rules are promulgated and opinions of interested parties are offered on those rules. He said when the Racing Commission does not listen to opinions of concerned people in making rules, consideration must be given to eliminating the Racing Commission.

Chairman Fischer called on Mr. Doug Plummer. Mr. Plummer said he is a rancher and horse breeder. He said horse breeders have been frustrated by dealings with the Racing Commission for 10 years or more. He said the Racing Commission allocated \$300,000 to the North Dakota Horse Park from the

breeders' fund and that was a wrong decision. He said licenses and fees of horse breeders and the race participants have doubled and it is necessary to obtain two licenses from different organizations for participation.

### **OCCUPATIONAL AND PROFESSIONAL LICENSING LAW STUDY**

Chairman Fischer called on committee counsel for presentation of a bill draft [\[90098.0200\]](#) relating to penalty provisions under occupational and professional licensing laws. Committee counsel said the bill draft is the culmination of a process initiated by a study assigned to the Administrative Rules Committee. He said contacts were made with all occupational and professional licensing boards and commissions, inviting their participation in the study. He said boards and commissions reviewed statutory and rule provisions in their jurisdiction and consulted with their legal counsel and the Attorney General's office. He said some boards and commissions determined that their statutory provisions relating to penalties were adequate and some determined that it would be appropriate to make statutory provisions more specific to identify more clearly what conduct is subject to criminal penalties. He said the bill draft is a compilation of the suggestions received from boards and commissions that determined statutory changes were appropriate. He said the committee could act on the bill draft or defer consideration, but he does not believe any more boards or commissions will be responding regarding this issue.

Representative DeKrey said he thinks the committee should send this bill on for legislative consideration.

**It was moved by Representative DeKrey and seconded by Representative Potter that the bill draft relating to penalty provisions under occupational and professional licensing laws be approved and recommended to the Legislative Council.**

Senator Andrist said greater uniformity among penalty provisions for occupations and professions would be desirable. Representative DeKrey said uniformity of penalty provisions is desirable but information received from agencies makes it clear that penalty provisions relating to agencies must be determined on a case-by-case basis because circumstances differ among occupations and professions.

Representative Griffin said he does not believe state's attorneys will be willing to prosecute minor violations of occupational and professional licensing laws.

The question was called and **the motion carried on a roll call vote.** Voting in favor of the motion were Senators Fischer, Andrist, Freborg, Klein, and Potter and Representatives Damschen, DeKrey, Drovdal, Ekstrom, Froelich, Griffin, Koppelman, Potter,

Thoreson, and Wrangham. No negative votes were cast.

### **NORTH DAKOTA LOTTERY**

Chairman Fischer called on Ms. Julie Thompson, Interim Director, North Dakota Lottery, for testimony ([Appendix C](#)) relating to lottery rules carried over for consideration from the previous committee meeting.

Representative DeKrey said Ms. Thompson's testimony indicates that the mission statement of the lottery promotes maximizing net proceeds from the lottery. He asked whether the mission statement is part of statutory law. Ms. Thompson said the mission statement is not law.

Representative Wrangham said he would support elimination of the rules provisions carried over for consideration. He said his concern is that the changes in question represent an expansion of gambling.

Senator Andrist said his concern with the intention of the North Dakota Lottery to conduct raffles is that it would stifle raffles by local charitable organizations and fundraisers. He said if the staff of the North Dakota Lottery believes that a raffle is included within the definition of a lottery, he wonders why it is necessary to add the word raffle to the rule. Ms. Thompson said the word raffle is added as an indication of intent of the North Dakota Lottery to conduct raffles.

Senator Klein said the North Dakota Lottery has been successful. He said he thinks it rubs some people the wrong way when efforts are made to promote a greater level of participation in lottery games. He said some members of the public would view adding raffles to state lottery games as an expansion of gambling. He said while it may be a legally correct conclusion that raffle is included within the meaning of lottery, it may be wiser to bring the issue forward for legislative consideration to allow more public input on the issue of whether the lottery should conduct raffles.

Representative Koppelman said several attempts were necessary before the voters approved a state lottery. He said much of the public understood the approval by voters was to allow participation in only Powerball and many believe anything beyond that is an unconstitutional expansion of gambling. Ms. Thompson said the North Dakota Lottery is allowed by law to participate in multistate games. She said profitability of lottery games is a significant consideration in administration of the North Dakota Lottery.

Senator Potter said the North Dakota Lottery has had a negative impact on charitable gaming. He said, as a legislator, profitability is not the factor he would apply to judge the administration of the lottery.

Senator Andrist asked what would be accomplished by adding the word raffle to the rule provision and what would be allowed that is not allowed now. Ms. Thompson said she believes the word lottery in the current rules would cover any raffle

activity to be conducted by the North Dakota Lottery so adding the word raffle to the rule is not an expansion of authority. Senator Andrist asked if he is correct in assuming the North Dakota Lottery would not resist taking out the word raffle in the rule. Ms. Thompson said she does not think the North Dakota Lottery would put up a fight about removing the word raffle.

Mr. Tom Trenbeath, Chief Deputy Attorney General, said the word raffle was included in the rule to avoid launching a raffle operated by the North Dakota Lottery without advance notice. He said the Attorney General's office and the staff of the North Dakota Lottery believe a raffle is a lottery and current law and rules would allow operation of a raffle by the North Dakota Lottery. He said the Attorney General is very sensitive to the concerns of legislators and the public about expansion of gambling and the Attorney General is not seeking to expand gambling through the rules change. He said the Attorney General's office believes adding the word raffle to the rule is in the nature of a clarification to provide advance notice that a raffle may be conducted.

Senator Potter said perhaps the Attorney General's office should consider the concerns of this committee as a reason not to undertake initiation of raffles as part of the North Dakota Lottery. Mr. Trenbeath said if this committee determines including the word raffle in the rules is inappropriate, the North Dakota Lottery probably would not pursue operating raffles.

Chairman Fischer called on Mr. Warren Dekrey, North Dakota Council on Gambling Problems, for comments on the rules of the North Dakota Lottery. Mr. Dekrey said the concerns of his organization are very much like those the committee has expressed. He said participation in Powerball was authorized by voters in 2003 and the lottery now conducts four games and another would be added with raffles. He said charitable gaming organizations also continue to seek expanded authority. He said expansion of gambling should be discouraged.

Mr. Dekrey said gambling participation creates social problems and lottery advertising promotes participation. He said raffles conducted by the North Dakota Lottery would negatively impact local and school raffles as fundraisers. He said he does not believe the public is clamoring for the North Dakota Lottery to add raffles as a new format.

Chairman Fischer called on Mr. Trenbeath. He said in response to the discussion at this meeting, he believes the Attorney General's Lottery Division would agree with the committee to withdraw the word raffle from the proposed rule.

**It was moved by Senator Klein, seconded by Representative Koppelman, and carried on a roll call vote that the Administrative Rules Committee agree with the Attorney General's Lottery Division to remove the word raffle from the proposed amendment to North Dakota Administrative Code (NDAC) Section 10-16-03-01, relating to games authorized to be conducted by the North Dakota**

**Lottery.** Voting in favor of the motion were Senators Fischer, Andrist, Freborg, Klein, and Potter and Representatives Damschen, DeKrey, Drovdal, Ekstrom, Froelich, Griffin, Koppelman, Nelson, Potter, Thoreson, and Wrangham. No negative votes were cast.

## STATE BOARD OF CHIROPRACTIC EXAMINERS

Chairman Fischer called on Dr. Carol Winkler, President, State Board of Chiropractic Examiners, for testimony ([Appendix D](#)) relating to July 2008 rules of the board.

Representative Ekstrom inquired about elimination of the terms cappers or steerers from the rule identifying unprofessional conduct. Dr. Winkler said those words are old terminology that may be eliminated because those activities are now covered by other provisions.

Representative Froelich asked why the fee increase in the rules is necessary. Dr. Winkler said the cost of board investigations and technology needs are increasing. She said the board does not increase fees often and prefers to hold off on fee increases as long as possible.

## DEPARTMENT OF TRANSPORTATION

Chairman Fischer called on Mr. Francis G. Ziegler, Director, Department of Transportation, for testimony ([Appendices E](#) and [F](#)) relating to July 2008 rules of the department.

Mr. Ziegler said the department worked with the Highway Patrol to make changes to rules relating to the limit on long vehicle combination size, updating language relating to the Department of Transportation and director, and to allow a long load sign to be displayed on the last vehicle in a three- or four-unit combination.

Mr. Ziegler said separate testimony is provided relating to rules of the Department of Transportation to incorporate rules that were previously adopted by the Motor Vehicle Division. He said the Motor Vehicle Division was at one time a separate department and, after that department was transferred into the Department of Transportation, rules previously adopted by the Motor Vehicle Department were not moved into the article of rules of the Department of Transportation. He said the objective of these rules is to incorporate rules dealing with motor vehicle operations.

Representative Ekstrom said the allowance for 97-foot long vehicle combinations is required by federal law and asked whether there are any road conditions when the 97-foot combination vehicles would not be allowed on highways. Mr. Ziegler said there are specified road and weather conditions under which the longer vehicle combinations are not allowed on highways.

In response to a question from Representative Koppelman, Ms. Leanna Emmer, Highway Patrol, said

he is correct that not all states allow the same length of combination vehicles. She said in general western states allow longer combination vehicles than eastern states. She said Minnesota does not allow the same length combination vehicles that North Dakota allows.

### STATE DEPARTMENT OF HEALTH

Chairman Fischer called on Mr. Dennis R. Fewless, Director, Division of Water Quality, State Department of Health, for testimony ([Appendix G](#)) relating to July 2008 water well rules.

### BOARD OF NURSING

Chairman Fischer called on Dr. Constance B. Kalanek, Executive Director, Board of Nursing, for testimony ([Appendix H](#)) relating to July 2008 rules of the board.

Dr. Kalanek said after the rules were submitted for publication, the board decided additional changes were appropriate. She said the board suggests that in NDAC Section 54-02-10-02.1(5), the word "calendar" be inserted to make clear that the period of allowable practice during processing of a license application is 30 calendar days. She said the board would suggest, in Section 54-02-12-01(1)(b), removing the phrase "who is not currently licensed as a registered nurse in North Dakota."

In response to a question from Representative Koppelman, Dr. Kalanek said the changes in NDAC Chapter 54-02-10 relate to interstate compact compliance. In response to another question from Representative Koppelman, Dr. Kalanek said the suggestion to use 30 calendar days is to make the rule clear and consistent with interpretations used in other compact states.

Senator Fischer said there are several places in these rules where the Board of Nursing is given authority to approve certain issues relating to licensing or an individual must demonstrate a fact to the satisfaction of the board. He said these provisions give the board a lot of discretion and he hopes this discretion is not abused by how it is used. Dr. Kalanek said the board is very conscious of consistency in making these kinds of determinations.

**It was moved by Representative Koppelman, seconded by Representative DeKrey, and carried on a roll call vote that the Administrative Rules Committee agree with additional changes to the rules of the Board of Nursing as recommended by the board.** Voting in favor of the motion were Senators Fischer, Andrist, Freborg, Klein, and Potter and Representatives Damschen, DeKrey, Drovdal, Ekstrom, Froelich, Griffin, Koppelman, Nelson, Potter, Thoreson, and Wrangham. No negative votes were cast

### NORTH DAKOTA STATE BOARD OF OPTOMETRY

Chairman Fischer called on Ms. Mary Nordsvén, Special Assistant Attorney General, North Dakota

Board of Optometry, for testimony ([Appendix I](#)) relating to July 2008 rules of the board.

Senator Potter said the rules allow practice of optometry as an independent contractor. He asked whether that is consistent with legislative intent. Ms. Nordsvén said there are certain ambiguities in the statutory provisions regarding practice of optometry. She said the rules are intended to clear up some of these ambiguities. She said it is important to remember that an optometrist practicing as an independent contractor is still required to exercise independent judgment in practice.

### EDUCATION STANDARDS AND PRACTICES BOARD

Chairman Fischer called on Ms. Janet Welk, Executive Director, Education Standards and Practices Board, for testimony ([Appendix J](#)) relating to July 2008 rules of the board.

### STATE BOARD OF ACCOUNTANCY

Chairman Fischer called on Mr. Harold Wilde, Chairman, State Board of Accountancy, for presentation of testimony ([Appendix K](#)) relating to rules of the board carried over for consideration from the previous committee meeting.

Mr. Wilde said the board agreed to propose a change in the board stipend to retain the current daily rate of \$300 for board members and to keep the change that increases the annual cap to \$2,000.

Senator Klein said he is concerned about the effect on new accountants if principles of accounting courses will not count toward licensing requirements. Mr. Wilde said principles of accounting will continue to be an important course for college students in an accounting program. He said there is no overall change in the number of credits a student is required to complete but the content change should make certified public accountant candidates more prepared for entry into the profession. He said the board would agree that it would be appropriate to delay the date in NDAC Section 3-01-02-01 to December 31, 2009, to make sure that students nearing college graduation are not caught unaware of the content change.

Senator Klein inquired about concerns expressed to the board regarding peer review as provided in the rules changes. Mr. Wilde said within the profession, the term "compilation" is used to refer to a service provided only by certified public accountant and licensed public accountant licenseholders. He said there were concerns that the peer review provision would affect unlicensed accountants but that will not occur because it applies only to entities allowed to perform a compilation. He said, in his experience, peer review has greatly improved oversight and quality of services in the profession.

Representative Koppelman asked if the per diem for board members serves as a discouragement to serving on the board. Mr. Wilde said the per diem amount does not reimburse board members at the

same rate as their hourly earnings but there are enough licensees willing to provide service on the board.

## HUMAN RESOURCE MANAGEMENT SERVICES

Chairman Fischer called on Ms. Laurie Steriotti Hammeren, Director, Human Resource Management Services, Office of Management and Budget, for testimony ([Appendix L](#)) relating to July 2008 rules adopted by the Office of Management and Budget.

Ms. Hammeren said agencies under the North Dakota merit system are required by federal law to maintain personnel standards on a merit basis because, if North Dakota is found out of compliance with federal regulations, the federal funds for these programs may be at risk. She said county social service agencies are part of the merit system and the rules adopted implement 2007 Senate Bill No. 2321 to allow counties to opt-out of the state merit system by establishing their own merit systems within the county. She said the rules establish procedures for a county social service agency to establish a merit system at the county level and be consistent with federal merit principles required by federal law. She said an attachment to her testimony summarizes all of the comments received relating to the rules, arranged according to the topic of each rule change. She said the most significant objection to the rules was lodged by representatives of Cass County, who did not agree with the provisions governing county authority to opt-out of the state merit system.

Senator Potter said the rules allow exemptions for a reasonable number of positions under the merit system. He asked what constitutes a reasonable number of positions. Ms. Hammeren said the term reasonable number is used because it is not possible to be specific about the number of exempt positions. She said one method to obtain exemption is through an application for approval of exemption to designate certain employees as at will employees. She said another method is legislative action to designate certain employee positions as at will positions.

Chairman Fischer called on Ms. Bonnie Johnson, Administrator, Cass County, for testimony ([Appendix M](#)) relating to rules adopted by Human Resource Management Services. Ms. Johnson said the Cass County Board of Commissioners requested her to appear today to express opposition to the interpretation of statutory provisions relating to at will and for cause employment. She said the Cass County State's Attorney has requested an opinion from the Attorney General regarding this issue. She said Cass County and the Office of Management and Budget disagree on legal interpretation of statutory provisions and Cass County officials believe an opinion from the Attorney General is the appropriate means to resolve the difference of opinion. She said Cass County is hoping to eliminate a divided employee policy under which some of the 400 Cass

County employees are at will employees and some are for cause employees.

Chairman Fischer called on Representative Kari L. Conrad, District 3 State Representative, for comments on the rules adopted by the Office of Management and Budget. Representative Conrad said she signed on as one of the sponsors of Senate Bill No. 2321, which has become the center of the debate regarding at will and for cause employment by county employees in the merit system. She said she appears today to discuss her intent in agreeing to sponsor the bill. She said her understanding was that the bill would provide some relief for Cass County because several county employees had capped out under the salary structure that existed at the time. She said some county employees not under the state merit system were allowed to receive higher salaries than other county employees who were under the state merit system. Representative Conrad said she participated in both committee hearings on Senate Bill No. 2321 and paid close attention to the floor debates on the bill and never heard any discussion of at will employment and for cause employment. She said she agreed to cosponsor the bill because she believed it was important to liberate counties from wage constraints that did not apply equally to all county employees.

Representative DeKrey asked if Representative Conrad believes the rules adopted by Human Resource Management Services reflect the legislative intent of Senate Bill No. 2321. Representative Conrad said she believes the rules as adopted do reflect the legislative intent of the bill.

Chairman Fischer called on Ms. Jodee Buhr, Executive Director, North Dakota Public Employees Association, for testimony ([Appendix N](#)) relating to the rules adopted by Human Resource Management Services.

Ms. Buhr said Senate Bill No. 2321 was enacted to allow counties to opt-out of the state merit system but only in accordance with federal standards. She said the bill was intended to allow counties an option to provide salary increases for employees who have been frozen at the top of a salary range. She said representatives of the North Dakota Public Employees Association attended every hearing on Senate Bill No. 2321 and never heard any discussion of changing the status of employees from a for cause status to an at will status.

Senator Fischer said he believes Cass County had a pay schedule and wanted to absorb social service employees into that pay scale. Ms. Buhr said she believes Cass County employees supported passage of Senate Bill No. 2321. She said she does not believe Cass County employees who supported the bill believed they could become at will employees because of enactment of the bill. She said the bill specifically requires the county to develop an optional system that complies with federal standards, which includes for cause employment status.

Senator Potter said as he understands the disagreement, Cass County believes at will employment meets federal standards and Human Resource Management Services does not believe that is the case. Ms. Hammeren said that is correct. She said she believes that question is the crux of the request for an opinion from the Attorney General. Senator Potter asked whether there is any reason these rules changes have to take effect July 1, 2008. Ms. Hammeren said that is up to the committee to determine. She said her office had hoped for a July 1 effective date to match up with the date of pay raises for most public employees.

Senator Fischer asked Ms. Johnson what rights employees in Cass County have if they are not under for cause status. Ms. Johnson said court decisions require fair treatment for employee review. She said Cass County has a four-step process for fair treatment involving appeal of decisions in turn to the supervisor, department head, portfolio holder on the board of county commissioners, and the full board of county commissioners.

Representative DeKrey said it would be appropriate to carry over consideration of the rules on county social service merit systems until the requested opinion from the Attorney General is received.

**It was moved by Representative DeKrey, seconded by Representative Koppelman, and carried on a roll call vote that the Administrative Rules Committee carry over consideration of the submitted rules under NDAC Chapter 4-07-34.1.** Voting in favor of the motion were Senators Fischer, Andrist, Freborg, Klein, and Potter and Representatives Damschen, DeKrey, Drovdal, Ekstrom, Froelich, Griffin, Koppelman, Nelson, Potter, and Thoreson. No negative votes were cast.

## **PUBLIC SERVICE COMMISSION**

Chairman Fischer called on Ms. Annette Bendish, Attorney, Public Service Commission, for testimony ([Appendix O](#)) relating to rules adopted by the Public Service Commission.

Ms. Bendish said the rules on reclamation under NDAC Article 69-05.2 were not intended to be submitted and should be withdrawn from consideration. She said the rules will be resubmitted when the Public Service Commission completes consideration of those rules.

Ms. Bendish said the rules prepared for committee consideration regarding wind turbine decommissioning are not the final set of rules as adopted by the Public Service Commission. She said the rules received by the committee are the initial version of the rules and the final version contains several changes made after consideration of comments received on the rules. She said a correct copy of the rules

adopted by the Public Service Commission is attached to her testimony.

Representative Koppelman said the committee has not had sufficient time to review the correct set of rules on wind turbine decommissioning and it would be appropriate to carry over consideration of those rules.

**It was moved by Representative Koppelman, seconded by Representative DeKrey, and carried on a voice vote that the committee carry over consideration of the rules submitted by the Public Service Commission governing wind turbine decommissioning.**

## **DEPARTMENT OF HUMAN SERVICES**

Chairman Fischer called on Ms. Julie Leer, Legal Counsel, Department of Human Services, for testimony ([Appendix P](#)) relating to rules adopted by the department.

## **TEACHERS' FUND FOR RETIREMENT**

Chairman Fischer called on Ms. Fay Kopp, Deputy Executive Director, Retirement and Investment Office, for testimony ([Appendix Q](#)) relating to Teachers' Fund for Retirement rules.

## **STATE BOARD OF ACCOUNTANCY**

Senator Klein said he believes it is appropriate for the committee to agree with the State Board of Accountancy on two changes to the rules as submitted.

**It was moved by Senator Klein, seconded by Senator Andrist, and carried on a roll call vote that the Administrative Rules Committee agree with the State Board of Accountancy on amendments to NDAC Section 3-01-01-01, retaining a board member compensation limit of \$300 per day, and Section 3-01-02-01, relating to delaying until the end of 2009 the accounting concentration change to exclude principles of accounting from required accounting or business courses.** Voting in favor of the motion were Senators Fischer, Andrist, Freborg, Klein, and Potter and Representatives Damschen, DeKrey, Drovdal, Ekstrom, Froelich, Griffin, Koppelman, Nelson, Potter, Thoreson, and Wrangham. No negative votes were cast.

No further business appearing, Chairman Fischer adjourned the meeting at 3:10 p.m.

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John Walstad  
Code Revisor

ATTACH:17