

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### ADMINISTRATIVE RULES COMMITTEE

Tuesday, May 16, 2000  
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, Rex R. Byerly, Duane DeKrey, Mary Ekstrom, Bette Grande, Pam Gullerson, George J. Keiser, Kim Koppelman, Stacey L. Mickelson, Darrell D. Nottestad, Sally M. Sandvig, Blair Thoreson; Senators John Andrist, Tom Fischer, Jerry Klein, Bob Stenehjem

**Members absent:** Representative Jon O. Nelson; Senators Deb Mathern, Rich Wardner

**Others present:** See Appendix A

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

#### EMERGENCY RULES STATUS

Chairman Devlin called on committee counsel for discussion of what constitutes an emergency for rule-making purposes. Committee counsel said North Dakota Century Code (NDCC) Section 28-32-02 provides that if an agency finds that emergency rule-making is necessary because of imminent peril to the public health, safety, or welfare, or because a rule-making delay would cause a loss of revenues appropriated to the agency, the agency may declare a proposed rule to be an interim final rule effective no earlier than the date of filing with the Legislative Council of the rulemaking notice. Committee counsel said a representative of the Attorney General's office discussed the issue of what constitutes an emergency at the Administrative Rules Committee meeting of October 21, 1999. He said the representative of the Attorney General's office said because the statute puts the finding of necessity for emergency rules within the discretion of an agency, the Attorney General's office is reluctant to second-guess an agency decision.

Committee counsel said the statement by the representative of the Attorney General's office is similar to decisions of courts in other states. He said the North Dakota Supreme Court has not had any decisions on this issue, but the provision regarding imminent peril to the public health, safety, or welfare was drawn from the Model State Administrative Procedure Act of the National Conference of Commissioners on Uniform State Laws and has been

reviewed by courts in other states. He said a California court has said courts are not conclusively bound by an agency's determination that an emergency exists, although it is recognized that what constitutes an emergency is primarily a matter for the agency's discretion (*Posch v. Dumke*, 31 Cal. App. 3d 932 (1973)). He said a Massachusetts court has found that the standard for deciding whether an agency's finding of an emergency was warranted is whether there was a substantial basis for it, and such a finding is given every presumption in its favor and is not subject to question in judicial proceedings unless palpably wrong (*American Grain Products Processing Institute v. Department of Public Health*, 467 N.E. 2d 455 (1984)).

Committee counsel said committee members have expressed concern that determination of emergency status by an agency is an internal decision with no outside review or requirement of justification. He said if the committee wishes to impose a review requirement with regard to determinations of emergency status, the committee may wish to consider requiring the adopting agency to convince another executive branch agency that an emergency exists. He said the review function might be appropriate for the Governor's office or the Attorney General's office.

Representative Byerly said he requested discussion of this issue because he believes there is a problem when an agency decision is basically final on the issue of when an emergency exists for rulemaking purposes.

Representative Keiser said he agrees the law should require something more than an agency declaration that an emergency exists. He said perhaps it should be required that an agency prepare a statement of justification for emergency rulemaking at the time a declaration is made for emergency rules.

Senator Andrist said it appears anyone could write something to justify emergency status because the statutory requirements are vague. He said he believes there should be some form of review and approval from outside the agency before rules are given emergency status.

**It was moved by Representative Keiser, seconded by Representative Byerly, and carried on a voice vote that any agency that has adopted emergency rules be requested to provide an explanation when the rules are reviewed by the**

**Administrative Rules Committee of the reasons why an emergency exists with respect to those rules.**

Representative Keiser said this could be added to the list of questions agencies are routinely asked to address in their appearances before the Administrative Rules Committee.

**It was moved by Senator Andrist, seconded by Representative Nottestad, and carried on a voice vote that the Legislative Council staff be requested to prepare a bill draft for committee consideration which would require prior approval from the Administrative Rules Committee before administrative rules may be made effective on an emergency basis.**

Committee counsel said a consideration in the approach in this bill draft will be that the Administrative Rules Committee meets only approximately every three months and requiring prior approval of the committee may create timing problems in getting emergency rules in place.

**STATUTORY BASIS FOR RULEMAKING**

Chairman Devlin called on Ms. Beth Baumstark, Legal Counsel, Attorney General's office, for comments on the statutory basis for rulemaking. She said she was contacted by committee counsel regarding interpretation of NDCC Section 28-32-02, relating to rulemaking authority of agencies. She said that section provides that every administrative agency may adopt, amend, or repeal reasonable rules in conformity with the provisions of Chapter 28-32 and any statute administered or enforced by the agency. She said this statement appears to be very broad in application and the Attorney General's office has tried to apply a restrictive reading to this statutory provision. She said there are many specific statutory rulemaking provisions outside NDCC Chapter 28-32, and during her time in the Attorney General's office, the office has advised agencies there must be a specific rulemaking authority outside NDCC Chapter 28-32 to support administrative rulemaking. She said the existence of the general rulemaking language of NDCC Section 28-32-02 and the specific provisions of other laws is cause for concern in interpretation. She provided several examples of statutory provisions allowing or requiring administrative rulemaking in specific instances.

Ms. Baumstark said she has discussed this issue with committee counsel, who expressed concern about this interpretation and its effect on existing provisions in the North Dakota Administrative Code (NDAC) which were adopted in reliance on NDCC Section 28-32-02 and who pointed out that some administrative agencies lack specific rulemaking authority.

Ms. Baumstark said she would recommend a bill to allow the Legislative Assembly to make clear whether the general authority for rulemaking applies

for all administrative agencies or whether specific statutory authority for rulemaking must exist for an agency in a particular area of law outside NDCC Chapter 28-32. She said the Attorney General's office takes no position on which option the Legislative Assembly should choose but recommends that a clear statutory directive exist about whether or not there is general rulemaking authority that applies to all administrative agencies.

In response to a question from Representative Gulleston, Ms. Baumstark said it is easier for the Attorney General's office to review rules when there is specific statutory authority for rulemaking. Representative Gulleston asked whether there are any statutory provisions that deny rulemaking authority to an agency. Ms. Baumstark said she is not aware of any statutory denial of rulemaking authority but there are several examples of statutory restrictions on rulemaking authority.

Representative Keiser said one of his concerns is that if the general statutory authority for rulemaking is eliminated, we would have a legislative session filled with bills from agencies seeking authorization to make rules in areas in which they believe they need that authority. He asked whether Ms. Baumstark thinks that will be a problem if general rulemaking authority is eliminated. Ms. Baumstark said that could be a problem, but it could be avoided by preparation of a bill draft to supply specific rulemaking authority in areas where it is needed. She said this would require a lot of work and might be accomplished by requesting information from each administrative agency on the areas of law in which the agency believes it will require specific rulemaking authority.

Senator Andrist asked whether Ms. Baumstark would be willing to work with the Legislative Council staff to develop a bill draft to eliminate general rulemaking authority for administrative agencies and create specific rulemaking authority in those areas of law where it is needed. Ms. Baumstark said she would be glad to help with that effort.

**It was moved by Senator Andrist, seconded by Representative Byerly, and carried on a voice vote that the Legislative Council staff be requested to prepare a bill draft in consultation with the Attorney General's office to eliminate general rulemaking authority and to create specific rulemaking authority in areas of law where it is needed.**

Committee counsel said the bill draft that has been requested contemplates that consideration will be given to each provision of state law and a decision made about whether or not rulemaking authority should exist for that provision and which agency should have that authority. He said this is an enormous undertaking that might generate errors or oversights in some areas of law. He said it might be advisable to provide in such a bill draft for delayed implementation so it would not become effective until

August 1 following the next ensuing legislative session. He said this would allow agencies another legislative session to seek remedial legislation if problems are found in areas of law where rulemaking authority is not specifically provided by the bill draft. He said another consideration is the status of provisions currently in the North Dakota Administrative Code which were adopted under the general rule-making authority that would be eliminated by the bill draft. He said the bill draft should probably provide for validation of preexisting rules so they remain in effect if the bill draft becomes law and changes the statutory basis for rulemaking. Representative Gulleason said she agrees these considerations should be used in preparing the bill draft. Chairman Devlin said in preparing the bill draft the Legislative Council staff and the Attorney General's office should give consideration to delayed effectiveness to allow an intervening legislative session for remedial legislation if necessary.

### **ADMINISTRATIVE AGENCIES PRACTICE ACT REVISION**

Chairman Devlin called on committee counsel to review a bill draft to revise the Administrative Agencies Practice Act, NDCC Chapter 28-32. Committee counsel said the bill draft rearranges the provisions of the chapter relating to administrative rulemaking. He said over the years provisions have been added in a fashion that makes the provisions difficult to read and to find. He said the objective in preparing the bill draft was to put rulemaking provisions in logical order and to have individual sections dealing with certain topics rather than a mixture of topics addressed in a single section as is the case under current law. He said in the bill draft provisions are rearranged without rewriting language to avoid substantive changes. He said several sections from outside NDCC Chapter 28-32 are included in the bill draft because statutory references to sections within the chapter must be corrected. He said the provisions of NDCC Chapter 28-32 relating to administrative hearings are unchanged, except section numbers must be changed to accommodate the increased number of sections relating to administrative rulemaking.

Committee counsel said the bill draft provides for repeal of current NDCC Chapter 28-32 as it will exist on December 31, 2000. He said the reason for this repeal date is so that any legislation affecting the chapter in the 2001 legislative session will not be repealed. He said the bill draft will be provided to the Attorney General's office and the Office of Administrative Hearings for review. Copies were distributed to committee members of a derivation table to allow the user to compare sections of existing law with provisions in the bill draft.

### **AGENCY NOTICE TO PARTIES OF ADMINISTRATIVE RULES COMMITTEE CONSIDERATION**

Chairman Devlin called on committee counsel to review a bill draft requested at the previous meeting to require agencies to notify interested parties of when rules will be considered by the Administrative Rules Committee. Committee counsel said the bill draft requires an agency to adopt a procedure to allow interested parties to request and receive notice from the agency of the date and place the rule will be reviewed by the Administrative Rules Committee. He said comments from agencies should be sought on how this would affect them.

### **FILING OF COMMENT WITH RULES**

Chairman Devlin called on committee counsel to review a bill draft requested at the previous meeting to require agencies to file comments received on rules with the Legislative Council when the rules are filed for publication. Committee counsel said the bill draft requires a copy of each written comment and a written summary of each oral comment made on rules to be filed with the Legislative Council when the rules are filed for publication in the North Dakota Administrative Code. He said there is presently no central location to research the history of an administrative rule. He said agencies may or may not retain material on administrative rules hearings but there is no central collection point for these materials. He said for legislation, the Legislative Council maintains records that allow researchers to review the legislative history of statutory provisions. He said collection of comments on rules in a central location would have the benefit of providing a place to research history on administrative rules. He said if this change becomes law the Legislative Council will have to make space to store these records and consideration should be given to whether the records should be retained permanently or for a limited time and whether the records should be stored on microfiche or some electronic storage method.

### **BOARD OF MEDICAL EXAMINERS**

Chairman Devlin called on Mr. John Olson for testimony regarding May 2000 rules of the State Board of Medical Examiners. Mr. Olson said he is appearing on behalf of Mr. Rolf Sletten, who was unable to be present. A copy of testimony prepared by Mr. Sletten is attached as Appendix B.

Chairman Devlin said the rules in NDAC Chapter 50-03-03 change the filing place for certain documents by emergency medical technicians from the State Board of Medical Examiners to the State Department of Health Division of Emergency Health Services. He asked whether emergency medical technician representatives were involved in discussions of these changes and whether this would do

anything to upset services of rural ambulance services. Mr. Olson said he cannot say for sure whether these changes will cause any problems since he was not involved in discussions, but he believes everyone was consulted in making these changes. He said he believes the State Board of Medical Examiners was the place where concerns of various groups converged and these changes were the result.

Senator Andrist said it appears licensure for students is a whole new area of regulation, and he asked why rules were chosen over legislation on this topic. Mr. Olson said the statutory change on licensing for students has been done, and these rules are to implement that change.

## **DEPARTMENT OF PUBLIC INSTRUCTION**

Chairman Devlin called on Dr. Wayne Sanstead, Superintendent of Public Instruction, for comments on rules of the superintendent carried over from the previous committee meeting. Dr. Sanstead said the Department of Public Instruction staff has worked through a long process in developing these rules and has had extensive consultation with concerned groups. He said he believes consensus has been developed that supports the rules with minor modifications. He said Dr. Gary Gronberg of the Department of Public Instruction would review suggested rules changes.

Dr. Gronberg distributed copies of proposed amendments of the Department of Public Instruction to NDAC Chapter 67-11-02 regarding elementary principal's credential, Chapter 67-11-04 regarding library media credential, Chapter 67-11-05 regarding school counselor credential, Chapter 67-11-06 regarding secondary principal's credential, Chapter 67-11-07 regarding superintendent's credential, and NDAC Section 67-19-01-39 regarding pupil personnel services and Section 67-21-01-41 regarding library media services. He reviewed these suggested amendments. He said there is one additional change required as a result of an oversight that was just discovered, and the North Dakota Education Association has a suggestion that the Department of Public Instruction would support.

Chairman Devlin called on Mr. Max Laird, President, North Dakota Education Association, for comments on the suggested rule change. A copy of Mr. Laird's prepared comments are attached as Appendix C.

Chairman Devlin called on Mr. Wilfred Volesky, North Dakota Council of Educational Leaders, for comments on the changes suggested by the Department of Public Instruction. Mr. Volesky said he is appearing on behalf of Mr. Larry Klundt, Executive Director of the Council of Educational Leaders, and he distributed copies of a letter prepared by Mr. Klundt in support of the changes suggested by the Department of Public Instruction. A copy of the letter is attached as Appendix D.

Chairman Devlin said it appears there is general agreement among concerned parties regarding the suggested amendments to the rules of the Department of Public Instruction. He said the committee would discuss whether to accept the amendments later in the meeting.

## **DEPARTMENT OF HUMAN SERVICES RATESETTING RULES**

Chairman Devlin said rules of the Department of Human Services relating to ratesetting for basic care and nursing facilities were carried over from the previous committee meeting. He called on Ms. Melissa Hauer, Department of Human Services, for comments on these rules. A copy of Ms. Hauer's prepared testimony is attached as Appendix E. Ms. Hauer said department representatives have met with representatives of the North Dakota Long Term Care Association and there is only one remaining area of disagreement regarding the basic care rules. She said the disagreement relates to NDAC Section 75-02-07.1-22(8), which provides that reimbursement to facilities is subject to a limit of 90 percent of licensed bed capacity. She said this issue is presently the subject of an administrative appeal challenging the authority of the department to impose this 90 percent occupancy rate limit.

Representative Devlin said there is a 90 percent occupancy limit in the statutory provisions governing reimbursement to nursing homes. He said there is no corresponding provision in the statutes governing reimbursement for basic care facilities. He said he believes because the Legislative Assembly has set the limit in one area of law but has not done so in the other area means by implication the limit does not apply where the Legislative Assembly has been silent, and this cannot be changed by rule. Ms. Hauer said the statutory provisions on rulemaking by the Department of Human Services are phrased in very broad terms that would cover this area of rulemaking. Representative Devlin said his problem with the approach in this instance is that the rule attempts to extend to an area of law in which the Legislative Assembly has not chosen to set a limit. He said he believes if the department thinks this limit is appropriate, the change should be pursued through introduction of legislation.

Ms. Barb Fischer, Manager, Long-Term Care and Hospital Services, Department of Human Services, said the chairman is correct in the observation there is a specific statute imposing a 90 percent occupancy limit regarding nursing facilities but no similar statutory limit for basic care facilities. She said basic care facility rules have been prepared to parallel the rules of nursing facilities, and this is the reason the 90 percent limitation in the rules would apply to basic care facilities.

Representative Devlin asked Ms. Fischer how many basic care facilities in the state would be

affected by the 90 percent occupancy limitation. Ms. Fischer said she is not certain how many of these facilities are under 90 percent occupancy but a rough estimate she made in reviewing statistics this morning showed that two-thirds of facilities would be affected.

Chairman Devlin called on Ms. Shelly Peterson, North Dakota Long Term Care Association, for comments on the ratesetting rules of the department. Ms. Peterson said the 90 percent occupancy limitation for basic care facilities is still a significant concern to the association. She said basic care facilities in rural areas would be most negatively affected by this limitation. She said a single facility would have an estimated loss of \$26,000 in reimbursement under this limitation. She said she believes this limitation should be a legislative issue and not a rulemaking issue.

Chairman Devlin called on Ms. Leslie Oliver, North Dakota Long Term Care Association, for comments on the department's ratesetting rules. Ms. Oliver said she believes the 90 percent occupancy limitation for basic care facilities should have been a matter of legislative consideration. She said legislative appropriations for basic care facility reimbursement were made without consideration of a 90 percent occupancy limitation because that limitation did not exist in law during legislative consideration of these appropriations. She said the Department of Human Services had opportunities to seek legislative changes if a 90 percent occupancy limit was to be imposed, but the department did not do so. She said there was also an interim committee that could have addressed this issue but did not. She said another aspect of this rule which causes problems for facilities is that the rule caught basic care facility administrators by surprise with no opportunity to adjust budgets.

Chairman Devlin called on Mr. Dave Zentner, Director, Medical Services, Department of Human Services, for comments on the 90 percent occupancy limitation for basic care facilities. Mr. Zentner said there was a task force on long-term care planning appointed by the Governor prior to the 1999 legislative session. He said a bill was not considered by the 1999 Legislative Assembly on this topic. He said the budget for the Department of Human Services was subject to change throughout the legislative session, so the department could not anticipate the need for a 90 percent occupancy limitation for basic care facilities until the end of the legislative session.

Representative Devlin said he believes the Legislative Assembly should have debated this limitation because of its effect across the state. He said he does not think rulemaking should be used when the effect is so widespread and significant. He said issues with that kind of impact should be decided by the Legislative Assembly.

Representative Sandvig asked whether the 90 percent occupancy limit for basic care facilities is necessary to allow the state to qualify for federal funds for medical assistance. Mr. Zentner said there

are no federal funds for basic care facilities, and they are entirely funded by state dollars.

Senator Stenehjem asked whether there was a fiscal note or any communications to the Appropriations Committees during the 1999 legislative session that would indicate appropriations for this biennium were based on a 90 percent occupancy limitation for basic care facilities. Ms. Fischer said there were fiscal notes based on a three percent operating margin and treating property as a passthrough, but no estimates were presented based on a 90 percent occupancy limit for basic care facilities. Senator Stenehjem said it appears this rule would make changes to reimbursements after the Appropriations Committees have reviewed and funded the program.

In response to a question from Representative Keiser, Ms. Fischer said revenue losses to basic care facilities from the 90 percent occupancy limitation were not calculated in the 1999 Department of Human Services budget. Representative Keiser asked whether it would be appropriate to assume the 1999 Legislative Assembly expected the state to pay \$26,000 more to the nursing home that was estimated to lose that amount through this change. Ms. Fischer said she is not sure if that statement is true, and calculations were not made during the legislative process to determine precise payments for each facility.

Representative Gulleson asked whether operators of basic care facilities came out of the 1999 legislative session believing they had a certain amount of money coming from the department, and then these rules changed that expectation. Ms. Fischer said she is not sure what facilities expected because amounts were not recalculated during the legislative session.

Representative Devlin asked whether at the end of the 1999 legislative session a basic care facility operator would have had any reason to expect the 90 percent occupancy limitation would apply to his facility. Ms. Fischer said she does not know the expectations of facility operators.

Representative Keiser said the Department of Human Services prepared fiscal notes during the 1999 legislative session regarding the three percent operating margin and treating property as a passthrough, and he asked whether a fiscal note would have been prepared if the 90 percent occupancy limit for the basic care facilities would have been imposed by law. Ms. Fischer said a fiscal note probably would have been prepared.

Representative Byerly said the 90 percent occupancy limitation for basic care facilities was not included in the appropriations process or in the statutory provisions governing reimbursement to basic care facilities, and it could have been. He said he thinks the bottom line is that the Department of Human Services should have brought this suggested change to the Legislative Assembly for consideration. **It was moved by Representative Byerly and**

seconded by Senator Fischer that the Administrative Rules Committee void subdivision b of subsection 8 of North Dakota Administrative Code Section 75-02-07.1-22, regarding a 90 percent occupancy limit for basic care facilities, on the grounds that with regard to this portion of the rule there is an absence of statutory authority, a failure to comply with express legislative intent or to substantially meet the procedural requirements of NDCC Chapter 28-32, or arbitrariness and capriciousness. Representative Byerly said the Department of Human Services should bring this matter forward as legislation for consideration in the 2001 Legislative Assembly.

Ms. Fischer said she does not think the department would have sought legislation on the 90 percent occupancy limitation for basic care facilities because basic care facilities and nursing facilities are addressed in separate chapters of the North Dakota Century Code. Representative Devlin said that is part of the problem he sees with this rule. He said these are separate chapters of law, one of which has a limitation and the other of which does not.

Representative Keiser said he does not believe there is a lack of authority for adoption of these rules because the Department of Human Services has very broad authority to adopt rules. He said he thinks this rule provision is contrary to express legislative intent and should be voided for that reason because the 90 percent occupancy limitation was not considered by the Legislative Assembly and does not exist by law even though a statute does provide such a limit for nursing facilities.

Representative Grande said the Legislative Assembly establishes budgets for these facilities, and if there is an unplanned financial impact to facilities, the Legislative Assembly should have had an opportunity to consider it in the budget and that did not occur in this case.

The question was called and **the motion carried**. Voting in favor of the motion were Representatives Devlin, Bernstein, Byerly, DeKrey, Ekstrom, Grande, Gulle-son, Keiser, Koppelman, Nottestad, Sandvig, and Thoreson and Senators Andrist, Fischer, Klein, and Stenehjem. There were no negative votes.

### STATE BOARD OF ANIMAL HEALTH

Chairman Devlin said rules of the State Board of Animal Health were carried over from the previous committee meeting because of concerns about application of those rules. He called on Dr. Larry Schuler, State Veterinarian and Executive Director, State Board of Animal Health, for comments relating to those rules. A copy of Dr. Schuler's prepared testimony is attached as Appendix F. Dr. Schuler said the suggested amendment would limit the application of the rule to chronic wasting disease in certain species rather than all cervidae. He said this change meets with the approval of the Farmed Elk Advisory

Committee and cervidae representative of the Nontraditional Livestock Advisory Council. Senator Klein said he believes these changes address the concern that surfaced at the previous committee meeting.

**It was moved by Senator Klein, seconded by Representative Koppelman, and carried that the Administrative Rules Committee agree with the State Board of Animal Health on amendments to North Dakota Administrative Code Section 48-12-01-03 as suggested by the board.** Voting in favor of the motion were Representatives Devlin, Bernstein, Byerly, DeKrey, Ekstrom, Grande, Gulle-son, Keiser, Koppelman, Nottestad, Sandvig, and Thoreson and Senators Andrist, Fischer, Klein, and Stenehjem. There were no negative votes.

### STATUS OF A DECLARATION BY THE AGRICULTURE COMMISSIONER

Chairman Devlin called on Mr. Paul Germolus, Assistant Attorney General and General Counsel, Department of Agriculture, to address a question raised by the committee at its previous meeting regarding the legal status of a declaration as compared to an administrative rule regarding a noxious weed. Mr. Germolus said the difference between a declaration and an administrative rule is that an administrative rule is legally enforceable and a declaration is not. He said he advised the Agriculture Commissioner of this, which was the reason the committee at its previous meeting reviewed an administrative rule regarding a noxious weed that previously had been declared to be a noxious weed. A copy of testimony presented by Mr. Germolus is attached as Appendix G.

### BOARD OF OCCUPATIONAL THERAPY PRACTICE EXTENSION

Chairman Devlin called on Mr. Bill Peterson, Assistant Attorney General, for presentation of a request for an extension of time to adopt rules by the Board of Occupational Therapy Practice. A copy of Mr. Peterson's letter requesting the extension is attached as Appendix H. **It was moved by Representative Nottestad, seconded by Representative Grande, and carried on a voice vote that the Administrative Rules Committee approve an extension of time to adopt administrative rules for the Board of Occupational Therapy Practice according to the request of the board.**

### OFFICE OF MANAGEMENT AND BUDGET RISK MANAGEMENT DIVISION

Chairman Devlin called on Ms. Jo Zschomler, Director, Risk Management Division, Office of Management and Budget, for testimony relating to rules adopted by the Risk Management Division for the establishment of the Risk Management and Motor Vehicle Accident Review Board. A copy of

Ms. Zschomler's prepared testimony is attached as Appendix I.

### **BOARD OF DENTAL EXAMINERS**

Chairman Devlin called on Mr. Jerry Kettleson, Counsel, Board of Dental Examiners, for testimony relating to April 2000 rules of the board. A copy of Mr. Kettleson's prepared testimony is attached as Appendix J.

Chairman Devlin asked for a summary of comments on these rules. Mr. Kettleson said the testimony received related to the issue of anesthesia injection and the Attorney General has determined that was not a proper subject for rulemaking and should be addressed by the Legislative Assembly. Mr. Kettleson said the comments have not been summarized in the testimony, because the portion of the rules relating to anesthesia injection was withdrawn from the rules after the comments were received.

### **STATE PLUMBING BOARD**

Chairman Devlin called on Mr. Jack Skaley, Deputy Secretary, State Plumbing Board, for comments on March 2000 rules of the board. A copy of Mr. Skaley's prepared testimony is attached as Appendix K. Mr. Skaley said the objective in these rules is to adopt the Uniform Plumbing Code as the official plumbing code for the state.

Representative Keiser asked whether adoption of the Uniform Plumbing Code means our state plumbing code will automatically change when changes are made to the Uniform Plumbing Code. Mr. Skaley said changes will not automatically be adopted in North Dakota because the Uniform Plumbing Code was adopted as it existed on the effective date of the rule adopted by the State Plumbing Board. He said as future changes to the Uniform Plumbing Code are made, they will have to be considered by the State Plumbing Board, and if the board decides to make them effective in North Dakota, an administrative rulemaking procedure would have to be initiated.

Representative Byerly said he is concerned about enforcement of plumbing code provisions in certain structures such as hunting lodges or primitive cabins. Mr. Skaley said the State Plumbing Board has never attempted to enforce the state plumbing code for the kinds of structures Representative Byerly described. He said he would review these concerns with the State Plumbing Board.

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

Chairman Devlin called on Ms. Janet Placek Welk, Executive Director, Education Standards and Practices Board, for testimony on March 2000 rules of the board. A copy of Ms. Welk's prepared testimony is attached as Appendix L.

### **PRIVATE INVESTIGATION AND SECURITY BOARD**

Chairman Devlin called on Mr. Jim Fleming, Attorney General's office, for presentation of testimony prepared by Ms. Cathy Schuh, President, Private Investigation and Security Board, relating to May 2000 rules of the board. A copy of the testimony prepared by Ms. Schuh is attached as Appendix M.

### **REAL ESTATE COMMISSION**

Chairman Devlin called on Mr. Dennis Schulz, Secretary-Treasurer, Real Estate Commission, for testimony relating to May 2000 rules of the commission. A copy of Mr. Schulz's prepared testimony is attached as Appendix N.

### **DEPARTMENT OF HUMAN SERVICES**

Chairman Devlin called on Ms. Hauer for testimony regarding two sets of rules adopted by the department. A copy of Ms. Hauer's report on licensing of programs for individuals with developmental disabilities is attached as Appendix O. A copy of the department's report regarding medical services rules is attached as Appendix P.

Ms. Hauer said a substantial amount of negative comment has been received since adoption of these rules, and the department requests the Administrative Rules Committee to eliminate subdivisions k and l of subsection 2 of NDAC Section 75-02-02-08. She said these subdivisions provide that no coverage will be provided without prior authorization from the department for partial hospitalization services or certain categories of prescribed drugs. She said the department would like to eliminate these provisions from the rules, and the department's position is that it would be appropriate for the Legislative Assembly to consider whether preauthorization should be required for these services and drugs.

Representative Devlin asked why the judgment of a "prudent layperson" was not included in the definition of "medically necessary" under NDAC Section 75-02-02-03.2. He said the reason he asks the question is if the decision of the layperson is that a medical emergency exists and treatment is provided but review of that decision determines the services were not medically necessary, the department will deny coverage. He said this is a particular concern for rural area ambulance services. Mr. Zentner said the definition of medically necessary is intended to cover what treatment is appropriate. He said this standard is not to be applied in hindsight but is to recognize that conditions that existed at the time of treatment may have appeared to be more serious than turned out to be the case. He said the determination of what is medically necessary is a separate issue from what constitutes an emergency for treatment purposes. He said the objective is to discourage unnecessary use of emergency services. He said with regard to rural ambulance services, the applicable standard would

be the definition of "medical emergency" under NDAC Section 75-02-02-03.2, which includes the "prudent layperson" standard for assessing whether emergency treatment appears necessary.

In response to a question from Representative Koppelman, Mr. Zentner said if a nonmedical person would believe a medical emergency exists, that would be adequate under these rules to support coverage for emergency treatment. Mr. Zentner said if a layperson would think a life-threatening situation exists, then an ambulance call would be appropriate.

**It was moved Representative Keiser, seconded by Representative DeKrey, and carried that the Administrative Rules Committee void subdivisions k and l of subsection 2 of NDAC Section 75-02-02-08 as requested by the Department of Human Services.** Voting in favor of the motion were Representatives Devlin, Bernstein, Byerly, DeKrey, Ekstrom, Grande, Keiser, Koppelman, Mickelson, Nottestad, Sandvig, and Thoreson and Senators Andrist, Fischer, Klein, and Stenehjelm. There were no negative votes.

Senator Andrist said he commends the Department of Human Services for looking for ways to save money. He said in the instances in which the committee has taken exception to the rules of the department today, he believes the Legislative Assembly is the proper forum for discussion of these issues.

Chairman Devlin called on Mr. David Peske, North Dakota Medical Association, for comments on the medical services rules. A copy of Mr. Peske's prepared testimony is attached as Appendix Q.

Chairman Devlin said he has discussed the issue with personnel from the Department of Human Services, and they are agreeable to the committee carrying over consideration of the definition of "medically necessary" under NDAC Section 75-02-02-03.2 and the provisions regarding medically necessary ambulance services and emergency room services under subdivisions h and i of subsection 2 of Section 75-02-02-08. He said the committee can consider a motion on this topic later.

### **TEACHERS' FUND FOR RETIREMENT**

Chairman Devlin called on Ms. Fay Kopp, Deputy Executive Director, North Dakota Retirement and Investment Office, for comments on Teachers' Fund for Retirement rules effective May 2000. A copy of Ms. Kopp's prepared testimony is attached as Appendix R.

### **WATER COMMISSION**

Chairman Devlin called on Ms. Julie Krenz, Assistant Attorney General, Water Commission, for testimony on April 2000 rules of the commission. A copy

of Ms. Krenz's prepared testimony is attached as Appendix S.

### **WORKERS COMPENSATION BUREAU**

Chairman Devlin called on Ms. Julie Leer, Assistant Attorney General, Workers Compensation Bureau, for testimony regarding May 2000 rules of the bureau. A copy of Ms. Leer's prepared testimony is attached as Appendix T.

In response to a question from Representative Ekstrom, Ms. Leer said the staff of the Office of Independent Review will be moved from the Workers Compensation Bureau building as of July 1. She said the bureau has decided to make this change because of concerns about whether the staff can remain independent when located with the staff of the bureau.

### **DEPARTMENT OF PUBLIC INSTRUCTION RULES AMENDMENTS**

**It was moved by Representative Mickelson, seconded by Representative Nottestad, and carried that the Administrative Rules Committee approve and adopt the amendments suggested by the Department of Public Instruction and the North Dakota Education Association.** Voting in favor of the motion were Representatives Devlin, Bernstein, Byerly, Ekstrom, Grande, Keiser, Mickelson, Nottestad, Sandvig, and Thoreson and Senators Andrist, Fischer, Klein, and Stenehjelm. There were no negative votes.

### **DEPARTMENT OF HUMAN SERVICES MEDICAL SERVICES RULES**

Chairman Devlin asked the committee for a decision regarding the medical services rules discussed earlier. **It was moved by Senator Stenehjelm, seconded by Representative Ekstrom, and carried on a voice vote that the Administrative Rules Committee carry over consideration of the May 2000 medical services rules of the Department of Human Services relating to the definition of "medically necessary" under NDAC Section 75-02-02-03.2 and medically necessary ambulance services and emergency room services under subdivisions h and i of subsection 2 of NDAC Section 75-02-02-08.**

The meeting was adjourned at 4:00 p.m.

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John Walstad  
Code Revisor

ATTACH:20