

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Thursday, October 21, 1999
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative William R. Devlin, Chairman, called the meeting to order at 10:00 a.m.

Members present: Representatives William R. Devlin, LeRoy G. Bernstein, Duane DeKrey, Mary Ekstrom, Betty Grande, George J. Keiser, Kim Koppelman, Jon O. Nelson, Darrell D. Nottestad, Sally M. Sandvig, Blair Thoreson; Senators John Andrist, Tom Fischer, Deb Mathern, Rich Wardner

Members absent: Representatives Rex R. Byerly, Pam Gulleeson, Stacey L. Mickelson; Senators Jerry Klein, Bob Stenehjem

Others present: See Appendix A

Senator Fischer said that on page 6 of the minutes of the July 14-15 meeting, in the final sentence of the discussion of the rules of the Board of Examiners for Nursing Home Administrators, it is stated that Ms. Herman said there is no nursing home in the state administered by an administrator who is a nonresident. Senator Fischer said it would be more accurate for the minutes to state that Ms. Herman said each nursing home in the state is administered by an onsite administrator. **It was moved by Senator Fischer, seconded by Representative Grande, and carried on a voice vote that the minutes of the previous meeting be corrected with regard to the statement of Ms. Herman and approved.**

MEMORANDUM ON WHAT IS AN ADMINISTRATIVE AGENCY

The chairman called on committee counsel for presentation of a memorandum entitled *Administrative Agencies as Defined by the Administrative Agencies Practice Act*. Committee counsel reviewed the definition of administrative agency in North Dakota Century Code (NDCC) Section 28-32-01. He said the definition outlines the status of an administrative agency in general terms and then provides a list of 20 exceptions that exclude certain agencies from the definition of administrative agency. He said the list includes some limited exclusions so that some agencies are administrative agencies for some purposes but not for other purposes.

Committee counsel said the definition of administrative agency was amended into its current format in 1981. He said an interim study resulted in the legislation creating the current definition format. He said before 1981 a three-part definition governed

determination of whether an agency was an administrative agency. He said the three-part definition required that an agency have statewide jurisdiction, authority to make decisions having the force and effect of law, and decisionmaking authority that by statute would be subject to review in the courts. He said the report of the interim committee states that the most troubling aspect of the definition was the requirement that an agency decision must be subject to court review. He said this requirement necessitated Supreme Court decisions and opinions of the Attorney General to determine whether each agency was or was not an administrative agency. He said opinions and court decisions had developed determining that 23 state agencies were not administrative agencies and three agencies were administrative agencies only for limited purposes. Each of the agencies identified appeared before the interim Administrative Rules Committee to discuss the status of its agency under the Administrative Agencies Practice Act. This process led to introduction and passage of the 1981 legislation establishing the format for the current definition of administrative agency. Since 1981, the definition of administrative agency has been amended on several occasions regarding activities of individual agencies or individual functions within agencies. Committee counsel said it appears that each agency or program excluded from the definition of administrative agency has been excluded as a result of legislative consideration and action. He said those agencies excluded by 1981 legislation had specific preexisting law interpreted by the Attorney General or Supreme Court to exclude them, and agencies excluded since 1981 were excluded by specific legislation for that purpose.

Committee counsel said one aspect of the definition of administrative agency which may merit consideration is that the definition applies under the entire Administrative Agencies Practice Act. He said the Act governs administrative rulemaking and administrative hearings and adjudicative functions. He said there are differences between these functions and situations may exist in which it would be desirable to include or exclude an agency in coverage of the Administrative Agencies Practice Act for rulemaking but not for adjudicative functions.

Chairman Devlin said consideration of status as an administrative agency will be an ongoing consideration and can be discussed again at the next committee meeting.

LEGAL STATUS OF RULES, GUIDELINES, AND PRONOUNCEMENTS OF AGENCIES

Chairman Devlin called on committee counsel for presentation of a memorandum entitled *Legal Status of Rules, Guidelines, and Pronouncement of Agencies*. Committee counsel said if an agency is within the definition of "administrative agency" under the Administrative Agencies Practice Act and adopts rules in compliance with the Act, those rules have the force and effect of law. He said the significance of having the force and effect of law is that a valid administrative rule is binding upon all persons and on the courts to the same extent as a statute.

Committee counsel said courts in other states and the United States Supreme Court have recognized a distinction between legislative and interpretive rules. He said under this distinction legislative rules have the force and effect of law, but interpretive rules are not binding on a reviewing court and serve only as a source of guidance. Under this approach, interpretive rules do not have the force and effect of law and the adopting agency must rely on the underlying statute to support its interpretation.

Committee counsel said the North Dakota Supreme Court has not recognized, and the North Dakota Administrative Agencies Practice Act does not address, a distinction between legislative and interpretive rules. He said the North Dakota Supreme Court has held that rules of an administrative agency are invalid if not adopted in accordance with the Administrative Agencies Practice Act. He said the court has also concluded that statutory interpretations by agencies do not have the force and effect of law but are to be given great weight by the courts in resolving doubtful meanings. He said the North Dakota Supreme Court has also determined that informal policy or administrative construction of a statute by an agency is entitled to "deference" or "some weight" if that interpretation does not contradict clear and unambiguous statutory language.

Committee counsel said the only North Dakota Supreme Court decision with respect to rules of agencies that are not administrative agencies involved rules adopted by the Director of Institutions (a state official with responsibility for correctional institutions prior to the creation of the Department of Corrections and Rehabilitation in 1989) governing conduct of Penitentiary inmates. He said the court observed that the Penitentiary rules were not subject to the Administrative Agencies Practice Act and allowed penalties for violation of the rules to stand.

Committee counsel said the conclusions that can be drawn from existing legal authority in North Dakota are that rules adopted in compliance with the

Administrative Agencies Practice Act have the force and effect of law. He said policies, guidelines, and directives of agencies not adopted in compliance with the Administrative Agencies Practice Act may be invalid or may be entitled to "deference" or "some weight" if they are interpretive. He said rules adopted by an agency that is not subject to the Administrative Agencies Practice Act have been upheld, although it is not clear whether such rules have the force and effect of law.

Representative Keiser said he has concerns about rules that might be enacted contrary to legislative intent, especially in situations in which the Legislative Assembly has defeated legislation and the subject of the defeated legislation is later adopted in rules. He asked what options exist to prevent this result. Committee counsel said one of the reasons for which rules may be voided by the Administrative Rules Committee is that rules are contrary to express legislative intent. He said if rules were adopted which were of the same effect as legislation that was defeated, those rules would be contrary to express legislative intent and there would be valid grounds to void the rules. He said another aspect of legislative intent which may be significant in some cases is when legislative intent contained in legislative history may not be in agreement with an agency interpretation that has not been adopted as a rule. He said when courts construe statutory provisions that are ambiguous, factors a court will consider include legislative intent and agency interpretations. He said when these aids to construction are in conflict, it is uncertain whether legislative intent or agency construction would be given more weight by a court.

DEFINITIONS IN RULES

Chairman Devlin called on committee counsel for presentation of a memorandum entitled *Definitions in Rules - Effect on Interpretation of Other Rules or Laws*. Committee counsel said a question was raised at the previous committee meeting regarding whether a definition of the phrase "farming operation" appearing in State Department of Health solid waste rules would possibly affect interpretation of property tax laws or other statutory or rule provisions intended to apply to farms.

Committee counsel said definitions contained in statutes or rules are almost always preceded by language of limitation to limit application of the definition to the chapter or title of law or rules in which the definition appears. He said legal authority is generally to the effect that courts will respect limitations set out in statutes or rules regarding application of definitions and will not apply definitions in areas of law or rules which are not similar to the law or rules in which the definition appears. He said several decisions of the North Dakota Supreme Court have followed this principle.

Committee counsel said for property tax purposes, definitions are included in relevant statutory provisions for the terms "agricultural property," "farm," "farmer," and "net income from farming activities." He said the existence of these definitions make it very unlikely that a court would substitute considerations contained in definitions related to other topics.

ADMINISTRATIVE AGENCIES PRACTICE ACT REVIEW

Chairman Devlin called on committee counsel to review NDCC Chapter 28-32, the Administrative Agencies Practice Act.

Committee counsel said the Administrative Agencies Practice Act covers two different aspects of administrative agency functions which include administrative rulemaking and administrative hearings or adjudicative proceedings. He said the first section of the chapter provides definitions applicable to both types of agency action, although not each definition applies to both kinds of proceedings. He said the 11 sections following the definitions section all relate only to administrative rulemaking. He said the remaining sections of the chapter relate only to adjudicative proceedings except that four sections near the end of the chapter relate to both rulemaking and adjudicative proceedings.

Committee counsel said if the committee is interested in pursuing updating of the statutory provisions, it would be possible to separate administrative rulemaking and administrative hearings into separate chapters without too much difficulty. He said the provisions relating to administrative hearings have recently been revised so there would not be much updating necessary in the language. He said the provisions relating to administrative rules have developed over several years and some provisions could be divided into multiple sections to make it easier for users to find applicable provisions within the statutory framework.

Committee counsel said the source of much of the Administrative Agencies Practice Act is the Model State Administrative Procedure Act as drafted by the National Conference of Commissioners on Uniform State Laws. He said the North Dakota laws are substantially different from the model Act, but it appears the model Act was the source of many of the North Dakota provisions.

Chairman Devlin said he would discuss with committee counsel how to proceed with possible revisions to the Administrative Agencies Practice Act.

RULES EMERGENCY STATUS

Chairman Devlin called on Mr. Jim Fleming, Attorney General's office, for presentation of information regarding what constitutes an emergency for rulemaking purposes. Mr. Fleming said the committee requested information from the Attorney General regarding review of emergency status of rules and the

conditions that must exist for emergency rulemaking. Mr. Fleming said NDCC Section 28-32-02 requires every rule proposed by an administrative agency to be submitted to the Attorney General for an opinion as to its legality. He said this section also provides that if an agency finds that emergency rulemaking is necessary because of imminent peril to the public health, safety, or welfare, the agency may declare the proposed rule to be an interim final rule effective no earlier than the date of filing with the Legislative Council of the notice of rulemaking. He said because the statute puts the finding of necessity within the discretion of the agency, the Attorney General's office would be reluctant to second-guess an agency decision.

Mr. Fleming said with regard to the rules of the Milk Marketing Board which were declared to be emergency rules, the letter accompanying the rules stated that emergency rulemaking was necessary to permit orderly marketing of milk and to maintain an adequate supply of milk and that these objectives were essential to protect public health, safety, or welfare. Mr. Fleming said it appears the Milk Marketing Board was within its statutory authority in making the emergency declaration and that the board had grounds from which it could perceive a threat to public health, safety, or welfare.

Representative Koppelman said the law requires advice from the Attorney General's office to agencies in rulemaking matters. He asked whether the law places the Attorney General in a difficult position in being required to advise agencies on whether emergency rulemaking is appropriate and also in reviewing rules as to legality after conclusion of rulemaking activity. Mr. Fleming said the staff person in the Attorney General's office who advises an agency on rulemaking activity would not be the same person who would review the rulemaking as to legality after adoption of the rules. He said the Attorney General's office is careful to separate advising agencies from reviewing agency actions.

Representative Koppelman said it appears that the statutory requirements for declaration of an emergency in rulemaking activity is too loose and would allow any rules to be declared to be emergency rules. Mr. Fleming said he believes agencies are accountable for their decisions to the public and to the Legislative Assembly. He said he believes if agencies abuse emergency rulemaking declarations, there will be an accounting for that abuse to the public, the Legislative Assembly, or the Administrative Rules Committee.

MILK MARKETING BOARD

Chairman Devlin called on Mr. John E. Weisgerber, Jr., Director, Milk Marketing Board, for a presentation regarding Milk Marketing Board rules declared effective August 31, 1998, as emergency rules. A copy of Mr. Weisgerber's prepared testimony

is attached as Appendix B. Mr. Weisgerber said he was requested by the committee at its previous meeting to provide more detail on concerns and comments received at the public hearing and during the comment period on the Milk Marketing Board rules. Mr. Weisgerber reviewed the concerns and comments received. Mr. Weisgerber said because of the many concerns expressed to the board, the board has voted to conduct a public hearing to reconsider the rules. He said the public hearing is scheduled for November 1999. He said the testimony and comments received indicate that this issue has divided the dairy industry almost evenly and there is no easy or clear-cut solution to these problems. He said the board is seeking a compromise solution by reopening public hearings on these issues.

In response to questions from Representative Devlin, Mr. Weisgerber said the Milk Marketing Board advised the Attorney General's office that the rules in question would be adopted on an emergency basis. He said the history of rulemaking by the Milk Marketing Board has been that emergency rulemaking has not always been used but has been used in many cases because of possible negative impact to dairy farmers from delays in rules changes.

BOARD OF NURSING

Chairman Devlin called on Ms. Constance Kalanek, Executive Director, Board of Nursing, for comments on medication administration by medication assistants and administration of medication in schools. A copy of Ms. Kalanek's prepared testimony is attached as Appendix C.

Chairman Devlin called on Ms. Melissa Hauer, Department of Human Services, for comments on the effect of Board of Nursing rules on dispensation of medication in residential treatment centers for children, residential child care facilities, and developmentally disabled treatment or care centers. A copy of Ms. Hauer's prepared testimony is attached as Appendix D.

In response to a question from Representative Keiser, Ms. Hauer said a statutory exemption from Board of Nursing regulation was provided by 1999 legislation for individuals dispensing medication in residential treatment centers for children, residential child care facilities, and developmentally disabled treatment or care centers. She said the statutory exemption will expire on July 31, 2001, and after that date the Board of Nursing rules would impact human services programs. She said the 1999 legislation established a study by the Board of Nursing, Department of Human Services, and other groups to determine whether to recommend legislation to extend the exemption.

Representative Grande asked whether the Board of Nursing rules indicate any intention that parents must obtain training to administer medication to their families. Ms. Hauer said the law exempts family

members from coverage and that exemption is not scheduled to expire.

Senator Andrist asked what effect the Board of Nursing rules have on small town nursing homes. Ms. Kalanek said she has discussed this issue with the executive director of the Long Term Care Association and was informed that the rules appear to be working very well at nursing homes, and the error rate on medication administration has improved. She said there appears to be no complaint about the effect of the rules.

Chairman Devlin called on Ms. Linda Johnson, Director of School Health Programs, Department of Public Instruction, for testimony on Board of Nursing rules and the effect on delivery of medication to students in schools. A copy of Ms. Johnson's prepared testimony is attached as Appendix E.

Ms. Johnson said a protocol has been established for administration of medication to students in school. She said an individualized health care plan for students on medication has been developed for use in schools. She said these plans provide that authority of schools comes directly from parents and is not subject to supervision by Board of Nursing rules.

Representative Devlin asked whether guidelines on school administration of medication are contained in rules being developed for adoption by the Department of Public Instruction. Ms. Johnson said she believes these guidelines are contained in those rules.

Senator Andrist asked what happens to a parent who sends aspirin to school with a child without signing necessary forms. Ms. Johnson said schools must develop their own policies on enforcement of the individualized health care plans and how strict they will be in monitoring administration of medication.

HIGHWAY PATROL AND DEPARTMENT OF TRANSPORTATION

Chairman Devlin called on Mr. Marshall W. Moore, Director, Department of Transportation, for testimony relating to Highway Patrol rules that eliminated overweight fees and ton-mile fees. A copy of Mr. Moore's prepared testimony is attached as Appendix F.

Mr. Moore said the rules changes resulted in losses of approximately \$478,000 each biennium to the highway fund. He said these changes were approved in light of an additional \$1.1 million in funds from other fees as a result of 1997 legislation. He said the negative revenue impact of these rules changes was reflected in the executive budget prepared for the 1999 legislative session.

Representative Nelson said last spring a work crew in his legislative district could not begin work until it brought in heavy equipment, which could not be moved until load restrictions for highways were lifted. He asked whether the Department of Transportation can waive those load restrictions. Mr. Moore said the department can and does waive load

restrictions in some cases and may require equipment to be moved on a different route than requested to avoid damage to highways and bridges. He said the department attempts to accommodate these requests if possible and also encourages those moving heavy equipment to get the equipment in position before the spring thaw if possible.

BOARD OF ACCOUNTANCY

Chairman Devlin called on Ms. Roene Hulsing for testimony on October 1999 rules of the board. A copy of Ms. Hulsing's prepared testimony is attached as Appendix G.

Representative Koppelman asked whether he is correct in believing the rules changes eliminated individual permits for accountants. Ms. Hulsing said that is correct and only firm permits are now required, although that requires a sole proprietor to maintain a firm permit.

Representative Ekstrom asked whether an individual may take the licensing examination with no previous experience required. Ms. Hulsing said that is correct. Representative Ekstrom asked whether other states have a requirement of experience before taking the examination. Mr. Jim Abbott, Executive Director, Board of Accountancy, said he believes there may be one or two other states that require some experience before taking the examination, but most states do not require previous experience.

Representative Grande inquired about the 50 percent score required to save a portion of the licensing examination. Ms. Hulsing said the examination consists of four parts. She said a passing score of 75 percent is required on each section. She said if an individual passes two portions of the examination, the passing scores on those sections can be "saved" for the future and the applicant must only pass the remaining two sections. However, if the individual did not achieve a score of at least 40 percent on the two portions of the examination that were not passed, the passing scores on the other sections cannot be "saved." She said the 40 percent passage requirement is increased to 50 percent under the rules changes.

Representative Keiser asked whether any bills were considered in 1999 on the topic of "substantial equivalency" relating to licensees from other states being licensed in North Dakota. Mr. Abbott said there was legislation on this topic in 1999. Representative Keiser said it appears that the rules institute by rule what failed to pass by legislation in 1999. Mr. Abbott said he does not believe that is the case and that substantial equivalency was a new provision enacted by statute which is being implemented by this rule. He said the 1999 legislation eliminated some things from statute to be filled in by rules and moved some things from rules to statute. Mr. Abbott said to his knowledge there are no prohibitions on substantial equivalency requirements in statute. He said

statutory provisions had included details about testing requirements for licensing and those requirements were removed from statute and had to be reinstated by rules.

Senator Mathern said she recalls testimony on the bill during the 1999 legislative session to the effect that elimination of statutory provisions in some areas would require creation of rules to deal with these topics.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Mr. Roger Unger, State Department of Health, for comments on Department of Health primary care hospital rules. A copy of Mr. Unger's prepared testimony is attached as Appendix H.

Chairman Devlin called on Mr. Kenan Bullinger, State Department of Health, for testimony relating to State Department of Health DNA analysis rules. A copy of Mr. Bullinger's prepared testimony is attached as Appendix I.

Chairman Devlin called on Mr. Mike Mullen, State Department of Health, for presentation of a request for an extension of time to adopt rules relating to eligibility for metabolic food benefits. A copy of a letter requesting the extension is attached as Appendix J.

Chairman Devlin asked how long the State Department of Health would like the extension for this rule-making to be extended. Mr. Mullen said the department would like to have the rule in effect on July 1, 2000. **It was moved by Representative Keiser, seconded by Representative Koppelman, and carried on a voice vote that the Administrative Rules Committee approve an extension of time to July 1, 2000, to adopt rules regarding eligibility for metabolic food benefits by the State Department of Health.**

INDUSTRIAL COMMISSION - OIL AND GAS DIVISION

Chairman Devlin called on Mr. Lynn D. Helms, Director, Oil and Gas Division, Industrial Commission, for testimony relating to oil and gas wells. A copy of Mr. Helms' testimony is attached as Appendix K. Mr. Helms said the rules amendments were made to provide some relief to the struggling oil industry. He said the changes would allow a well to retain shut-in status for more than one year without being plugged if it had been shut in for economic reasons and to eliminate the fee for stripper well and workover project applications.

Representative Keiser said it appears the reason for providing this relief to the oil industry is depressed oil prices, and he inquired why it was not provided that these changes would sunset at some future increased price for oil. Mr. Helms said a triggered sunset of these changes was not considered. He said at some point the Oil and Gas Division would look at

the possibility of eliminating these changes, but he does not know at what price level that would occur.

STATE BOARD OF ANIMAL HEALTH

Chairman Devlin called on Dr. Larry Schuler, State Veterinarian and Executive Officer, State Board of Animal Health, for testimony on rules relating to scrapie disease in sheep and goats. A copy of Dr. Schuler's prepared testimony is attached as Appendix L.

STATE BOARD OF MEDICAL EXAMINERS

Chairman Devlin called on Mr. Rolf P. Sletten, Executive Secretary and Treasurer, State Board of Medical Examiners, for testimony relating to rules of the board. A copy of Mr. Sletten's prepared testimony is attached as Appendix M.

Mr. Sletten said rules changes were required to conform rules to a statutory change to provide that physician assistants are licensed rather than registered. He said another change relates to 1997 legislation that was subsequently amended in 1999 to permit adoption of these rules. He said the history of the change relates to small town hospitals that were unable to arrange services of a licensed radiologist. He said rules were developed after the 1997 legislative session to allow technologists to provide radiology services, but the Attorney General concluded that the scope of the rules exceeded the authority of the enabling legislation and 1999 legislation was needed to correct this deficiency.

Representative Koppelman requested background on the conclusion of the Attorney General regarding the rules exceeding statutory authority. Mr. Sletten said the background is rather complicated and he would provide this information by letter to committee members if requested. Chairman Devlin asked Mr. Sletten to provide the letter to the Legislative Council staff for distribution to committee members.

EXTENSION OF TIME REQUESTS FROM WORKERS COMPENSATION BUREAU AND PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chairman Devlin said requests were received from the Workers Compensation Bureau and Public Employees Retirement System for an extension of time to adopt rules. Copies of the requests are attached as Appendices N and O. Chairman Devlin said the Workers Compensation Bureau has requested an extension to June 1, 2000, for rules to implement 1999 House Bill No. 1296, and the Public Employees Retirement System has requested an extension of time until September 30, 2000, to adopt rules to implement 1999 House Bill No. 1257.

It was moved by Senator Andrist, seconded by Representative Nottestad, and carried on a voice vote that an extension of time be granted for the

Workers Compensation Bureau until June 1, 2000, to adopt rules to implement 1999 House Bill No. 1296 and an extension be granted to the Public Employees Retirement System until September 30, 2000, to adopt rules under 1999 House Bill No. 1257.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin said that since the July meeting of the committee, committee members have received correspondence from several individuals concerned about rules considered at the July meeting relating to licensing of group homes and residential child care facilities. He said the committee no longer has jurisdiction over those rules, but the individuals concerned were disappointed that the rules require written consent within 90 days before use of any image or identifying information concerning any child or member of a child's family. Chairman Devlin said the Home on the Range and other facilities are concerned that this rule is unduly restrictive on newsletters and fundraising materials. He said the concerned individuals missed their opportunity to express concerns to the Administrative Rules Committee in its consideration of these rules.

Chairman Devlin said he discussed the rule in question with Ms. Carol K. Olson, Executive Director, Department of Human Services. He said Ms. Olson agreed to have the Department of Human Services staff review this issue to consider reopening the rule-making process to address the concerns of the individuals who have contacted committee members.

Representative Keiser said he appreciates that the director has agreed to look into this matter again. He said the hearing on this issue was very contentious, and a large degree of displeasure was expressed with this rule. Representative Keiser said the concerned individuals missed their opportunity to appear before the Administrative Rules Committee perhaps because they are unfamiliar with the review process. He said perhaps there should be a requirement that agencies notify those present at hearings of the time when the Administrative Rules Committee will consider rules after adoption.

Representative Koppelman said perhaps a requirement of notice to concerned individuals could be added to the list of questions to be addressed by agencies when rules come for review before the Administrative Rules Committee. Chairman Devlin said he would discuss with the Legislative Council staff some possibilities of better informing the public, and he would schedule discussion of this issue for the next committee meeting.

BOARD OF PHARMACY

Chairman Devlin called on Mr. Howard C. Anderson, Jr., Executive Director, Board of Pharmacy, for testimony relating to rules of the board. A copy of

Mr. Anderson's prepared testimony is attached as Appendix P.

PUBLIC SERVICE COMMISSION

Chairman Devlin called on Mr. Jon Mielke, Executive Secretary, Public Service Commission, for testimony relating to three sets of rules adopted by the Public Service Commission effective August, September, and October 1999. A copy of Mr. Mielke's prepared testimony is attached as Appendix Q. Mr. Mielke said the three sets of rules relate to the general topics of grain and hay warehousing and buyers, weights and measures, and gas pipeline safety.

In response to a question from Representative Nelson, Mr. Al Moch, Public Service Commission, said anhydrous ammonia measurement can be inaccurate, and the Legislative Assembly will probably have to deal with this issue. He said the Public Service Commission wanted to require use of either meters or truck scales for anhydrous ammonia measurement, but percentage gauges are still used and were grandfathered into acceptance. He said the Public Service Commission lacks a proven device for meter testing of percentage gauges, and there is one private business providing this service, but the fees are rather high. He said improvements are possible, but it will probably require a legislative appropriation for a testing device.

SECRETARY OF STATE

Chairman Devlin called on Mr. Bob Schaible, Deputy Secretary of State, for testimony relating to administrative rules changes regarding the central indexing system. A copy of the prepared testimony of Secretary of State Alvin A. Jaeger is attached as Appendix R.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Ms. Coral Mahler, Legal Counsel, Department of Human Services, for testimony relating to child support guidelines rules of the department. A copy of Ms. Mahler's prepared testimony is attached as Appendix S.

Chairman Devlin said the rules provide adjustments in child support for extended visitations and include a minimum of 164 nights to qualify for extended visitation adjustment. He asked whether the 164-night provision was included in statute or created by rule. Ms. Mahler said she believes that limitation was included to address joint custody situations and equitable adjustments of child support.

Chairman Devlin said the imputed income provisions of North Dakota Administrative Code Section 75-02-04.1-07 include a statement that an obligor is presumed to be underemployed if gross income is less than 167 times the federal hourly minimum wage. He said this presumption appears to lack a timeframe in which the earned amount would apply. He said the

definition at the beginning of the chapter provides that net income is an annual amount, but gross income is not defined to include a monthly or annual timeframe.

Chairman Devlin called on Ms. Susan Beehler, Bismarck, for comments on the child support guidelines rules. Ms. Beehler said she is a custodial parent and is the wife of a noncustodial parent, so she is familiar with child support guidelines as a recipient and as an obligor. She said she has followed the development of the child support guidelines. She said the Department of Human Services has been accommodating and has listened to concerns expressed during the process. She said the guidelines as adopted are an improvement from the prior guidelines and have been modified somewhat from the proposed version to address some of the concerns expressed. She said there are other areas of the guidelines that are still of concern to her. She said her opinion is that the drafting committee for the child support guidelines was not representative of the public. She said the committee did not include representatives of groups representing the interests of children. She said she had difficulty obtaining worksheets developed by the Department of Human Services to determine child support under the guidelines and believes the worksheets should have been made a part of the rules so they are available to the public.

It was moved by Representative Bernstein, seconded by Representative Koppelman, and carried on a voice vote that the child support guidelines rules of the Department of Human Services be carried over to the next committee meeting for consideration.

Representative Keiser said at the next meeting of the committee, the Department of Human Services could provide some examples of how the new guidelines and the old guidelines would affect people. Mr. Blaine Nordwall, Department of Human Services, asked how the department should select examples for illustration of the effect of the guidelines. Representative Keiser said two or three examples of determination of child support amounts for differing income levels and other factors would be useful.

DEPARTMENT OF PUBLIC INSTRUCTION

Chairman Devlin said the Superintendent of Public Instruction has not adopted rules to replace the rules scheduled under 1997 legislation for expiration effective November 1, 1999. He said he believes the earliest the new rules could become effective is now January 1, 2000, which would leave a gap of two months during which there will be no rules of the Superintendent of Public Instruction which will be enforceable. He asked committee counsel whether the rules could be adopted by the Superintendent of Public Instruction on an emergency basis to make them effective before January 1, 2000. Committee counsel said the rulemaking proceeding has not made any mention of emergency rulemaking to his

knowledge, and he believes the statutory provisions would require a declaration of emergency rulemaking to be made earlier in the rulemaking process and would not be valid at the conclusion of the process.

Representative Koppelman said he is concerned there will be a period of time during which there will be no rules of the Superintendent of Public Instruction which will be enforceable. He said this is disappointing because the Administrative Rules Committee on several occasions during the last interim had representatives of the Superintendent of Public Instruction address the progress of rulemaking and the committee expressed its concern that it was important that the Superintendent of Public Instruction meet the November 1, 1999, deadline for having rules in place. **It was moved by Representative Koppelman, seconded by Representative Grande, and carried on a voice vote that the concern of the Administrative Rules Committee should be expressed to the Superintendent of Public Instruction with a request that each school district in the state should be notified that the rules of the Superintendent of Public Instruction expire November 1, 1999, and no rules have been put in place to replace the expired rules.**

Senator Mathern said she is concerned about advising schools there are no enforceable rules.

Representative Bernstein said he is disappointed by the Department of Public Instruction missing the deadline for having replacement rules in effect. He said the Administrative Rules Committee has been in contact with the department throughout the time since the 1997 legislation was passed. He said the committee has made it clear to the department its concern about meeting the deadline that has now been missed.

Representative Grande said she is also disappointed in the failure of the Department of Public Instruction to have replacement rules in effect by November 1, 1999. She said citizens of the state are left unprotected by this failure to get replacement rules in effect.

Committee counsel said he has contacted the Department of Public Instruction and the Attorney General's office with regard to the status of the rules of the department. He said the rules are being reviewed by the Attorney General's office for approval as to legality. He said after approval, the rules will be adopted and filed for publication. He said if the rules are filed by November 20, 1999, they would become effective January 1, 2000.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Mr. Nordwall. Mr. Nordwall said he wanted to bring to the attention of the committee some concerns that he has discovered would arise if the child support guidelines rules are carried over for consideration. He said the next meeting of the committee will be in approximately

three months, and a three-month delay in finalizing the child support guidelines could cause great problems because of computer programming needs. He said it is necessary to begin computer programming necessary to implement the new guidelines and a delay may cause certification problems. He introduced Mr. Mike Schwindt, Department of Human Services, for more information on the potential problems. Mr. Schwindt said the child support guidelines have to be worked into the computer system of the Department of Human Services, and it is necessary to do the computer programming as soon as possible. He said certification of the program is dependent upon compliance of the system with federal child support enforcement requirements. In response to a question from Representative Devlin, Mr. Schwindt said the financial risk to the state could be approximately \$700,000 if the system does not comply.

Senator Wardner said he questions whether any of the child support guidelines rules would fall under any of the six reasons for which the Administrative Rules Committee may void administrative rules. He said he does not believe any of the reasons for voiding rules exist in this case.

Senator Andrist said he agrees there is no apparent statutory basis for the committee to void the rules in question, and the committee cannot argue over each point of contention. He said he thinks the rules should be approved.

Chairman Devlin said he does not believe the committee has legal grounds to void the child support guidelines rules. He said there are parts of the rules he does not agree with, but the legal authority for voiding rules does not cover disagreement with policy. He said another consideration is that if the committee voids the new rules, the old rules would be reinstated. He said he understood Ms. Beehler's testimony to be to the effect that the new rules are better than the old version, although she still disagrees with some aspects of the new rules. He said it appears that voiding the rules and reverting to the old version of the rules would be a step backward for all concerned.

It was moved by Representative Keiser, seconded by Representative Nelson, and carried on a voice vote that the committee reconsider and withdraw its motion to carry over consideration of the Department of Human Services child support guidelines rules.

BOARD OF ACCOUNTANCY

Mr. Abbott said he reviewed the history of 1999 legislation discussed earlier in the meeting with regard to the issues of substantial equivalency and examination requirements. He said the testimony on the 1999 legislation was that specific examination details were to be moved out of statutes and into administrative rules where they could more easily be altered as necessary. He said the 1999 law as passed did have substantial equivalency provisions,

and the rules as adopted do not conflict with those provisions. Senator Mathern thanked Mr. Abbott for the information and said a little more explanation was needed on the background of 1999 legislation with regard to the rules of the board.

NEXT MEETING

Chairman Devlin said the next meeting of the Administrative Rules Committee is tentatively scheduled for February 22-23, 2000. He said it appears that more than one day will be required for the next committee meeting and that the meeting would

tentatively be scheduled to begin at 1:00 p.m. on February 22.

The meeting was adjourned at 5:00 p.m.

John Walstad
Code Revisor

ATTACH:19