

# NORTH DAKOTA LEGISLATIVE MANAGEMENT

## Minutes of the

### ADMINISTRATIVE RULES COMMITTEE

Thursday, March 10, 2011  
Brynhild Haugland Room, State Capitol  
Bismarck, North Dakota

Senator Jerry Klein, Chairman, called the meeting to order at 3:00 p.m.

**Members present:** Senators Jerry Klein, John M. Andrist, Tom Fischer, Layton Freborg, Joan Heckaman; Representatives Wesley R. Belter, Randy Boehning, Bill Devlin, Jim Kasper, George J. Keiser, Kim Koppelman, Joe Kroeber, Jon Nelson, Lonny Winrich, Dwight Wrangham

**Members absent:** Representatives Stacey Dahl, Chuck Damschen, Dwayne DeKrey, Blair Thoreson

**Others present:** See [Appendix A](#)

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

#### STATE BOARD OF DENTAL EXAMINERS

Chairman Klein called on Ms. Rita Sommers, Executive Director, State Board of Dental Examiners, for testimony ([Appendix B](#)) relating to rules adopted by the board and carried over for consideration from the previous committee meeting. Senator Andrist said that he believes the rule on advertising by dentists as amended in North Dakota Administrative Code Section 20-02-01-01 deprives dentists of First Amendment protection and due process. He said it appears the rule was adopted to protect dentists rather than to protect the public. Ms. Sommers said the board wants to avoid advertising involving competing claims of superior services that cannot be proven. She said if a dentist can prove having superior services, advertising would be acceptable. She said the rule amendment provision regarding advertising about fees allows dentists to advertise fees, but those advertisements cannot be misleading.

#### NORTH DAKOTA LOTTERY

Chairman Klein called on Mr. Randy Miller, Director, North Dakota Lottery, for testimony ([Appendix C](#)) relating to lottery rules.

#### STATE DEPARTMENT OF HEALTH

Chairman Klein called on Mr. Tom Bachman, Air Quality Division, State Department of Health, for testimony ([Appendix D](#)) relating to Clean Air Act implementation rules adopted by the department.

In response to a question from Representative Keiser, Mr. Bachman said none of the rules adopted exceed federal minimum standards.

In response to a question from Representative Nelson, Mr. Bachman said the State Department of Health is involved in litigation with the Environmental Protection Agency regarding air standards and how monitoring greenhouse gases is to be accomplished.

In response to a question from Representative Koppelman, Mr. Bachman said recognition of carbon dioxide as a greenhouse gas by the Environmental Protection Agency will require permits for emitters of 150,000 tons or more of carbon dioxide. He said this permit is required by federal law.

Representative Kasper asked if the state did not adopt these rules, what result would occur. Mr. Bachman said failure to adopt the rules at the state level would result in withholding some federal highway construction funds, and the Environmental Protection Agency Denver office would become the issuer of permits in North Dakota.

Chairman Klein called on Mr. Scott Radig, Director, Waste Management Division, State Department of Health, for testimony ([Appendix E](#)) relating to underground storage tank rules.

Mr. Radig requested a grammatical correction in Section 33-24-08-48. Committee counsel said the correction will be made as suggested.

#### STATE BOARD OF NURSING

Chairman Klein called on Dr. Constance Kalanek, Executive Director, State Board of Nursing, for testimony ([Appendix F](#)) relating to rules adopted by the board. Committee counsel distributed a copy of a new Section 54-05-03.1-06.2 ([Appendix G](#)), which he said was submitted for publication by the State Board of Nursing but inadvertently omitted from the rules as prepared for committee consideration.

Representative Keiser expressed concern with the definition added to the rules of the phrase "letter of concern." He asked why this provision was included in the rules. Dr. Kalanek said the rule was changed resulting from 2009 legislation. Representative Keiser asked why a letter of concern is not appealable by the individual affected. Dr. Kalanek said a letter of concern is nondisciplinary action. Representative Keiser said the licensee is not allowed to challenge or explain the circumstances when a letter of concern is filed. Dr. Kalanek said a letter of concern is kept on file for one year and is not a part of the licensee's record available to the public or an employer.

In response to a question from Representative Koppelman, Dr. Kalanek said the language in the definition of letter of concern was based on recommendations of counsel. Representative Koppelman said the rule provision covers "conduct," which is much broader than practicing without registration and could cover virtually any activity. Dr. Kalanek said that she believes the term is used in statute.

Representative Devlin said he is concerned that the rule provides for a letter of concern if an individual "may have been engaged" in unacceptable conduct. He said this is a very low standard and could be based on little or no evidence. Dr. Kalanek said a letter of concern would not be a disciplinary action. Representative Devlin asked if disciplinary action, such as suspension, is appealable. Dr. Kalanek said disciplinary action is appealable, and there has been an increased number of instances for emergency suspensions.

Representative Kasper asked what initiates action by the board to prepare a letter of concern. Dr. Kalanek said a complaint may be filed with the board, and the affected individual is notified. She said the board conducts an investigation after the complaint is filed. In some cases, witnesses will not come forward or the conduct does not rise to the level of a formal complaint. She said in these cases, the board may have concerns about the conduct, and a letter of concern will be authorized.

**It was moved by Representative Keiser, seconded by Representative Kasper, and carried on a roll call vote that the committee void the definition of "letter of concern" under Section 54-01-03-01 on the grounds that this rules provision is arbitrary and capricious and contrary to legislative intent and in conflict with state law.** Voting in favor of the motion were Senators Klein, Andrist, Fischer, Freborg, and Heckaman and Representatives Belter, Boehning, Devlin, Kasper, Keiser, Koppelman, Kroeber, Nelson, Winrich, and Wrangham. No negative votes were cast.

Chairman Klein called on Ms. Shelly Peterson, President, North Dakota Long Term Care Association, for testimony ([Appendix H](#)) relating to the rules of the State Board of Nursing.

Ms. Peterson expressed opposition of the North Dakota Long Term Care Association to the rule provision regarding a letter of concern to be issued by the State Board of Nursing. She said 2009 House Bill No. 1269 stated that the State Board of Nursing may issue a nondisciplinary letter of concern based upon proof that the person has violated one of the listed areas of conduct. She said the rule as submitted does not require any degree of proof and is not in compliance with the statutory requirement.

Chairman Klein called on Mr. Jerry Jurena, President, North Dakota Hospital Association, for testimony ([Appendix I](#)) relating to rules of the State Board of Nursing. Mr. Jurena expressed opposition of the North Dakota Hospital Association to the rule

providing for a letter of concern and thanked the committee for voiding that provision.

## EDUCATION STANDARDS AND PRACTICES BOARD

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

## PUBLIC SERVICE COMMISSION

Chairman Klein called on Ms. Illona A. Jeffcoat-Sacco, General Counsel, Public Service Commission, for testimony ([Appendix K](#)) relating to rules adopted by the commission.

## STATE BOARD OF DENTAL EXAMINERS

Senator Andrist said he believes the advertising rules adopted by the State Board of Dental Examiners are inappropriate for several reasons. He said the rules as presented benefit the dental profession and not the public.

Representative Koppelman agreed with Senator Andrist.

**It was moved by Representative Koppelman and seconded by Representative Kasper that the committee void the State Board of Dental Examiners' amendments to Section 20-02-01-01 on the grounds that the rules are arbitrary and capricious and create a potential conflict with state law.**

Representative Nelson said it appears to him that the Board of Dental Examiners acted in response to public complaints and not to complaints between competing dentists.

Senator Andrist said he would support the motion and encourage the State Board of Dental Examiners to revisit this issue.

Representative Koppelman said the state already has laws in place prohibiting false advertising.

**The motion carried on a roll call vote.** Voting in favor of the motion were Senators Andrist, Fischer, and Freborg and Representatives Belter, Devlin, Kasper, Keiser, Koppelman, and Wrangham. Voting in opposition to the motion were Senators Klein and Heckaman and Representatives Kroeber, Nelson, and Winrich.

**It was moved by Representative Keiser, seconded by Representative Kasper, and carried on a voice vote that the meeting be adjourned.** No further business appearing, Chairman Klein adjourned the meeting at 4:35 p.m.

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John Walstad  
Code Revisor

ATTACH:11