

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Monday, December 7, 2015
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Bill Devlin, Chairman, called the meeting to order at 8:00 a.m.

Members present: Representatives Bill Devlin, Randy Boehning, Robert Frantsvog, Kim Koppelman, Scott Louser, Mike Schatz, Mary Schneider, Peter F. Silbernagel, Gary R. Sukut, Nathan Toman, Robin Weisz; Senators Kelly M. Armstrong, Jerry Klein, Connie Triplett

Members absent: Representatives Joshua A. Boschee, Gail Mooney, Blair Thoreson; Senator Kyle R. Davison

Others present: See [Appendix A](#)

It was moved by Senator Klein, seconded by Senator Armstrong, and carried on a voice vote that the minutes of the September 15, 2015, meeting be approved as distributed.

NORTH DAKOTA BOARD OF PHYSICAL THERAPY

Chairman Devlin called on Mr. Bruce Wessman, Executive Director, North Dakota Board of Physical Therapy, for testimony ([Appendix B](#)) regarding the rules adopted by the board.

In response to a question from Representative Schatz, Mr. Wessman said the license application fee is \$100 and the testing fee is \$350 to \$400. He said all states use the same test. He said North Dakota does not have reciprocity agreements with other states. He said work has begun on an interstate compact.

In response to a question from Representative Silbernagel, Mr. Wessman said upon receiving a score report, license verification, and proof of education, the board can issue a license within a day.

In response to a question from Representative Koppelman, Mr. Wessman said the provision for a temporary 30-day license was repealed because the procedure for a temporary license was the same as for a regular license. He said the board may consider a reciprocity agreement in the future. He said reciprocity raises concerns over protecting the public.

In response to a question from Representative Frantsvog, Mr. Wessman said all states have the same passing score. He said the test can be taken three times.

In response to a question from Representative Schneider, Mr. Wessman said the rule changes do not have the effect of expanding physical therapy in the state.

In response to a question from Senator Klein, Mr. Wessman said telehealth may not be used for supervising physical therapy assistants.

In response to a question from Representative Weisz, Mr. Wessman said the profession's continuing education is on a 2-year cycle. He said the amount of time physical therapists have to complete continuing education requirements is unchanged by the rules.

STATE REAL ESTATE COMMISSION

Chairman Devlin called on Ms. Patricia M. Jergenson, Executive Director, State Real Estate Commission, for testimony ([Appendix C](#)) regarding a rule carried over from the September 15, 2015, meeting. Ms. Jergenson said a working group agreed to revise the language in question from the previous meeting. She said the key change was the clarification that earnest money deposits are considered payable or distributable as of the closing date of the purchase agreement.

In response to a question from Representative Koppelman, Ms. Jergenson said the commission will not go back and review past cases in which penalties were issued. She said the rule provides clarification of a law that was already in effect. She said the rule provides a place for the public to check--unclaimed property--rather than in a trust account.

Chairman Devlin called on Mr. John Ward, Assistant Attorney General, for comments. Mr. Ward said recurring violations had occurred. He said the rule is just a clarification of the practice already in place.

It was moved by Representative Koppelman, seconded by Representative Silbernagel, and carried on a role call vote to revise North Dakota Administrative Code Section 70-02-01-15(2)(d) with the language proposed by the Real Estate Commission. Representatives Devlin, Boehning, Frantsvog, Koppelman, Louser, Schneider, Silbernagel, Sukut, Toman, Weisz and Senators Armstrong, Klein, and Triplett voted "aye." No negative votes were cast.

ATTORNEY GENERAL

Chairman Devlin called on Mr. Dallas Carlson, Director, Bureau of Criminal Investigation, Attorney General's office, for testimony ([Appendix D](#)) regarding the rules adopted by the Attorney General. Ms. Judith Volk, Information Services Manager, Bureau of Criminal Investigation, Attorney General's office, explained the rules adopted by the Attorney General.

In response to a question from Representative Koppelman, Ms. Molly Brooks, Director, Criminal Justice Information Sharing Program, Bureau of Criminal Investigation, Attorney General's office, said it is necessary for entities with access to criminal history record information and criminal justice data information sharing to have an originating agency identifier (ORI) authorized by the Federal Bureau of Investigation (FBI) and be authorized by the Attorney General. She said having ORI status now allows for more sharing of data. Ms. Volk said it was necessary for ORI to be mentioned in the statute.

In response to a question from Senator Triplett, Ms. Volk said fingerprints for reasons such as employee background investigations and foster care licensing are not stored. She said after the state and FBI background investigations are completed, a hard copy of the record is retained for 3 years.

In response to a question from Senator Armstrong, Ms. Volk said it is up to the requesting agency to remove those individuals from the system who are no longer licensed.

In response to a question from Representative Koppelman, Ms. Volk said concealed permitholders records are kept for 6 years.

Chairman Devlin called on Mr. Randall Miller, Executive Director, North Dakota Lottery, Attorney General's office, for testimony ([Appendix E](#)) regarding rules adopted by the Attorney General.

In response to a question from Senator Klein, Mr. Miller said the Multi-State Lottery Association is always looking to refresh the games. He said *Powerball* is the strongest branding game. He said the *Lucky for Life* game was added because it will fit well with the lottery's mixture of games. He said the payment of prizes is unique in the *Lucky for Life* game and will hopefully be attractive to the public. He said lottery sales have averaged approximately \$27 million per year over the last 3 years.

BOARD OF CHIROPRACTIC EXAMINERS

Chairman Devlin called on Dr. Joel Weiss, President, State Board of Chiropractic Examiners, for testimony ([Appendix F](#)) regarding rules adopted by the board.

In response to a question from Representative Koppelman, Dr. Weiss said the rules clarify the requirements of a prepaid chiropractic plan.

In response to a question from Representative Schneider, Dr. Weiss said with the expansion of social media, the board's intent when changing the term "telemarketing" to "marketing" was to make sure all marketing options are accessible and that the marketing is done in a professional manner.

In response to a question from Senator Triplett, Dr. Weiss said with the ease of access to information on the Internet, the decision was made to remove the board's mailing address from Section 17-01-01-01. He said he would not object to revising this section to include a website or contact person.

In response to a question from Representative Boehning, Dr. Weiss said the board wants the public to be well-informed on what is involved in prepaid plans and how the plans affect insurance coverage.

In response to a question from Representative Silbernagel, Dr. Weiss said if a patient has an issue with a provider, the patient should contact the Board of Chiropractic Examiners.

GAME AND FISH DEPARTMENT

Chairman Devlin called on Ms. Kim Kary, Chief, Administrative Services Division, Game and Fish Department, for testimony ([Appendix G](#)) regarding rules adopted by the department.

In response to a question from Representative Silbernagel, Ms. Kary said the rules regarding aquatic nuisance species are similar to Minnesota rules.

In response to a question from Senator Triplett, Mr. Greg Power, Chief, Fisheries Division, Game and Fish Department, said the decision as to whether to expand the aquatic nuisance species rules statewide is a balancing act. He said the department believes it has acted ahead of the problem. He said the department expects to propose statewide rules within the next 3 months.

In response to a question from Representative Silbernagel, Mr. Power said statewide boat inspection will be expensive. He said Minnesota spends \$4.2 million per year and Montana spends \$1.2 million per year on watercraft inspections.

HIGHWAY PATROL

Chairman Devlin called on Ms. Jackie M. Darr, Motor Carrier Permit Supervisor, Highway Patrol, for testimony ([Appendix H](#)) regarding rules adopted by the Highway Patrol.

In response to a question from Representative Weisz, Ms. Darr said any vehicle or load over 8.6 feet wide requires signage.

In response to a question from Senator Klein, Ms. Darr said North Dakota does not impose wide-load prohibitions on weekends as is done in surrounding states. He said emergency moves are permitted such as when equipment was needed in Bismarck and Minot during the 2011 flood.

In response to a question from Representative Silbernagel, Ms. Darr said fees are waived on the first 10 loads of overwidth culverts.

In response to a question from Representative Boehning, Ms. Darr said fees collected are deposited into the highway fund.

STATE DEPARTMENT OF HEALTH

Chairman Devlin called on Ms. Kodi Pinks, Autism Database Administrator, Childrens' Special Health Services Division, State Department of Health, for testimony ([Appendix I](#)) regarding rules of the autism spectrum disorder database adopted by the department.

In response to a question from Senator Weisz, Ms. Pinks said the definition of autism spectrum disorder used in the rules is based upon a national definition.

In response to a question from Representative Silbernagel, Ms. Pinks said the department's goal is to collect data on autism spectrum disorder. She said at some point the department hopes to conduct data analysis on the information to be able to provide services to this population.

In response to a question from Senator Triplett, Ms. Pinks said it was difficult to define the term "reporter." She said the department wanted to err on the side of caution to ensure as many reports as possible for the database. She said the four-page reporting form takes 10 to 15 minutes to complete. She said the information requested includes the primary care individual, the subject's age, and level of care. She said the form is based upon other state forms.

Chairman Devlin called on Mr. Curt Erickson, Manager, Waste Management Division, State Department of Health, for testimony ([Appendix J](#)) regarding rules on hazardous waste management adopted by the department.

In response to a question from Senator Klein, Mr. Erickson said the rules will have no effect on most of the hazardous waste facilities in the state. He said the rules give more leeway in managing on-campus hazardous waste before it is shipped off-campus for disposal. He said the rules also require the state to be notified of imports and exports of waste. He said the less stringent rules do not affect public safety.

Chairman Devlin called on Mr. Scott Radig, Director, Waste Management Division, State Department of Health, for testimony ([Appendix K](#)) regarding rules adopted by the department.

In response to a question from Representative Frantsvog, Mr. Radig said the waste facility recently built near Williston falls under the hazardous waste rules. He said the material going into that facility is not radioactive material and is not regulated under these rules. He said the facility is regulated under hazardous waste rules because of the heavy metals involved.

In response to a question from Senator Klein, Mr. Radig said the department contracted with the Argonne National Laboratory (Argonne) to conduct a risk assessment study on the possibility of disposal of technologically enhanced naturally occurring radioactive material (TENORM). He said Argonne was asked to look at a level at which workers did not have to be classified as radiation workers. He said Argonne used the best science available. He said the department is relying on the company's expertise that a concentration of 50 picocuries per gram is protective of landfill workers and members of the general public.

In response to a question from Senator Armstrong, Mr. Radig said the department gave Argonne the parameters and information regarding the construction and types of landfills and the number of hours a landfill worker would work. He said the department did not give Argonne a picocuries per gram level the department wanted to use.

In response to a question from Senator Triplett, Mr. Radig said the picocuries per gram drops off dramatically the farther away one gets from the landfill. He said the level decreases by a square of the actual distance. He said there will be very low additional exposure to any member of the general public. He said there are location standards included in the rules which prohibit the disposal sites from being located over an aquifer and within 1,000 feet of a drinking water well. He said additional restrictions may be imposed by zoning laws.

In response to a question from Representative Schneider, Mr. Radig said most of the oil-producing states have a similar picocuries per gram level to that being proposed. He said most non-oil-producing states use a level of 5 to 30 picocuries per gram. He said the department did not receive any scientific testimony during the hearing which refuted Argonne's findings. He said radioactive waste must have an analysis done at a certified laboratory before the trucks arrive at the waste site. He said the department will implement the program with existing staff. He said four additional staff were approved for work on compliance.

Chairman Devlin said the Administrative Rules Committee's duty is not to hold a legislative hearing on this issue. He said it is the responsibility of the committee to ensure the agency is doing what the agency is instructed to do under the law.

Chairman Devlin called on Mr. Lynn C. Wolff, Fargo, for testimony regarding the rules. Mr. Wolff said he is concerned about the lack of personnel to monitor compliance. He said 13 sites is too many for the number of regulators the state has available.

Chairman Devlin called on Mr. Larry Heilmann, Fargo, for testimony regarding the rules. Mr. Heilmann said he is retired from the United States Department of Agriculture research laboratories at North Dakota State University. He said he has worked with radioactive isotopes and knows how to handle the material. He said there is no safe level of radiation. He said he is worried about the number of sites to be regulated and inspected by the State Department of Health. He said the department does not have the expertise and staff to properly handle that responsibility. He said the department does not employ anyone in the area of radiation health physics. He said a thorough geological survey is needed to determine the safest locations in the state for disposal. He said a couple of sites would be sufficient. He said the committee should delay approval of the rules.

In response to a question from Representative Silbernagel, Mr. Heilmann said Argonne is a reputable laboratory.

In response to a question from Representative Schneider, Mr. Heilmann said the Argonne report was good but this was not a major study for Argonne.

Chairman Devlin called on Mr. Darrell Dorgan, North Dakota Energy Waste Coalition, for testimony regarding the rules. Mr. Dorgan said the committee has the authority to delay the rules or to ask for more information. He said there have been over 1,000 spills of brine and waste water in last 12 months. He said a request for an

Attorney General's opinion has been made regarding an open meetings violation of the State Health Council.

Chairman Devlin called on Ms. Lyonne Linseth, Killdeer, for testimony regarding the rules. Ms. Linseth said her farmstead is located on the Bakken Formation. She said she is concerned about the lack of oversight by the State Department of Health. She said no logical plan is in place as to where the disposal sites are located. She said there are no assurances that the companies will comply. She said she has no confidence the State Department of Health will protect the state's residents' health.

Chairman Devlin called on Mr. Dave Glatt, Chief, Environmental Health Section, State Department of Health, for testimony regarding the rules. Mr. Glatt said the department currently has the staff necessary for regulation. He said penalties are being assessed and collected. He said the department takes enforcement seriously. He said science backs up the department's rules on TENORM.

In response to a question from Representative Schneider, Mr. Glatt said radioactive waste will now be tracked. He said the department will use existing staff for those duties.

In response to a question from Senator Triplett, Mr. Glatt said the estimated number of sites was based upon the number currently licensed for special landfills. He said there could be fewer or more depending on the number of sites that request approval. He said the concern about an open meetings violation is related to a State Health Council meeting and not the administrative rules process. He said the State Department of Health is not a party to the legal action regarding the denial of a license by a county. He said that case involves the Industrial Commission.

In response to a question from Representative Boehning, Mr. Glatt said larger waste disposal sites have a full-time inspector. He said others are inspected monthly or as needed. He said dumping pits are not approved by the state. He said the department does investigate those cases if it receives dumping complaints.

In response to a question from Senator Armstrong, Mr. Glatt said when the rules become effective on January 1, 2016, no companies will be licensed to take TENORM.

In response to a question from Representative Schneider, Mr. Glatt said although Montana has a 30 picocuries per gram limit, he does not expect North Dakota to be a magnet for out-of-state disposal. He said the most important benefit the state will receive from the rules is that TENORM will now be tracked.

In response to a question from Representative Boehning, Mr. Glatt said cradle-to-grave tracking of TENORM will be done.

In response to a question from Senator Triplett, Mr. Glatt said disposal site owners will have to identify where the TENORM is located on the site.

Chairman Devlin called on Mr. David Schwalbe, Bismarck, for testimony regarding the rules. Mr. Schwalbe said the increase from 5 picocuries per gram to 50 picocuries per gram will create a burden on taxpayers. He said he is also concerned about the criteria for site ownership, bonding, and security.

INSURANCE COMMISSIONER

Chairman Devlin called on Mr. Johannes N. Palsgraaf, Legal Counsel, Insurance Department, for testimony ([Appendix L](#)) regarding rules adopted by the Insurance Commissioner.

Mr. Palsgraaf said the rules adopted relate to producer licensing, insurance holding company systems, credit for reinsurance, accounting practices and procedures, life insurance advertising, boilers, and bail bondsmen.

SUPERINTENDENT OF PUBLIC INSTRUCTION

Chairman Devlin called on Mr. Bob Marthaller, Assistant Superintendent, Department of Public Instruction, for testimony ([Appendix M](#)) regarding the rules relating to the approval of school construction projects adopted by the Superintendent of Public Instruction.

In response to a question from Senator Klein, Mr. Marthaller said the drop in the number of school construction projects is likely related to the reduction in oil activity.

Chairman Devlin called on Ms. Valerie Fischer, Director, Adult Education, Department of Public Instruction, for testimony ([Appendix N](#)) regarding rules relating to adult education adopted by the Superintendent of Public Instruction.

It was moved by Representative Boehning, seconded by Senator Armstrong, and carried on a roll call vote that the effective date for the administrative rules related to adult education presented by the Department of Public Instruction be changed to July 1, 2016. Representatives Devlin, Boehning, Frantsvog, Koppelman, Louser, Schneider, Silbernagel, Sukut, Toman, Weisz and Senators Armstrong, Klein, and Triplett voted "aye." No negative votes were cast.

DEPARTMENT OF HUMAN SERVICES

Chairman Devlin called on Ms. Julie Leer, Legal Advisory Unit, Department of Human Services, for testimony ([Appendix O](#)) regarding rules adopted by the department. Ms. Leer said the rules relate to the human service grant program.

Chairman Devlin and the committee recognized Ms. Leer for her professionalism and expertise in her dealings with the Administrative Rules Committee over the years.

PUBLIC EMPLOYEES RETIREMENT SYSTEM

Chairman Devlin said the request by the Public Employees Retirement System for the repeal of Sections 71-06-01-01, 71-06-01-06, and 71-06-01-06.1 will be rescheduled for the next meeting.

OTHER BUSINESS

Chairman Devlin called on the Legislative Council staff for a presentation ([Appendix P](#)) regarding *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015). She said the issue was whether the North Carolina State Board of Dental Examiners could use state-action immunity as a shield from federal antitrust law. She said to invoke state-action immunity, the United States Supreme Court held the entity must show the state clearly articulated authority for the entity to engage in anti-competitive conduct and that the entity was actively supervised by the state.

Senator Triplett said the committee should request information from the Attorney General regarding the impact of this decision on North Dakota.

Regarding the rules of the State Board of Chiropractic Examiners, Senator Triplett said the rules should include a board contact person or address.

It was moved by Senator Triplett, seconded by Representative Schneider, and failed on a roll call vote that, if so agreed upon by the State Board of Chiropractic Examiners, subsection 6 of Section 17-01-01-01 be amended to include an appropriate contact. Representatives Devlin, Frantsvog, Koppelman, and Schneider and Senators Armstrong and Triplett voted "aye." Representatives Boehning, Louser, Silbernagel, Sukut, Toman, and Weisz and Senator Klein voted "nay."

It was moved by Representative Schneider, seconded by Senator Triplett, and failed on a roll call vote to hold over rules relating to the concentration limit for disposal of TENORM waste until the State Department of Health has time to adequately address the committee's concerns. Representative Schneider voted "aye." Representatives Devlin, Boehning, Frantsvog, Koppelman, Louser, Silbernagel, Sukut, Toman, Weisz and Senators Armstrong, Klein, and Triplett voted "nay."

At the request of Chairman Devlin, the Legislative Council staff distributed a copy of an opinion ([Appendix Q](#)) of Mr. Edward E. Erickson, Assistant Attorney General, regarding a rule of the State Board of Pharmacy reviewed by the committee at its September 15, 2014, meeting. She said the opinion indicates the portion of Section 61-02-01-04 relating to a Class L permit that was inadvertently omitted when the board submitted its rules for consideration by the committee had been reviewed by the Attorney General's office and approved as to its legality.

No further business appearing, Chairman Devlin adjourned the meeting at 1:40 p.m.

Vonette J. Richter
Assistant Code Revisor

ATTACH:17