



ADMINISTRATIVE RULES COMMITTEE

Monday, December 11, 2023
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative Brandy Pyle, Chairman, called the meeting to order at 10:00 a.m.

Members present: Representatives Brandy Pyle, Donna Henderson, Scott Louser, Andrew Marschall, Carrie McLeod, Dan Ruby, Matthew Ruby, Mike Schatz, Vicky Steiner, Bill Tveit, Steve Vetter, Robin Weisz; Senators Sean Cleary, Jerry Klein, Diane Larson, Janne Myrdal, Bob Paulson

Members absent: Representatives Brandon Prichard, Nathan Toman

Others present: Representative Todd Porter, Mandan
See [Appendix A](#) for additional persons present.

It was moved by Senator Klein, seconded by Senator Myrdal, and carried by a voice vote that the minutes of the September 6, 2023, meeting be approved as distributed.

SUPERINTENDENT OF PUBLIC INSTRUCTION

Mr. Joe Kolosky, Director, Office of School Approval and Opportunity, Department of Public Instruction, provided testimony ([Appendix B](#)) regarding an October 2023 rule carried over from the September 6, 2023, meeting. He noted:

- In response to the rule being held over, the department drafted a revision to the rule to address the concerns of the committee regarding the phrase "member of the military installation."
- The Attorney General's office advised the department the proposed revision to the rule modifying the phrase would not align with the statute because the phrase "member of the military installation" is taken from the statute implemented, North Dakota Century Code (NDCC) Section 15.1-08-02.
- The department submits its originally proposed rule for the committee's review.

OFFICE OF MANAGEMENT AND BUDGET

Ms. Molly Herrington, Chief People Officer, Human Resources Management Services, Office of Management and Budget, provided testimony ([Appendix C](#)) regarding October 2023 rules carried over from the September 6, 2023, meeting. She noted the office worked with its legal counsel to revise North Dakota Administrative Code (NDAC) Chapter 4-07-20.1 in response to the committee's feedback at the September 6, 2023, meeting.

It was moved by Senator Klein, seconded by Representative Marschall, and carried on a roll call vote that the committee finds the rule change to NDAC Chapter 4-07-20.1 as presented at the September 6, 2023, meeting arbitrary and capricious under NDCC Section 28-32-18(1). Representatives Pyle, Henderson, Louser, Marschall, McLeod, D. Ruby, Schatz, Steiner, Tveit, Vetter, and Weisz and Senators Cleary, Klein, Larson, Myrdal, and Paulson voted "aye." Representative M. Ruby voted "nay."

It was moved by Senator Klein, seconded by Representative Tveit, and passed on a roll call vote that NDAC Chapter 4-07-20.1 be amended as originally presented with the revised rules under NDCC Section 28-32-18(3). Representatives Pyle, Henderson, Louser, Marschall, McLeod, D. Ruby, M. Ruby, Schatz, Steiner, Tveit, Vetter, and Weisz and Senators, Cleary, Klein, Larson, Myrdal, and Paulson voted "aye." No negative votes were cast.

DEPARTMENT OF ENVIRONMENTAL QUALITY

Mr. Karl Rockeman, Director, Water Quality Division, Department of Environmental Quality, provided testimony ([Appendix D](#)) regarding the January 2024 rules of the department.

WORKFORCE SAFETY AND INSURANCE

Mr. Tim Wahlin, Chief of Injury Services, Workforce Safety and Insurance, provided testimony ([Appendix E](#)) regarding the January 2024 rules of the agency.

INSURANCE COMMISSIONER

Ms. Laney Herauf, Legal Counsel, Insurance Department, provided testimony ([Appendix F](#)) regarding the January 2024 rules of the department.

BOARD OF PHARMACY

Dr. Mark J. Hardy, Executive Director, Board of Pharmacy, provided testimony ([Appendix G](#)) regarding the January 2024 rules of the board.

BOARD OF REGISTRATION FOR PROFESSIONAL ENGINEERS AND LAND SURVEYORS

Mr. Darcie Handt, Executive Director, Board of Registration for Professional Engineers and Land Surveyors, provided testimony ([Appendix H](#)) regarding the January 2024 rules of the board.

EDUCATION STANDARDS AND PRACTICES BOARD

Dr. Rebecca Pitkin, Executive Director, Education Standards and Practices Board, provided testimony ([Appendix I](#)) regarding the January 2024 rules of the board.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Mr. Darin Meschke, State Registrar and Director of Vital Records, Department of Health and Human Services, provided testimony ([Appendix J](#)) regarding the January 2024 rules of the department relating to NDAC Chapter 33-04-12, Correction and Amendment of Vital Records. He noted the amendments were adopted to comply with House Bill No. 1297 (2023), which created and enacted NDCC Section 23-02.1-25.1.

A committee member expressed concern the administrative rules did not comply with legislative intent, which was to prohibit amendments or corrections to birth records based on gender identity or sex reassignment surgery. A committee member expressed concern the list of acceptable sex reassignment surgeries maintained by the department could be expanded unilaterally by the department.

In response to questions from committee members, Mr. Meschke noted:

- The department has interpreted NDCC Section 23-02.1-25.1(2)(c) to permit amending or correcting the sex designation on a birth record when the individual has had what is referred to as "bottom half surgery."
- The intent of the department's proposed rule in NDAC Section 33-04-12-02(4) is to clarify which reassignment surgeries are acceptable by maintaining a list.

A committee member noted testimony provided to the Senate Human Services Committee indicated the exception found in NDCC Section 23-02.1-25.1(2)(c) means "bottom half surgery." A committee member noted when reading Section 23-02.1-25.1(2)(c) with Section 23-02.1-25.1(3), he understood "the sex of the individual was changed with anatomically correct genitalia for the identified sex as certified by a medical provider" to mean the sex of the individual was changed to correct the individual's sex organs, which were ambiguous at birth.

It was moved by Senator Myrdal, seconded by Representative Tveit, and passed on a roll call vote to void the proposed changes to NDAC Section 33-04-12-02 because the rule fails to comply with express legislative intent under NDCC Section 28-32-18(1). Representatives Pyle, Henderson, Louser, Marschall, McLeod, D. Ruby, M. Ruby, Schatz, Steiner, Tveit, Vetter, and Weisz and Senators, Cleary, Klein, Larson, Myrdal, and Paulson voted "aye." No negative votes were cast.

Mr. Kirby Kruger, Section Director, Disease Control and Forensic Pathology, Department of Health and Human Services, provided testimony ([Appendix K](#)) regarding the January 2024 rules of the department relating to NDAC Chapter 33-06-01, Conditions Designated as Reportable.

Ms. Bridget Weidner, Director, Health Facilities Unit, Department of Health and Human Services, provided testimony ([Appendix L](#)) regarding the January 2024 rules of the department relating to NDAC Chapter 33-07-01.1, Hospitals.

In response to a question from a committee member, Ms. Weidner noted the department amended "mother" to "patient" to clarify that hospitals care for patients and to be consistent with other rules.

A committee member noted that a patient receiving obstetrical services and giving birth is always a "mother."

It was moved by Representative Tveit, seconded by Representative Schatz, and passed on a roll call vote to void the proposed changes to NDAC Section 33-07-01.1-34 relating to the term "mother" because the rule change was arbitrary and capricious under NDCC Section 28-32-18(1). Representatives Pyle, Henderson, Louser, Marschall, McLeod, D. Ruby, M. Ruby, Schatz, Steiner, Tveit, and Vetter and Senators Larson, Myrdal, and Paulson voted "aye." Representative Weisz and Senators Cleary and Klein voted "nay."

Ms. Weidner, provided testimony ([Appendix M](#)) regarding the January 2024 rules of the department relating to NDAC Chapter 33-07-03.2, Nursing Facilities. In response to a question from a committee member, she noted:

- The rules were amended in response to requests from the industry.
- The rule change to NDAC Section 33-07-03.2-17 simplifies residential records requirements decreasing the regulatory burden for nursing homes.
- The department received comments opposing the rule change to NDAC Section 33-07-03.2-17 after the comment period ended. The late comments did not affect the department's position regarding the removal of residential records requirements.

Ms. Patti Kritzberger, President-Elect, North Dakota Health Information Management Association, provided testimony ([Appendix N](#)) opposing the rule change to NDAC Section 33-07-03.2-17, which removed residential records requirements. She noted a credentialed professional is necessary to sufficiently maintain residential records.

Ms. Shelly Peterson, President, North Dakota Long Term Care Association, supported the rule change to NDAC Section 33-07-03.2-17. She noted the rule change does not preclude a facility from contracting with a medical record professional to assist in records maintenance when needed.

Ms. Julie Wagendorf, Director, Food and Lodging Unit, Department of Health and Human Services, provided testimony ([Appendix O](#)) regarding the January 2024 rules of the department relating to NDAC Chapter 33-33-04.1, Food Code.

Mr. Chris Price, Director, Emergency Medical Systems Unit, Department of Health and Human Services, provided testimony ([Appendix P](#)) regarding the January 2024 rules of the department relating to NDAC Chapters 33-11-01.1, 33-11-01.2, 33-11-02, 33-11-03, 33-11-04, 33-11-05, 33-11-06, and 33-11-07, relating to North Dakota Quick Response Units, North Dakota Ground Ambulance Services, Basic Life Support Ground Ambulance License, Advanced Life Support Ground Ambulance License, North Dakota Air Ambulance Services, Basic Life Support Air Ambulance License, Advanced Life Support Air Ambulance License, and Critical Care Air Ambulance License. He noted:

- The department received significant public comment on the lights and sirens provision.
- The department revised multiple rules based on comments received during the comment period, including allowing for more discretion for lights and sirens usage by the regulated community.
- The department's counsel advised the department there would be no additional liability incurred because of the rules changes related to lights and sirens.
- North Dakota Insurance Reserve Fund took no position on the rule because it had no effect on claims processing.

Representative Porter provided testimony regarding the concern generated by the emergency medical services (EMS) providers community. He noted:

- The members of the regulated community did not see the revised and final version of the rules which was adopted following the comment period.

- The members of the regulated community should have an additional comment period following the department's adoption of the final rules.
- The department should take more time to promulgate rules because the rules have not been amended in many years.

In response to a question from a committee member, Ms. Fordahl noted:

- The committee's role in addressing concerns of the regulated community at the quarterly meeting of the Administrative Rules Committee is limited by NDCC Chapter 28-32.
- The purpose of holding consideration of a rule over for one subsequent meeting under NDCC Section 28-32-18(2) is to determine whether the committee wishes to find the rule void under Section 28-32-18(1) or whether amending the rule under Section 28-32-18(3) is necessary to address one of the considerations found in Section 28-32-18(1)(a)-(f).

Mr. Tim Wiedrich, Emergency Preparedness and Response Section Chief, Department of Health and Human Services, provided testimony regarding the rulemaking of the department. He noted:

- The department responded to public comments in the rulemaking process and made revisions as necessary.
- The confusion regarding the rules is limited to two areas--lights and sirens, and emergency medical dispatch.

Ms. Allyson Hicks, Assistant Attorney General, General Counsel Division, provided testimony describing the department's statutory rulemaking process which includes seeking public comments, responding to each comment, revising rules based on comments if appropriate, and adopting final rules. She noted the department does not have authority to unilaterally revise the rules after final adoption of the rules.

It was moved by Senator Myrdal, seconded by Representative Weisz, and passed on a roll call vote that NDAC Article 33-11 be held over for further consideration at the March 2024 meeting. Representatives Pyle, Henderson, Louser, Marschall, McLeod, D. Ruby, M. Ruby, Schatz, Steiner, Tveit, Vetter, and Weisz and Senators Cleary, Klein, Larson, Myrdal, and Paulson voted "aye." No negative votes were cast.

Mr. Price provided testimony ([Appendix Q](#)) regarding the January 2024 rules of the department relating to NDAC Chapter 33-36-01, EMS Personnel Training, Testing, Certification, and Licensure. He noted:

- The department made significant changes to the rules based on public comments, including withdrawal of the revision to the nomenclature for licensed EMS personnel and withdrawal of the requirement for emergency medical technicians training from an accredited institution.
- The proposed rules require EMS instructors be affiliated with an EMS training institute, but the department has not promulgated affiliation standards.
- The department intends to recognize emergency medical responders (EMR) certified as of January 1, 2024, and EMRs attending EMR courses approved before January 1, 2024, and certified by June 30, 2024, using the existing process. Going forward, the department will require newly trained EMRs to become certified by the National Registry of Emergency Medical Technicians (NREMT) assessment process.
- Newly trained EMRs may take the NREMT assessment remotely. Department grants may cover fees associated with the assessments.

Ms. Sarah Miller, 2nd Vice President, North Dakota 911 Association; Vice President, North Dakota Association of Public-Safety Communications Officials; and Dispatch Director and 911 Coordinator, Barnes County, provided testimony expressing concerns about rules related to emergency medical dispatch and the rules' effective date. She noted the regulated community is seeking written clarification guaranteeing the assurances made by the department.

Mr. Ken Rensch, Co-Chair, Emergency Medical Services Association's Advocacy Committee, provided testimony supporting the rules of the department.

Ms. Kimberly Robbins, Certified Emergency Medical Responder, provided testimony expressing concerns about the NREMT requirement.

In response to concerns, Mr. Price noted:

- The proposed rules recognize all existing EMRs' prior certifications in perpetuity.
- The department has not changed rules related to training requirements. Only the rules relating to assessment requirements have been amended.

It was moved by Senator Myrdal, seconded by Representative Tveit, and passed on a roll call vote that NDAC Chapter 33-36-01 be held over for further consideration at the March 2024 meeting. Representatives Pyle, Henderson, Louser, Marschall, McLeod, D. Ruby, M. Ruby, Schatz, Steiner, Tveit, Vetter, and Weisz and Senators Cleary, Klein, Larson, Myrdal, and Paulson voted "aye." No negative votes were cast.

Mr. Jonathan Alm, Director, Legal Division, Department of Health and Human Services, provided testimony ([Appendix R](#)) regarding the January 2024 rules of the department relating to NDAC Chapter 75-02-02, Medical Services.

In response to a question from a committee member, Mr. Alm noted the department amended rules to reflect person-first language and to achieve consistency in administrative rules.

Members of the committee expressed concern regarding the change from "pregnant woman" to "pregnant individual" because only a woman can be pregnant.

It was moved by Representative M. Ruby, seconded by Representative D. Ruby, and passed on a roll call vote to void the part of the rule that replaces "mother" and "woman" with "individual" and "her" with "their" due to an absence of statutory authority. Representatives Pyle, Henderson, Louser, Marschall, McLeod, D. Ruby, M. Ruby, Schatz, Steiner, Tveit, Vetter, and Weiss and Senators Paulson, Cleary, Klein, Larson, and Myrdal voted "aye." No negative votes were cast.

Mr. Alm provided testimony regarding the January 2024 rules of the department relating to:

- NDAC Chapter 75-02-02.1, Eligibility for Medicaid ([Appendix S](#));
- Chapter 75-02-06, Ratesetting for Nursing Home Care ([Appendix T](#));
- Chapter 75-02-07.1, Ratesetting for Basic Care Facilities ([Appendix U](#));
- Chapters 75-03-23 and 75-03-24, Provision of Home and Community-Based Services Under the Service Payments for Elderly and Disabled Program and Medicaid Waiver For the Aged and Disabled Program and Expanded Service Payments for Elderly and Disabled ([Appendix V](#));
- Chapters 75-03-38 and 75-03-39, Autism Spectrum Disorder Program and Autism Services Waiver ([Appendix W](#)); and
- Chapter 75-04-05, Payment for Provider Agencies of Services to Individuals with Intellectual Disabilities - Developmental Disabilities ([Appendix X](#)).

EXTENSION REQUESTS

Retirement Board

Pursuant to NDCC Section 28-32-07, Ms. Rebecca Fricke, Interim Executive Director, Retirement Board, provided testimony ([Appendix Y](#)) in support of the board's request for an extension to adopt rules.

It was moved by Representative Vetter, seconded by Representative M. Ruby, and carried on a voice vote that the Retirement Board be granted an extension to December 2024 to adopt rules to implement House Bill No. 1040 (2023).

Office of Management and Budget

Pursuant to NDCC Section 28-32-07, Ms. Sherry Neas, Director, Central Services, Office of Management and Budget, and State Procurement Manager, provided testimony ([Appendix Z](#)) in support of the Office of Management and Budget's request for an extension to adopt rules to implement statutory changes from legislation which largely simplified procurement.

It was moved by Representative Steiner, seconded by Senator Myrdal, and carried on a voice vote that the Office of Management and Budget be granted an extension to September 2024 to adopt rules.

Public Service Commission

Pursuant to NDCC Section 28-32-07, Mr. John Schuh, General Counsel, Public Service Commission, requested an extension to adopt rules due to required approval from the federal Office of Surface Mining Reclamation and Enforcement, which is pending.

It was moved by Senator Myrdal, seconded by Representative Tveit, and carried on a voice vote that the Public Service Commission be granted an extension to December 2024 to adopt rules to implement Senate Bill No. 2317 (2021).

No further business appearing, Chairman Pyle adjourned the meeting at 3:46 p.m.

Liz Fordahl
Counsel

ATTACH:26