

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday, October 24, 2000
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative William R. Devlin, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives William R. Devlin, Rex R. Byerly, Duane DeKrey, Mary Ekstrom, Bette Grande, George J. Keiser, Kim Koppelman, Jon O. Nelson, Darrell D. Nottestad, Blair Thoreson; Senators John Andrist, Tom Fischer, Jerry Klein, Deb Mathern, Bob Stenehjem, Rich Wardner

Members absent: Representatives LeRoy G. Bernstein, Pam Gulleson, Stacey L. Mickelson, Sally M. Sandvig

Others present: See Appendix A

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

STATE WATER COMMISSION - DEPARTMENT OF TRANSPORTATION REQUEST FOR EXTENSION OF TIME

Chairman Devlin called on Mr. Francis G. Ziegler, Department of Transportation, for comments on a request, carried over for consideration from the previous committee meeting, from the State Water Commission and Department of Transportation for an extension of time to adopt rules pursuant to 1999 legislation requiring rules on standards for highway construction and water flow. A copy of prepared testimony presented by Mr. Ziegler is attached as Appendix B.

Chairman Devlin asked committee counsel whether it would be necessary for the committee to grant an extension of time before rules could be adopted by these two agencies. Committee counsel said the nine-month period allowed by statute to complete rulemaking expired on May 1, 2000. He said that although this nine-month period has expired, the agencies continue to have authority to adopt rules because the expiration of the nine-month period does not eliminate agency authority for rulemaking.

STATISTICS ON RULEMAKING ACTIVITY 1998-2000

Chairman Devlin called on committee counsel to review statistical information compiled on rulemaking activity during this biennium. Committee counsel said

statistical information was compiled to allow comparison of rulemaking activity in the period November 1996 through October 1998 and the period November 1998 through November 2000. He said the total of North Dakota Administrative Code sections affected by agency rulemaking activity was 2,789 for 1996-98 and 2,074 for 1998-2000. He said this represents a significant reduction in rulemaking activity as measured by the number of sections of rules affected. He said the reduction is perhaps even more significant than it appears from these statistics because the number of sections affected for the current biennium include 323 new rules sections created by the Department of Public Instruction, 242 sections repealed by the State Plumbing Board, and 109 sections eliminated by the Department of Corrections and Rehabilitation. He said the Department of Public Instruction made new rules pursuant to 1999 legislation making the department an administrative agency for rulemaking purposes. He said the State Plumbing Board repealed 242 sections of rules by adopting the Uniform Plumbing Code by reference. He said the Department of Corrections and Rehabilitation is not an administrative agency and had rules published in the North Dakota Administrative Code which have now been removed by request of the department. He said the State Department of Health amended 35 sections of rules in the current biennium as compared with 420 sections in 1996-98. He said the Department of Human Services amended 95 sections of rules in 1998-2000 as compared with 311 sections amended in 1996-98.

NORTH DAKOTA CENTURY CODE SECTIONS PROVIDING RULEMAKING AUTHORITY

Chairman Devlin called on committee counsel to review a memorandum entitled *North Dakota Century Code Sections Providing Administrative Agencies Practice Act Rulemaking Authority*. Committee counsel said the memorandum is a compilation of Century Code sections identified as providing authority for agencies to make administrative rules under the procedure in North Dakota Century Code (NDCC) Chapter 28-32. He said the memorandum identifies 646 sections of law that provide rulemaking authority to an agency or to more than one agency.

Committee counsel said the listing of sections providing rulemaking authority was initiated by review of Century Code provisions by the Attorney General's office. He said that review produced a substantial list of sections of law with rulemaking authority. He said he agreed with the Attorney General's office that, because the project may have an effect on agencies, each agency should have an opportunity to review statutes it administers and determine whether statutory rulemaking authority exists. He said a letter was sent to each administrative agency identifying sections of law that appear to provide rulemaking authority. He said the letter asked each agency to review its areas of statutory administration and to advise the Legislative Council office of any additional sections of law providing rulemaking authority plus any changes to existing law the agency would recommend to provide the agency with necessary rulemaking authority if NDCC Section 28-32-02 is amended to eliminate rulemaking authority under that section. He said the memorandum is a compilation of provisions of law with rulemaking authority that was completed after receiving responses from agencies.

Committee counsel said the memorandum shows what a huge task it would be to review existing rulemaking authority of agencies. He said if the Administrative Rules Committee chose to review all statutory provisions on rulemaking, it would be necessary to review more than 100 sections of law at each committee meeting during an interim.

INSURANCE COMMISSIONER

Chairman Devlin called on Mr. Chuck Johnson, General Counsel, Department of Insurance, for testimony relating to August 2000 rules of the Insurance Commissioner carried over for consideration from the August 29, 2000, Administrative Rules Committee meeting. A copy of Mr. Johnson's prepared testimony is attached as Appendix C.

Senator Mathern asked how the petroleum tank release compensation fund is funded. Mr. Jeff Bitz, Insurance Department, said each petroleum storage tank is subject to an annual registration fee, which is deposited in the fund. Senator Mathern asked whether fines are deposited in the fund. Mr. Bitz said no fines are imposed and coverage under the fund is limited to those who comply with registration requirements.

STATE GAMING COMMISSION

Chairman Devlin called on Mr. Chuck Keller, Attorney General's office, for testimony relating to July 2000 rules of the State Gaming Commission carried over for consideration from the August 29, 2000, Administrative Rules Committee meeting. A copy of Mr. Keller's prepared testimony is attached as Appendix D.

Mr. Keller also made available to the committee copies of a July 1997 memorandum of the Attorney

General's office on legal issues regarding whether rules could be adopted to allow use of electronic bingo card marking devices.

Chairman Devlin said the apparent feeling of some committee members at the previous meeting was that electronic bingo card marking devices allow a player to play a greater number of bingo cards in each game and that is an expansion of gaming. Mr. Keller said in other games such as pull tabs, blackjack, sports pools, or paddlewheel, a player may bet more and have more opportunities to win or lose. He said he would liken use of these devices to other existing opportunities in games of chance.

Senator Andrist said the Legislative Assembly has consistently opposed expansion of gaming. He said he would hope that the Gaming Commission would keep that in mind in rulemaking. Mr. Keller said the State Gaming Commission has avoided introducing any legislation suggesting an expansion of gaming. He said the State Gaming Commission did consider whether use of these devices would constitute an expansion of gaming and asked for a legal opinion on this topic, which determined that using the devices would not be an expansion of gaming in legal terms.

In response to a question from Senator Klein, Mr. Keller said cheating is possible in bingo and use of electronic bingo card marking devices makes it impossible to cheat.

Representative Byerly said cheating in bingo is not the area of greatest concern to him. He said the fact that a bingo player can gamble more money and play more chances raises a concern with expansion of bingo as gaming beyond a recreational activity.

Representative Nottestad said he does not believe use of electronic bingo card marking devices is an expansion of gaming.

Representative DeKrey said the role of the Administrative Rules Committee is to determine whether a rule fits under applicable law. He said in this case the rule is within the statutory limits for gaming.

BOARD OF PSYCHOLOGIST EXAMINERS

Chairman Devlin called on Mr. Bill Peterson, Attorney General's office, for testimony on September 2000 rules of the Board of Psychologist Examiners. A copy of Mr. Peterson's prepared testimony is attached as Appendix E.

BOARD OF DIETETIC PRACTICE

Chairman Devlin called on Mr. Jim Fleming, Attorney General's office, for presentation of testimony relating to October 2000 rules of the Board of Dietetic Practice. A copy of Mr. Fleming's prepared testimony is attached as Appendix F.

In response to a question from Senator Andrist, Mr. Fleming said fees of licensees are not changed by these rules.

BOARD OF OCCUPATIONAL THERAPY PRACTICE

Chairman Devlin called on Ms. Wanda Berg, Chairman, Board of Occupational Therapy Practice, for testimony relating to November 2000 rules of the board. A copy of Ms. Berg's prepared testimony is attached as Appendix G.

Senator Andrist said fees of licensees are nearly doubled by these rule changes. He asked why the increases are necessary. Ms. Berg said the fees have been increased to allow the board to provide better service to members and to cover administrative costs, implement a newsletter, and develop a web site. She said increased revenues will be used to benefit the membership. She said the board also wants to establish a cushion of funds that can be used for costs of disciplinary proceedings if necessary.

Senator Andrist said the second sentence of North Dakota Administrative Code Section 55.5-02-03-01 is unclear. He said this sentence provides that an occupational therapist may supervise three occupational therapy assistants if one assistant has five or more years of experience. He said consideration should be given to rewording this sentence because it can be interpreted in different ways.

BOARD OF VETERINARY MEDICAL EXAMINERS

Chairman Devlin called on Dr. John R. Boyce, Executive Secretary, Board of Veterinary Medical Examiners, for testimony relating to November 2000 rules of the board. A copy of Dr. Boyce's prepared testimony is attached as Appendix H.

ADMINISTRATIVE AGENCIES PRACTICE ACT REVISION

Chairman Devlin called on committee counsel to review a bill draft to revise the Administrative Agencies Practice Act, NDCC Chapter 28-32. Committee counsel said the bill draft rearranges the provisions of the chapter relating to administrative rulemaking and, because the rulemaking provisions are broken into several more sections than current law, the administrative hearing provisions are renumbered. He said the provisions of the chapter relating to administrative hearings are unchanged, with the exception of three minor changes requested by the Office of Administrative Hearings after reviewing the bill draft.

Committee counsel said the bill draft has been previously reviewed by the committee and made available to administrative agencies for review. He said no comments have been received on the bill draft since the previous committee meeting.

In response to a question from Representative Koppelman, committee counsel said that because this bill draft revises the Administrative Agencies Practice Act and renames provisions, the other bill drafts to

be considered by the committee have been drafted in the alternative, which means that an amendment is prepared based on current law and the same amendment is prepared based on whether this bill passes in the next legislative session.

It was moved by Representative Keiser, seconded by Representative Grande, and carried on a roll call vote that the bill draft revising the Administrative Agencies Practice Act be approved and recommended to the Legislative Council. Representatives Devlin, Byerly, DeKrey, Ekstrom, Grande, Keiser, Koppelman, Nelson, Nottestad, and Thoreson and Senators Andrist, Fischer, Klein, Mathern, Stenehjem, and Wardner voted "aye." No negative votes were cast.

PROFIT SHARING BY STATE EMPLOYEES

Committee counsel said a letter was distributed to committee members from Ms. Deb Knudsen, Public Employees Retirement System. He said at the previous committee meeting a question arose about "profit sharing" references added to a rule of the Public Employees Retirement System. He said the letter states that employees of the North Dakota Mill and Elevator would be the only state employees eligible for profit sharing as a method of compensation at the present time, although other agencies might be capable of generating a profit.

AGENCY NOTICE TO PARTIES OF ADMINISTRATIVE RULES COMMITTEE CONSIDERATION

Chairman Devlin called on committee counsel to review a bill draft to require agencies to notify interested parties when rules will be considered by the Administrative Rules Committee.

Ms. Melissa Hauer, Department of Human Services legal counsel, said the department has a question about what the committee has in mind with regard to agency adoption of a procedure to notify parties of Administrative Rules Committee consideration of a rule. Representative Keiser said he thinks those who testify or submit comments on rules should have an opportunity to receive notice from the agency of the time and place when the Administrative Rules Committee will consider those rules. Committee counsel said the language of the bill draft states that parties that request notice from the agency should receive that notice. He said the language is flexible to allow agencies to choose a reasonable method to provide notice. He said he envisions a sheet being circulated at public hearings to allow those in attendance to sign up to receive notice from the agency of when the Administrative Rules Committee will consider the rules. Ms. Hauer said this would be similar to the procedure already being used by the Department of Human Services.

Representative Devlin said it seems reasonable to assume that people interested in rules would attend public hearings and would have an opportunity to request notice.

It was moved by Representative Nelson, seconded by Representative DeKrey, and carried on a roll call vote that the bill draft requiring agencies to establish a procedure to allow interested parties to request notice from the agency of when the Administrative Rules Committee will consider rules be approved and recommended to the Legislative Council. Representatives Devlin, Byerly, DeKrey, Ekstrom, Grande, Keiser, Koppelman, Nelson, Nottestad, and Thoreson and Senators Andrist, Fischer, Klein, Mathern, Stenehjem, and Wardner voted "aye." No negative votes were cast.

FILING OF COMMENTS WITH RULES

Chairman Devlin called on committee counsel to review a bill draft to require agencies to file comments received on rules with the Legislative Council when the rules are filed for publication. Committee counsel said the bill draft has previously been reviewed by the committee. He said the objective of the bill draft is to gather comments on rules in a central location. He said the principal purpose for this would be to have comments available for Administrative Rules Committee members to request for review before considering agency rules.

It was moved by Representative Nottestad, seconded by Senator Stenehjem, and carried on a roll call vote that the bill draft requiring filing of comments with rules submitted for publication be approved and recommended to the Legislative Council. Representatives Devlin, Byerly, DeKrey, Ekstrom, Grande, Keiser, Koppelman, Nelson, Nottestad, and Thoreson and Senators Andrist, Fischer, Klein, Mathern, Stenehjem, and Wardner voted "aye." No negative votes were cast.

ADMINISTRATIVE RULES COMMITTEE APPROVAL OF EMERGENCY STATUS OF RULES

Chairman Devlin called on committee counsel to review a bill draft to require agencies to obtain Administrative Rules Committee approval of emergency status of rules. Committee counsel said the bill draft was considered at the previous committee meeting and has been revised to make clear that if the committee does not approve the status as emergency rules, the agency may proceed with adoption of the rules and they would become effective at the time rules normally become effective.

Chairman Devlin called on Ms. Hauer who said the department is concerned about this bill draft. She said the bill draft would add another layer of difficulty to rulemaking procedures. She said she believes the concern of the committee arose from one or two

agency actions in which committee members thought an emergency declaration was inappropriate. She said this would create an added requirement for all emergency rulemaking even though only limited instances of concern exist.

Representative Byerly said the bill draft would require an explanation to the Administrative Rules Committee within 120 days after the declared effective date of a proposed rule. He questioned whether this would require an additional appearance before the Administrative Rules Committee. Ms. Hauer said within the timeframe established by the bill draft, agency rules would not be complete, so this would require an appearance before the Administrative Rules Committee for review of emergency status and the agency would have to appear again before the committee at a later time when the rules are finally adopted.

Chairman Devlin said he agrees that an additional appearance would be required by the bill draft. He said another approach would be to allow the committee to request an agency to appear if there are concerns with an emergency rules declaration.

Representative Keiser said it appears the question is whether it would be justifiable to add another committee appearance to the rulemaking process. He said he thinks it would be justifiable because it does not appear that these decisions are being reviewed.

Committee counsel said one issue that should be considered by the committee is that the bill draft requires agencies to request review of an emergency rules declaration by the Administrative Rules Committee within 120 days after the effective date of rules. He said this could be a problem during the time from November through June encompassing a legislative session. He said the Administrative Rules Committee does not meet during that time and it would be difficult for an agency to obtain committee approval. Representative Nelson asked whether anything would prevent the Administrative Rules Committee from meeting during a legislative session. Committee counsel said the committee would be able to meet during that time because the committee has ongoing status because it is a statutory committee, but it may be difficult to schedule a meeting during that time because of legislative session demands on the time of committee members.

STATUTORY BASIS FOR RULEMAKING

Chairman Devlin called on committee counsel for presentation of a bill draft to require statutory authority for rulemaking outside the authority under NDCC Chapter 28-32. Committee counsel said the committee requested Legislative Council staff and the Attorney General's office to work together on this issue. He said the Attorney General's office reviewed statutory provisions for agency rulemaking and compiled a substantial body of laws that appear to

provide agency rulemaking authority. He said he agreed with the staff of the Attorney General's office that each administrative agency should have the opportunity and obligation to review its statutory provisions to determine whether it has statutory rulemaking authority outside NDCC Chapter 28-32. He said letters were sent to approximately 100 agencies asking them for this kind of review and identifying those statutes that appear to provide rulemaking authority for the agency. He said the chart distributed to committee members listing 646 sections of law is the result of this effort.

Committee counsel said the bill draft presented to the committee provides rulemaking authority outside NDCC Chapter 28-32 for agencies in provisions of law they administer. He said a note has been added to the bill draft following each section to indicate which agency has requested this authority. He said the bill draft has alternative amendments to existing NDCC Section 28-32-02 to amend that section to provide that an administrative agency must have statutory rulemaking authority outside NDCC Chapter 28-32. He said the effective date provision contained in the bill draft makes this change effective for administrative rules for which notice of rulemaking is filed after July 31, 2001. He said this provision also validates rules in existence for which the notice of rulemaking was filed before August 1, 2001. He said this is to make clear that the statutory change is not intended to invalidate any existing rules adopted under the rulemaking authority provided by NDCC Chapter 28-32.

Committee counsel said the bill draft was made available for review by the Attorney General's office. He said he was advised by an assistant attorney general that the new language on page 9, lines 16 and 17, can be removed from the bill draft. He said this language duplicates rulemaking authority that already exists in NDCC Section 54-52-04.

Committee counsel said there are several issues the committee should bear in mind in consideration of this bill draft. He said the Attorney General's office has not concluded that rulemaking authority does not exist under NDCC Section 28-32-02. He said the Attorney General's office has advised the committee that a choice should be made of whether general rulemaking authority under NDCC Section 28-32-02 provides authority for agencies to adopt rules or whether a requirement should be added, such as contained in the bill draft, to require statutory authority outside NDCC Chapter 28-32 before an agency may adopt rules. He said that if general rulemaking authority is eliminated, the Legislative Assembly will have to consider the issue of rulemaking authority in all future legislation. He said another issue would involve placement of statutes because whether a statute is placed in a chapter with rulemaking authority or a chapter without rulemaking authority could make a substantial difference. He said another

issue that is undeterminable at this point is whether amendments or additions to an existing chapter of law, made after the rulemaking provision was added to that chapter, would come under the rulemaking authority. He said another issue for consideration is with regard to appropriations bills, where there will be no rulemaking authority for implementation unless that authority is added to the bill.

Committee counsel said the objective of the bill draft was to eliminate the problem described by the Attorney General's office of whether general rulemaking authority exists in a case where an agency might have seven programs to administer and five of those programs have specific rulemaking authority included. The question that arises then is whether the general rulemaking authority covers the two programs that lack specific statutory authority. He said this kind of problem could exist under the bill draft because under existing law and the bill draft there are general grants of rulemaking authority to agencies such as the Department of Human Services and the State Department of Health. He said each of these agencies would have a general provision allowing the agency to make rules under any statute the agency administers and within areas administered there are specific rulemaking provisions in some areas but not in others. He said under the approach in the bill draft, the Legislative Assembly will have to become more specific in enacting laws to reduce the need for interpretation through administrative rules and more specific in granting rulemaking authority.

Representative DeKrey said it appears a better approach might be to provide general rulemaking authority for agencies unless there is a specific statutory prohibition on rulemaking authority in a certain area of law.

Chairman Devlin called on Ms. Beth Baumstark, Attorney General's office, for comments on the bill draft. Ms. Baumstark said she does not have specific comments on the bill draft but is available for questions. She said the Attorney General's office has not suggested that enactment of the bill draft is necessary. She said the Attorney General's office has suggested that there are areas in law where it is not clear whether general rulemaking authority applies. She said the suggestion is that it should be made clear by statute whether NDCC Section 28-32-02 provides general rulemaking authority in all areas of law administered by agencies where there is no specific rulemaking authority provided.

ADMINISTRATIVE RULES COMMITTEE APPROVAL OF EMERGENCY STATUS OF RULES

Chairman Devlin called on Ms. Hauer who said she has a concern with some areas of statutory law where the Department of Human Services has been granted authority for emergency rulemaking without following the procedures in NDCC Chapter 28-32.

She asked whether those statutes would be affected by the bill draft that would require Administrative Rules Committee approval of emergency status of rules.

Committee counsel said those provisions of law are more specific than the provision being amended by the bill draft. He said when a specific provision and a general provision are in conflict, the specific provision is to be the controlling authority. He said this would mean that those statutes giving the Department of Human Services emergency rulemaking authority without following the procedures of NDCC Chapter 28-32 would not be affected by enactment of this bill draft.

It was moved by Representative Byerly, seconded by Representative Keiser, and carried on a roll call vote that the bill draft requiring Administrative Rules Committee approval of the emergency status of rules be approved and recommended to the Legislative Council. Representatives Devlin, Byerly, DeKrey, Ekstrom, Grande, Keiser, Koppelman, and Nelson and Senators Andrist, Fischer, Klein, Mather, Stenehjem, and Wardner voted "aye." No negative votes were cast.

STATUTORY BASIS FOR RULEMAKING

Chairman Devlin asked whether anyone in attendance at the meeting has additional comments on the bill draft regarding rulemaking authority of agencies. No response was received.

Senator Fischer said the bill draft would have the effect of placing the code revisor in a position of making legislative decisions. He said the problem is that placement of statutes would determine whether rulemaking authority exists under those statutes. Committee counsel said that is correct.

Representative DeKrey said there are concerns with the bill draft that cannot be resolved at this point. He said the committee should not take action with regard to the bill draft. He said if the committee disapproves the bill draft, it could be interpreted as disapproval of the concept that specific rulemaking authority should exist before rules may be adopted. He said individuals on the committee may wish to work with this bill draft to prepare it for introduction in the legislative session and committee disapproval would have a negative effect on those efforts.

Representative Ekstrom said she would prefer to explore the possibility of providing by law that general rulemaking authority exists in all areas unless a specific prohibition on rulemaking has been enacted.

STATE WATER COMMISSION - DEPARTMENT OF TRANSPORTATION REQUEST FOR EXTENSION OF TIME

Chairman Devlin said the time has already passed for adoption of rules under 1999 legislation regarding standards for highway construction and water flow. He said he sees no reason to grant an extension of

time to adopt rules because it appears that whether or not the committee grants the request, these agencies have authority for adoption of these rules.

STATE GAMING COMMISSION

It was moved by Representative Byerly and seconded by Senator Andrist that the Administrative Rules Committee void the July 2000 rules of the State Gaming Commission to the extent they allow use of electronic bingo card marking devices on the grounds that that aspect of the rules authorizes an expansion of charitable gaming contrary to legislative intent.

Representative Byerly said he believes authorization of use of electronic bingo card marking devices is contrary to the well-known opposition of the Legislative Assembly to any expansion of gaming.

Senator Klein said he does not support the motion. He said organizations may have purchased equipment based on this rule. He said additional equipment might be purchased before the legislative session, but he thinks this issue needs to be addressed by the full Legislative Assembly.

Representative DeKrey said he does not support the motion. He said the Administrative Rules Committee has been accused of being a mini-legislature and this action would cause more of that criticism. He said he agrees that the Legislative Assembly should consider this issue.

Senator Wardner said he does not support the motion because the Legislative Assembly has given the State Gaming Commission the authority to do what they have done in these rules.

Representative Ekstrom said she does not support the motion. She said an additional consideration is that use of electronic bingo card marking devices by handicapped individuals might also be eliminated by this action.

The question was called and **the motion was defeated.** Representative Byerly and Senator Andrist voted "aye." Representatives Devlin, DeKrey, Ekstrom, Grande, Keiser, Koppelman, and Nelson and Senators Fischer, Klein, Mather, Stenehjem, and Wardner voted "nay."

Chairman Devlin said it appears there is no business pending before the committee and no further business to come before the committee. He thanked the committee members for their work during this interim.

It was moved by Representative DeKrey, seconded by Representative Koppelman, and carried on a roll call vote that the chairman and the staff of the Legislative Council be requested to prepare a report and the bill drafts recommended by the committee and to present the report and recommended bill drafts to the Legislative Council. Representatives Devlin, Byerly, DeKrey, Ekstrom, Grande, Keiser, Koppelman, and Nelson and Senators Andrist, Fischer, Klein, Mather,

Stenehjem, and Wardner voted "aye." No negative votes were cast. The meeting was adjourned at 1:30 p.m.

John Walstad
Code Revisor

ATTACH:8