

NORTH DAKOTA LEGISLATIVE COUNCIL

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Thursday and Friday, July 26-27, 2001
Roughrider Room, State Capitol
Bismarck, North Dakota

Representative LeRoy G. Bernstein, Chairman, called the meeting to order at 9:00 a.m.

Members present: Representatives LeRoy G. Bernstein, Duane DeKrey, William R. Devlin, Bette Grande, Nancy Johnson, Kim Koppelman, Jon O. Nelson, Darrell D. Nottestad, Sally M. Sandvig, Blair Thoreson, Dwight Wrangham; Senators Thomas Fischer, Jerry Klein, Deb Mathern, David O'Connell, Bob Stenehjem

Members absent: Representative Mary Ekstrom; Senators John M. Andrist, Layton Freborg

Others present: See Appendix A

Chairman Bernstein called on Mr. John D. Olsrud, Director, Legislative Council, who reviewed the *Supplementary Rules of Operation and Procedure of the North Dakota Legislative Council*.

Chairman Bernstein welcomed committee members and said it is an important function for the committee to review rules to be sure legislative intent is appropriately implemented.

BACKGROUND MEMORANDUM

Chairman Bernstein called on committee counsel for presentation of a memorandum entitled *Administrative Rules - Background Memorandum*. Committee counsel said the statutory provisions governing administrative rulemaking procedures are contained in North Dakota Century Code (NDCC) Chapter 28-32, the Administrative Agencies Practice Act. He said since 1977 the Legislative Council has been responsible for compiling and publishing the North Dakota Administrative Code (NDAC). He reviewed statistics on rulemaking activity in recent years. He said the volume of rulemaking appears to be down during the most recent three biennial periods. He said this may indicate decreased rulemaking activity, but the number of sections affected and number of pages of rules may be impacted by a single large set of rules, such as those adopted by the State Department of Health on environmental topics.

Committee counsel said 2001 House Bill No. 1030, recommended by the Administrative Rules Committee, reorganized the provisions of NDCC Chapter 28-32 without substantive change. He said an appendix is attached to the memorandum to allow provisions to be located from the previous chapter in the revised chapter or vice versa.

Committee counsel said the Administrative Rules Committee is established by statute and is not discharged upon making its report to the Legislative Council at the end of the interim. He said the committee could be called to meet at any time, including during a legislative session. He said NDCC Section 54-35-02.5 requires the committee membership to include at least one member from each standing committee of the House of Representatives or Senate in the most recently completed legislative session.

Committee counsel said the Administrative Rules Committee has had statutory authority since 1981 to make formal objections to agency rules. He said the committee has not filed a formal objection since 1995. He said 1995 legislation was enacted to expand the authority of the Administrative Rules Committee to find that all or any portion of a rule is void if the committee makes the specific finding that one of six statutory requirements exists with regard to the rule. He reviewed the requirements for a finding that a rule is void. Committee counsel said NDCC Section 28-32-18 requires consideration by the committee within 90 days after the date of the Administrative Code supplement in which a rule change appears for the committee to have authority to find the rule void. He said an exception exists for rules appearing in the Administrative Code supplement from November 1 through May 1 encompassing a regular legislative session of the Legislative Assembly. He said the rules considered at today's meeting fall within that timeframe and that is the reason why rules are being considered that were in the supplement from December 2000 through July 2001.

Committee counsel said NDCC Section 28-32-18 allows a rule change, repeal, or creation after consideration by the committee if the adopting agency and the committee agree that the rule change is necessary to address any of the considerations for which the committee may find the rule to be void. He said this allows an agency to change an administrative rule when the committee expresses concerns, and the agency is not required to commence a new rule-making proceeding. He said if a rule change is agreed upon by the committee and the agency, it must be reconsidered at a subsequent Administrative

Rules Committee meeting, and public comment on the agreed rule change must be allowed.

Committee counsel said the Legislative Council has assigned the Administrative Rules Committee the responsibility to approve extensions of time for administrative agencies to adopt rules, establish a procedure to distribute copies of administrative agency filings of notice of proposed rulemaking, and receive notice of appeal of an administrative agency's rule-making action.

Committee counsel reviewed statutory provisions governing rulemaking activities and pointed out changes made by 2001 legislation.

Committee counsel said there is a statutory provision providing that each agency shall mail a copy of the agency's full notice to each person who has made a timely request to the agency for a mailed copy of the notice. He said associations representing special interest constituencies should take advantage of this provision to file a standing request for notice with agencies that may adopt rules of interest to members of the associations. He said the statutory provision also provides that the agency may mail or otherwise provide a copy of the agency's full notice to any person who is likely to be an interested person. He said agencies generally try to comply with this provision, but there may be difficulty in determining who is an interested person. He said a special statutory provision governs notice of rulemaking by the Superintendent of Public Instruction. He said the Superintendent of Public Instruction is required to provide notice of any proposed rulemaking to each statewide association with a focus on educational issues which has requested to receive notice and to the superintendent of each public school district or the president of the school board if the district has no superintendent.

Committee counsel said NDCC Section 28-32-10 requires the Legislative Council to establish guidelines for agencies to comply with notice requirements of Chapter 28-32. He said guidelines were adopted by the committee in October 1996 which should now be revised to reflect the revision of Chapter 28-32. He said a copy of suggested changes has been distributed to committee members.

Committee counsel said 2001 legislation affecting administrative rulemaking was contained in several bills. He said House Bill No. 1027 requires agencies to adopt a procedure to allow interested parties to request and receive notice from the agency of the date and place a rule will be reviewed by the Administrative Rules Committee. He said House Bill No. 1028 requires approval by the Governor before an agency may adopt an administrative rule effective on an emergency basis. He said House Bill No. 1029 requires a copy of written comments and a written summary of oral comments on rulemaking to be filed with the Legislative Council when the rule is filed for publication. He said House Bill No. 1228 was vetoed by the Governor and would have allowed the

Administrative Rules Committee to reopen review of existing administrative rules. He said the bill was similar to 1997 House Bill No. 1191, which was also vetoed. He said House Bill No. 1030 revised the Administrative Agencies Practice Act without substantive change. He said House Bill No. 1451 allows the Administrative Rules Committee to request an administrative agency briefing on existing administrative rules and provides that the agency point out any provisions that appear to be obsolete and any areas in which statutory authority has been changed or repealed since the rules were adopted or amended. He said the bill allows an agency to amend or repeal a rule without the usual proceedings for rulemaking if the agency initiates the request for considering amendment or repeal, the agency provides notice to the regulated community in a manner reasonably calculated to provide notice to interested persons, and the agency and committee agree the amendment or repeal eliminates a provision that is obsolete or no longer in compliance with law and that no detriment would result to the substantive rights of the regulated community. He said Senate Bill No. 2032 created the Department of Commerce and changed references in the definition of administrative agency to comply with the name change of the agency and those previous agencies affected. He said Senate Bill No. 2103 eliminates the requirement that the State Seed Commission establish by rule the fees for commodity grade inspections. He said the bill substitutes a provision that the Agriculture Commissioner may establish and charge fees for commodity grade inspections. He said a question exists, because the Agriculture Commissioner is an administrative agency, as to whether the Agriculture Commissioner must go through administrative rulemaking procedures to establish commodity grade inspection fees. He said Senate Bill No. 2166 allows waiver by the Superintendent of Public Instruction of any rule governing accreditation of schools under certain conditions. He said if the Superintendent approves a waiver, the Superintendent is to file a report with the committee designated by the Legislative Council. Committee counsel said the Education Committee has been designated by the Legislative Council to receive these filings.

Committee counsel reviewed the questions addressed to adopting agencies for presentations to the committee with regard to rules under review. He said the nine questions provided to agencies during the previous interim are shown in the memorandum. He said the only one of the questions that appears to require change to comply with 2001 legislation is the question relating to adoption of emergency rules. He said this question will be revised in future mailings to include a question of whether the Governor has approved emergency rulemaking.

RULEMAKING NOTICE GUIDELINES

It was moved by Representative Devlin, seconded by Representative Koppelman, and carried on a roll call vote that the guidelines for rulemaking notice be amended in accordance with the distributed copies of suggested changes.

Voting in favor of the motion were Representatives Bernstein, DeKrey, Devlin, Grande, Johnson, Koppelman, Nelson, Nottestad, Sandvig, Thoreson, and Wrangham and Senators Fischer, Klein, Mathern, O'Connell, and Stenehjem. No negative votes were cast.

COMMITTEE DISCUSSION

Representative Grande said she believes a problem exists in rules of the Education Standards and Practices Board with regard to school librarians. She said it appears the rules require a school librarian to be a certified teacher. She said it does not appear appropriate to prohibit a qualified librarian from filling a position because the individual is not a certified teacher in this state. She said the committee should investigate this issue.

Representative Koppelman said the rule in question is an existing rule, and he would question whether the committee has authority to initiate review of existing rules, in view of the veto of House Bill No. 1228. He said it appears the committee could invite agency discussion of a rule, but the committee would be limited to hearing testimony and would have no further authority.

Chairman Bernstein said committee members could consider whether to invite representatives of the Education Standards and Practices Board to review the rule in question. He said the committee could discuss this issue later in the meeting.

STATE BOARD OF MEDICAL EXAMINERS

Chairman Bernstein called on Mr. Rolf Sletten, Executive Secretary, State Board of Medical Examiners, for testimony relating to December 2000 rules of the board. A copy of Mr. Sletten's prepared testimony is attached as Appendix B.

Mr. Sletten said attached to his prepared testimony is a proposed amendment to NDAC Section 50-02-11-01 to make additional changes to the rule which were inadvertently omitted from the rule amendments submitted for publication. He requested approval by the committee of this proposed amendment.

In response to a question from Representative Koppelman, Mr. Sletten said the rule change relating to delegation of authority to the board chairman to approve provisional temporary licenses is intended to comply with the general practice followed by the board. He said the initial question on provisional temporary licensing is whether to have the applicant

in for an interview, and this decision is most appropriately made by the chairman.

Representative Devlin asked how many opportunities a person is given to pass the medical licensing examination. Mr. Sletten said applicants have four opportunities to pass all parts of the examination.

It was moved by Representative Nottestad, seconded by Senator Fischer, and carried on a roll call vote that the committee agree with the State Board of Medical Examiners on amendment of NDAC Section 50-02-11-01 as submitted by Mr. Sletten. Voting in favor of the motion were Representatives Bernstein, DeKrey, Devlin, Grande, Johnson, Koppelman, Nelson, Nottestad, Sandvig, Thoreson, and Wrangham and Senators Fischer, Klein, Mathern, O'Connell, and Stenehjem. No negative votes were cast.

STATE BOARD OF ACCOUNTANCY

Chairman Bernstein called on Ms. Roene Hulsing, member of the State Board of Accountancy, Dickinson, for testimony relating to December 2000 rules of the board. A copy of Ms. Hulsing's prepared testimony is attached as Appendix C.

In response to a question from Representative Grande, Ms. Hulsing said licensing fees for firms cover the firm only and not individual accountants. She said individual accountants also pay individual licensing fees. She said the fee for firms is intended to provide more equitable imposition of fees within the profession. She said fees are used for the general fund of the State Board of Accountancy. Representative Grande said it appears fees for firms are inequitable to smaller firms because larger firms pay less per accountant.

DEPARTMENT OF FINANCIAL INSTITUTIONS

Chairman Bernstein called on Mr. Timothy J. Karsky, Commissioner, Department of Financial Institutions, for testimony relating to January 2001 rules adopted by the Department of Banking and Financial Institutions. A copy of Mr. Karsky's prepared testimony is attached as Appendix D.

STATE DEPARTMENT OF HEALTH

Chairman Bernstein called on representatives of the State Department of Health for testimony relating to several sets of rules adopted by the department. Four representatives of the State Department of Health presented testimony relating to rules within their areas of expertise.

Mr. Monte Engel, State Department of Health, presented testimony relating to licensing rules for hospitals and long-term care facilities relating to definition modifications to permit facilities to reduce bed capacity. A copy of his prepared testimony is attached as Appendix E.

Mr. Tom Bachman, Division of Air Quality, State Department of Health, presented testimony relating to June and July 2001 rules of the department. A copy of his prepared testimony is attached as Appendix F.

Representative Devlin said printers in North Dakota will not reach the required standards under Title V of the Clean Air Act, but it appears the rules would require monthly reporting by those printers.

Mr. Bachman said the requirement in the rules matches the federal requirement under Environmental Protection Agency rules. He said if there is a problem, perhaps the Environmental Protection Agency could be approached for a reduced reporting frequency when printers clearly will not reach the level under the rules.

Mr. Dennis Fewless, State Department of Health, presented testimony on water quality rules and underground injection control rules. Copies of his prepared testimony on these topics are attached as Appendices G and H.

Mr. Timothy Wiedrich, Director, Division of Emergency Health Services, State Department of Health, presented testimony relating to rules governing the state trauma system. A copy of his prepared testimony is attached as Appendix I.

In response to a question from Representative Koppelman, Mr. Wiedrich said he believes these rules are consistent with legislation approved during the 2001 Legislative Assembly.

Senator Klein asked how these rules will affect rural community trauma systems. Mr. Wiedrich said another level designation has been added for facilities without physicians which are now covered as Level 5 facilities in the rules.

In response to a question from Representative Sandvig, Mr. Wiedrich said third-party reimbursors have recognized that care provided by trauma centers is reimbursable. He said the rules do remove some of the choices of facilities that patients had before, and not all hospitals in the state have committed themselves to provide trauma care.

Representative Nelson said rural hospital staffs are concerned about trauma care bypassing them to transport patients to higher-level trauma centers. He asked whether there were objections raised regarding these concerns during hearings. Mr. Wiedrich said that concern was not raised as an issue during hearings. He said most rural Level 4 or 5 trauma centers do not offer surgery as an option for trauma patients, and if surgery appears necessary, the patient would not be treated at those centers in any event.

STATE WATER COMMISSION AND DEPARTMENT OF TRANSPORTATION

Chairman Bernstein called on Mr. Dale L. Frink, State Engineer, State Water Commission, for testimony relating to May 2001 rules adopted jointly by the State Water Commission and Department of Transportation. A copy of Mr. Frink's prepared testimony is

attached as Appendix J. Mr. Frink said since the rules became effective May 1, 2001, the State Water Commission has received comments from many sources expressing concern about Federal Emergency Management Agency (FEMA) funding for replacement culverts and increased costs for hydrologic analysis. He said the State Water Commission and Department of Transportation held a meeting with concerned parties on July 25, 2001. He said considerable discussion and input from legislators and others in attendance led to an agreement that an amendment to the rules is necessary. He said the proposed additional amendment would make it clear that if the standards in the rules are followed, the road authority would not be liable for damages, but if the road authority elects not to follow the rules, that entity would not be entitled to the immunity provided by statute.

Senator Fischer asked how counties or townships that cannot afford engineering costs of a project can be protected from liability. Mr. Frink said failure to comply with the rules would mean no immunity would be provided. He said under current law, most townships and counties are not sued on these projects and that will not be changed by the rules. He said political subdivisions will not be forced to do hydrologic analyses unless they wish to enjoy the immunity provided by statute for compliance with the rules.

Senator O'Connell inquired about the cost of hydrologic study involved with culvert replacement projects. Mr. Frink said the cost would vary depending upon the project. He said a regular culvert would probably involve two or three hours of time for an engineer to complete a hydrologic study.

Chairman Bernstein called on Mr. Jeffrey J. Volk, Moore Engineering, Inc., West Fargo, for comments on the stream crossing standards rules. A copy of Mr. Volk's prepared testimony is attached as Appendix K. Mr. Volk said he appears on behalf of Cass County water resource districts to oppose the rules as they apply to township roads. He said the reason for his opposition is that the standards require a substantially different design standard than current usage requires for culverts on township roads. He said attached to his prepared testimony is a chart showing culvert diameters based on current usage and based on the rules. He said as an engineer, he would have to design to meet the standards in the rules. He said that would place the burden on the township board of supervisors to decide whether or not to expend the extra money to meet that designed standard.

In response to a question from Senator O'Connell, Mr. Volk said a rule of thumb on culvert cost for township or county roads would be a cost of \$1 per inch diameter of a culvert times the length of the culvert in feet.

In response to a question from Representative Koppelman, Mr. Volk said it appears the rules would impact only on township road design standards.

Representative Nelson asked Mr. Volk how often he sees complaints about county or township roads. He said water issues are often a problem, and water resource districts receive many situations for review because upstream and downstream interests often do not agree.

Representative Nottestad asked whether a downstream township would have to meet these standards when an upstream township does. Mr. Volk said it is true a downstream township would become a water-holding area if it does not allow the same waterflow as an upstream township, but the same problem exists without these new rules.

Chairman Bernstein called on Mr. Wade Williams, North Dakota Association of Counties, Jamestown, for comments on the stream crossing rules. Mr. Williams said the Association of Counties appreciates the assistance of the State Water Commission and Department of Transportation in listening to concerns that have arisen since adoption of the rules. He said county officials were allowed to express their concerns and receive information on how the rules are to be applied.

In response to a question from Senator Klein, Mr. Williams said the North Dakota Association of Counties supports the stream crossing rules with the addition of the amendment provided to the committee by Mr. Frink.

Chairman Bernstein called on Mr. Tom Moe, North Dakota Township Officers Association legal counsel, Mayville, who said the association supports these standards but believes the standards require adjustment. Mr. Moe said he would suggest reducing the township road culvert size requirement to require that the culvert handle a two-year storm. He said he would also support addition of the amendment suggested by Mr. Frink. He said an additional consideration, not related to the rules, is the possibility of considering removing culvert authority from the road authority and giving it to a water resource district. He said a water resource district would have more resources for engineering and other costs and would be more familiar with water issues.

Representative Devlin said the committee could carry consideration of changes to the stream crossing rules over for consideration at tomorrow's portion of the meeting. He said he believes the suggested change by the State Water Commission would make clear the rule and the intent of the legislation are in sync. He said if the road authority complies with the standards, they are assured of immunity. He said that is all that the rule accomplishes, and it is not mandatory to meet those standards.

Representative Nelson said he attended the meeting with the State Water Commission and concerned parties and agrees the proposed

amendment resolves the most contentious problem. He said he commends the State Water Commission and Department of Transportation for working with concerned groups to address issues of concern.

Chairman Bernstein said the committee could meet earlier in the morning than scheduled for Friday and review the proposed rule amendment. He said township officials could meet with representatives of the State Water Commission and Department of Transportation to see whether changes are desirable with regard to the impact on township culverts.

Chairman Bernstein called on Mr. Wayne Oien, Griggs County highway superintendent, Cooperstown, for comments on the stream crossing standards. Mr. Oien said Griggs County is facing a disaster and is now working with FEMA on replacement of several culverts. He said neighboring counties also have several culverts to replace, and it will take a long time to complete hydrologic studies on these changes. He said he is concerned about how these rules might impact these pending projects.

Representative Nelson said it appears from discussions regarding FEMA treatment of projects that Griggs County can proceed with replacement of culverts and begin study on ones that are expected to be most contentious among affected landowners. He said he believes that FEMA will share in the cost when the county chooses to do hydrologic studies. He said he believes the county should work with its usual engineer on these projects. He said he believes if the county chooses not to do hydrologic studies, the county will not be immune from liability and that is the same situation that exists under current law.

Chairman Bernstein called on Mr. Doug Friez, Division of Emergency Management, for comments on the stream crossing standards. Mr. Friez said he believes this is good legislation and rules and will help with future flood mitigation efforts. He said he does not believe FEMA presents a major stumbling block in the process of making these improvements.

STATE BOARD OF ANIMAL HEALTH

Chairman Bernstein called on Dr. Susan J. Keller, State Veterinarian, for testimony relating to April 2001 rules of the board. A copy of Dr. Keller's prepared testimony is attached as Appendix L.

In response to a question from Representative Devlin, Dr. Keller said these rules do not affect the fencing requirements for elk enclosures.

DEPARTMENT OF HUMAN SERVICES

Chairman Bernstein called on Ms. Melissa Hauer, Department of Human Services legal counsel, for testimony on three sets of rules adopted by the department. Ms. Hauer provided written testimony on each set of rules, copies of which are attached as Appendices M, N, and O.

Committee members had no questions regarding the intergovernmental transfer program rules.

With regard to the rules governing programs and services for individuals with developmental disabilities, Representative Devlin said the rules use a standard of "common knowledge in the community," which seems to him to be very difficult to define. Ms. Hauer said it is true this phrase may be difficult to interpret. Mr. Robbin Hendrickson, Disability Services Division, Department of Human Services, said this standard follows language used in other rules already in existence. In response to a further question from Representative Devlin, Mr. Hendrickson said this phrase is also used in rules governing foster care, day care, residential treatment facilities, and similar programs.

With regard to the rules governing reimbursement for providers of services to individuals with developmental disabilities, Senator Fischer said he has a concern about the rules using the phrase "budget flexibility" but not providing a definition. Mr. Mark Kolling, Director, Developmental Disabilities Unit, Department of Human Services, said in the rules on reimbursement, there is a reference regarding nonallowable costs, which is also used in statute. He said this reference governs costs for which reimbursement is not provided.

Representative Devlin asked whether providers will see a reduction in reimbursement due to staffing restrictions. Mr. Kolling said it is not guaranteed, but cash flow to providers should be adequate to cover reimbursement costs. He said providers usually must reimburse the state because payments to providers exceed the ultimate entitlement.

Senator Fischer said for more than a year, he has been bothered by a policy of the Department of Human Services which contained a statement that the written policy supersedes two chapters of the North Dakota Administrative Code. He said this statement of policy was in error and an administrative rule may not be superseded by a policy statement and may be altered only as provided by law, through a rulemaking proceeding in compliance with NDCC Chapter 28-32.

Chairman Bernstein said the communication described by Senator Fischer was in error. He said the situation was resolved by the Department of Human Services communicating a correction to providers to make clear that rules cannot be superseded by policy. Senator Fischer said he just wanted to bring this incident to the committee's attention.

STATE BOARD OF NURSING

Chairman Bernstein called on Ms. Connie Kalanek, Executive Director, State Board of Nursing, for testimony relating to June 2001 rules of the board. A copy of Ms. Kalanek's prepared testimony is attached as Appendix P.

Senator Mathern said 2001 legislation on continuing education for nurses was contentious. He

asked whether the State Board of Nursing is working on this topic. Ms. Kalanek said 2001 Senate Bill No. 2114 had a section allowing transitional licensees to have an option on continuing education. She said the board will be working through the rules process regarding these provisions.

BOARD OF EXAMINERS ON AUDIOLOGY AND SPEECH-LANGUAGE PATHOLOGY

Chairman Bernstein called on Mr. Bill Peterson, assistant attorney general appearing on behalf of the Board of Examiners on Audiology and Speech-Language Pathology, for testimony relating to February 2001 rules of the board. A copy of Mr. Peterson's prepared testimony is attached as Appendix Q.

Mr. Peterson said the fee increase approved by the board is largely attributable to legal fees from one large bill to the board for a disciplinary action.

Senator Fischer said it appears this is another example of legal fees being a huge burden for a professional licensing board. Senator Mathern said the Legislative Council's interim Commerce Committee is examining that issue.

STATE BOARD OF MASSAGE

Chairman Bernstein called on Ms. Karen Wojahn, State Board of Massage, Beach, for presentation of testimony regarding January 2001 rules of the board. A copy of Ms. Wojahn's prepared testimony is attached as Appendix R.

STATE BOARD OF CHIROPRACTIC EXAMINERS

Chairman Bernstein called on Dr. William C. Swanson, State Board of Chiropractic Examiners, for testimony regarding April 2001 rules of the board. A copy of Dr. Swanson's prepared testimony is attached as Appendix S.

STATE WATER COMMISSION AND DEPARTMENT OF TRANSPORTATION

Upon reconvening the committee on Friday morning, Chairman Bernstein called on Mr. Frink for comments on discussions with interested parties regarding the stream crossing standards rules adopted jointly by the State Water Commission and Department of Transportation. Mr. Frink said the amendment presented to the committee at yesterday's portion of the meeting is still supported by interested parties. He said an additional rule change has been agreed upon by interested parties and the State Water Commission and Department of Transportation relating to design flood frequency for township roads. He distributed a copy of a proposed additional amendment to NDAC Section 89-14-01-03 intended to make clear that flood recurrence interval for culverts on township roads is 10 years. A copy of the

proposed amendment is attached as Appendix T. He said he believes this change would resolve concerns expressed at yesterday's portion of the meeting regarding requirements for culverts on township roads.

It was moved by Representative Koppelman, seconded by Representative Nelson, and carried on a roll call vote that the Administrative Rules Committee agrees with the State Water Commission and the Department of Transportation upon two proposed amendments to NDAC Sections 89-14-01-01 and 89-14-01-03 as those proposed amendments were prepared and distributed to the committee by the State Engineer. Voting in favor of the motion were Representatives Bernstein, DeKrey, Devlin, Grande, Koppelman, Nelson, Nottestad, Sandvig, Thoreson, and Wrangham and Senators Fischer, Klein, and Mathern. No negative votes were cast.

Mr. Frink asked when these amendments would be effective. Committee counsel said he would interpret the statutory provision to make the amendments effective immediately upon approval by the committee motion. He said the statute requires the committee to receive public testimony at its next meeting if there is testimony on these issues, but the statute does not require the effective date of the amendment to be delayed until that time. He said the situation could be analogized to an original rulemaking procedure, when agency rules are adopted and become effective prior to review by the Administrative Rules Committee. He said it also appears that upon receiving further public comment at its next meeting, the committee could agree on further amendments with the agencies.

Senator Klein said the attendance at yesterday's meeting was good and involved numerous representatives of concerned political subdivisions. He said the public was well-served by the opportunity for input in the rulemaking proceeding.

PESTICIDE CONTROL BOARD

Chairman Bernstein called on Mr. Jeff Weispfenning, Deputy Agriculture Commissioner, for testimony relating to January 2001 rules of the Pesticide Control Board. A copy of Mr. Weispfenning's prepared testimony is attached as Appendix U.

Representative Nelson said he has discussed these rules changes with commodity groups, and they appear unaware of these changes. He asked whether these groups were notified of the rulemaking hearings. Mr. Weispfenning said the department does press releases, and he believes the commodity groups are on an e-mail list maintained by the department to receive any press releases on department activities, including rulemaking. Representative Nelson said he is concerned these rules may conflict with 2001 House Bill No. 1009 or House Bill No. 1328, which made the minor use pesticide fund a revenue source for the Crop Harmonization Committee.

Mr. Weispfenning said his recollection is that the minor use pesticide fund was the source of a cash transfer to the Crop Harmonization Committee but is not a continuing revenue source for the Crop Harmonization Committee. In response to a further question from Representative Nelson, Mr. Weispfenning said these rules were done before the 2001 legislative session, so it was not possible to anticipate legislative changes, but he does not believe session changes are in conflict with these rules as adopted.

Representative Nelson asked why the rules should prevent lobbying of regulators with money from this fund. He said it appears it would be of valuable use of minor use pesticide funds for the Crop Harmonization Committee to conduct lobbying activity. Mr. Weispfenning said he believes the Crop Harmonization Committee has a broad range of authority, including authority to conduct lobbying activity and has a transfer of \$150,000 to use for its purposes. He said he believes the funds transfer from the minor use pesticide fund would not be subject to the restriction on lobbying activity.

Representative Nelson said the language in the amendment to NDAC Section 60-03-02-01 limits use of the minor use pesticide fund and other funds of the Pesticide Control Board to restrict lobbying activity. Mr. Weispfenning said he believes this change to the rules was made to incorporate in the rules what had been the basis of an Attorney General's opinion.

Representative Devlin said he believes state policy should be to allow use of the minor use pesticide fund for sending representatives to talk to Congress on behalf of farmers. He said he is concerned the rules would restrict that activity and does not recall that the law would have done so.

Senator Klein said he also does not like the rule restricting lobbying activities with regard to pesticides.

It was moved by Representative Nelson, seconded by Representative Nottestad, and carried on a voice vote that the committee carry over consideration of NDAC Section 60-03-02-01 as amended to its next meeting.

PUBLIC SERVICE COMMISSION

Chairman Bernstein called on Ms. Illona Jeffcoat-Sacco, Public Service Commission legal counsel, for testimony relating to several sets of rules adopted by the Public Service Commission. A copy of Ms. Jeffcoat-Sacco's prepared testimony is attached as Appendix V.

SEED COMMISSION

Chairman Bernstein called on Mr. Ken Bertsch, Seed Commissioner, State Seed Department, Fargo, for presentation of testimony relating to May 2001 rules of the Seed Commission. A copy of Mr. Bertsch's prepared testimony is attached as Appendix W.

WORKERS COMPENSATION BUREAU

Chairman Bernstein called on Ms. Julie Leer, Workers Compensation Bureau general counsel, for presentation of testimony relating to March and June 2001 rules of the bureau. A copy of Ms. Leer's prepared testimony is attached as Appendix X.

Ms. Leer said thus far no one has come forward under the amnesty period provided by the rules.

COMMITTEE DISCUSSION

Representative Grande raised the issue discussed previously during the meeting relating to Education Standards and Practices Board rules requirements on school librarians' qualifications. Representative Devlin said he does not believe the Administrative Rules Committee is the place for discussion of this issue. He said he believes individual legislators could pursue the issue through the board or introduction of legislation. Representative Koppelman said he believes the Administrative Rules Committee should not become involved in this issue at this point. He said it appears the committee would have no authority other than seeking information.

Representative Wrangham said he is concerned about one aspect of the rules adopted by the State Board of Accountancy. He said the board approved fee increases for licensees, but the testimony of the board representative indicated the board did not require any extra revenue. He said he is concerned about agency policy on increased fees without an apparent need for increased revenues.

Representative Koppelman said Attorney General Wayne Stenehjem has taken office since the previous meeting of the Administrative Rules Committee. He

said the Attorney General may have some views on rulemaking which differ from preceding officeholders, in view of the Attorney General's legislative background and involvement in legislation on rulemaking. He said he understands that the division of the Attorney General's office governing administrative rulemaking does not have an appointed lead attorney. He said when this position has been filled by appointment, the committee should invite the Attorney General and the staff attorney responsible for rulemaking activity to address the committee with regard to any rulemaking issues the Attorney General believes should be addressed by the committee during this interim.

Representative Devlin said an issue has come to his attention which he believes should be addressed. He said committee counsel should address the question of what happens when an agency changes its interpretation of an existing administrative rule. He said it seems to him that a change in interpretation can have the same effect as a rule amendment. He asked whether a new rulemaking proceeding would be required upon an interpretation change.

There being no further business to come before the committee, Chairman Bernstein adjourned the meeting at 11:10 a.m.

John Walstad
Code Revisor

ATTACH:24