

# NORTH DAKOTA LEGISLATIVE COUNCIL

## Minutes of the

### ADMINISTRATIVE RULES COMMITTEE

Wednesday, December 12, 2001  
Roughrider Room, State Capitol  
Bismarck, North Dakota

Senator Jerry Klein, Vice Chairman, called the meeting to order at 9:00 a.m.

**Members present:** Representatives William R. Devlin, Mary Ekstrom, Bette Grande, Kim Koppelman, Jon O. Nelson, Darrell D. Nottestad, Sally M. Sandvig, Blair Thoreson, Dwight Wrangham; Senators John M. Andrist, Thomas Fischer, Layton Freborg, Jerry Klein, Deb Mathern, David O'Connell, Bob Stenehjem

**Members absent:** Representatives LeRoy G. Bernstein, Duane DeKrey, Nancy Johnson

**Others present:** See Appendix A

Senator Klein said he is acting as chairman for this meeting because Representative Bernstein is attending a funeral.

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

#### STATE BOARD OF ACCOUNTANCY

Vice Chairman Klein called on Ms. Roene Hulsing, a member of the State Board of Accountancy, Dickinson, for testimony relating to September 2001 rules of the board. A copy of Ms. Hulsing's prepared testimony is attached as Appendix B. Ms. Hulsing introduced Ms. Carol Mielke, a member of the State Board of Accountancy, Bismarck.

Senator Mathern asked whether there is any concern that the peer review process may create another level of credential. Ms. Hulsing said there has been proposed legislation in the past on creation of another level of credential and that legislation was defeated. She said she does not believe another level of credential is being created by the rules changes and that concern was expressed at the hearing and discussed by the board.

Senator Andrist said he is concerned about reciprocity issues for professional licensing purposes. He asked whether the rules changes are more restrictive than previous rules. Ms. Hulsing said there are two issues for consideration regarding reciprocity. She said one issue is the experience required before writing an examination in North Dakota, which does not come into play very often. She said the other issue is that the National Association of State Boards of Accountancy is working to make uniform reciprocity provisions among all states. She said North Dakota is

on the forefront on reciprocity issues after 1999 legislation and these rules changes eliminate provisions that are obsolete in view of the 1999 legislation.

In response to a question from Representative Devlin, Ms. Hulsing said peer review charges to the firm being reviewed are on an hourly basis. She said the total cost to her firm was about \$900 and this cost would be required every three years when reviews are done. Representative Devlin said Ms. Hulsing indicated in her testimony that too many substandard reports have been found from review of firms. He asked how many substandard reports have been compiled. Ms. Hulsing said a small number of firms have received substandard reviews but she does not have statistics available. She said she could provide the information on substandard reports from reviews. Vice Chairman Klein requested that she provide the information to committee counsel for distribution to committee members.

Representative Koppelman said elimination of the reciprocity provisions of the rules was said to be believed to eliminate a legal problem that existed in the rules. He asked what legal problem was observed with the previous rule. Ms. Hulsing said she is not certain of the precise legal issue and this was a recommendation of legal counsel for the board. Representative Koppelman said he would like to receive an explanation from the board's legal counsel on the concerns addressed by eliminating the reciprocity provision and whether this change reduces opportunities for professionals from other states to receive reciprocal licensing treatment in North Dakota. Vice Chairman Klein requested Ms. Hulsing to provide information on these questions to committee counsel for distribution to committee members.

Senator Klein asked whether costs of peer review for smaller firms are a concern. Ms. Hulsing said hers is a small firm and she does not believe peer review will add too much additional cost for small firms.

Representative Nottestad asked whether the State Board of Accountancy will have to add staff as a result of these rules changes and the peer review process. Ms. Hulsing said the board will not have to add staff because peer review is not done by the board staff. She said peer review should actually reduce

complaints and problems that must be addressed by board staff.

In response to a question from Senator Mathern, Ms. Hulsing said examination fees for the CPA exam are set by the American Institute of Certified Public Accountants.

## DEPARTMENT OF FINANCIAL INSTITUTIONS

Vice Chairman Klein called on Mr. Timothy J. Karsky, Commissioner of Financial Institutions, for testimony regarding December 2001 rules of the Department of Financial Institutions. A copy of Mr. Karsky's prepared testimony is attached as Appendix C.

Representative Koppelman said the rules were adopted as emergency rules on the statutory grounds that the adoption was necessary to avoid imminent peril to public welfare. He asked Mr. Karsky for a description of the imminent peril addressed by the rulemaking and why the approval of the Governor was not required for the emergency status. Mr. Karsky said there were no recordkeeping requirements in the statutory provisions regarding deferred presentment service providers, so the rules were necessary to require recordkeeping and it was necessary that the rules be effective at the same time the law became effective, which was July 1, 2001. He said it was not necessary to obtain approval from the Governor of the emergency status of the rules because the statutory provision requiring the Governor's approval became effective August 1, 2001, and the deferred presentment service provider statute was effective July 1, 2001. He said the department began rulemaking as soon as the law was enacted.

Senator Mathern said she has a major problem with lending of the type authorized by the statutory provisions in question. She said she believes extremely high rates of interest are payable on these types of loans. Mr. Karsky said by calculation of the department, the maximum rate of finance charge on these "payday" loans is 561 percent. He said the volume of loans made during two months was approximately \$24,000. He said annual percentage rate of interest on these loans is very high but that does not seem to drive down the demand for these kinds of loans.

Representative Ekstrom said North Dakota Administrative Code (NDAC) Section 13-06-01-07(3) states that a deferred presentment service provider cannot share business premises with any other business. She said she has seen these businesses sharing a building and asked how this came about. Mr. Karsky said these lenders are allowed to share premises with another business upon permission from the Commissioner of Financial Institutions. In response to another question from Representative Ekstrom, Mr. Karsky said most of these lenders who have started doing business this year in North Dakota are

new businesses to North Dakota rather than extensions of existing businesses. He said some of these lenders are extensions of preexisting North Dakota businesses, such as pawnshops that have also become deferred presentment service providers.

Representative Devlin asked whether the rules that apply to these lenders are similar to the rules that apply to other types of financial institutions. Mr. Karsky said the rules are similar and one significant exception is that these lenders are allowed by statute to collect only one bad check fee per year from each borrower.

Representative Devlin said NDAC Section 13-06-01-16 imposes limits on advertising by deferred presentment service providers. He asked whether the department perceives any problems with restraints on freedom of speech because of these limits. Mr. Karsky said there is no constitutional violation regarding restraint on speech to the department's knowledge. In response to a further question from Representative Devlin, Mr. Karsky said this rule on advertising limitations is not drawn from a national standard.

Representative Nottestad asked whether the Department of Financial Institutions will be able to stay on top of the activities of these lenders and their advertising. Mr. Karsky said there will be a substantial amount of work for the department to monitor activities and advertising. Senator Mathern asked whether the department has enough staff to deal with these new duties. Mr. Karsky said this responsibility is a substantial expansion of department responsibilities. He said the department has given consideration to examining each of these lenders at least every 12 to 15 months. He said the department believes it can accomplish that goal with current staff.

In response to a question from Senator Stenehjem, Mr. Karsky said deferred presentment service providers did not complain during the hearing process about the advertising restrictions in the rules. Senator Stenehjem said he would like to hold committee consideration of the advertising rule until the next meeting to allow committee members to discuss the effect of the rule with providers.

**It was moved by Senator Stenehjem, seconded by Representative Koppelman, and carried on a voice vote that the committee carry over consideration of NDAC Section 13-06-01-16 relating to advertising by deferred presentment service providers.**

## STATE ELECTRICAL BOARD

Vice Chairman Klein called on Mr. Donald Offerdahl, Executive Director, State Electrical Board, for testimony relating to December 2001 rules of the board. A copy of Mr. Offerdahl's prepared testimony is attached as Appendix D.

Representative Ekstrom said NDAC Section 24-02-01-02(4) allows unlicensed maintenance

personnel to make minor repairs, and she asked how minor repair is to be interpreted. Mr. Offerdahl said the phrase minor repair is not defined in the rules and this exception was added at the request of the Workers Compensation Bureau.

### **HIGHWAY PATROL**

Vice Chairman Klein called on Mr. Doyle F. Schulz, Director, Motor Carrier Division, Highway Patrol, for testimony relating to December 2001 rules of the Highway Patrol. A copy of Mr. Schulz's prepared testimony is attached as Appendix E. Mr. Schulz said a regulatory analysis prepared on these rules changes shows that a failure to adopt these rules would place the state in a noncompliance status and result in the loss of \$1,138,878 to the state in federal funds for fiscal year 2002.

### **INSURANCE COMMISSIONER**

Vice Chairman Klein called on Mr. Charles E. Johnson, Insurance Department general counsel, for presentation of testimony relating to December 2001 rules adopted by the Insurance Commissioner. A copy of Mr. Johnson's prepared testimony is attached as Appendix F. Mr. Johnson said eight separate rules topics were consolidated in this rulemaking action to reduce costs. He said the prepared testimony shows separate answers for each of the eight topics to respond to questions addressed to the Insurance Commissioner regarding the rulemaking.

Representative Koppelman said Mr. Johnson's testimony indicates that in some cases rules adopted were required by federal law. He asked what would happen if these rules were not adopted by the state. Mr. Johnson said in areas such as Medicare supplement insurance provisions, state rules would not have matched federal requirements and in most cases this would mean that enforcement regarding Medicare supplement insurance would go to the federal agency rather than North Dakota. He said the Insurance Commissioner believes North Dakota is better served by state enforcement and for that reason the Commissioner adopted these rules changes.

Senator Mathern inquired about the statutory privacy provisions regarding insurers and asked whether notice is required to consumers before consumer information disclosures. Mr. Johnson said notice is not needed for consumer information disclosure but it is important to observe that under the insurance laws and rules a consumer is not the same as a customer. He said a customer is someone who purchases a policy from an insurance company but a consumer may be just someone who has asked for an insurance price quote. He said the lower standard for disclosure applies to a consumer but not to a customer.

### **BOARD OF PHARMACY**

Vice Chairman Klein called on Mr. Howard C. Anderson, Jr., Executive Director, Board of Pharmacy, for testimony relating to October 2001 rules of the board. A copy of Mr. Anderson's prepared testimony is attached as Appendix G.

In response to several questions, Mr. Anderson described how a telepharmacy operation would function. In response to a question from Senator Klein, Mr. Anderson said this telepharmacy authorization is the first program of this model in the nation.

### **DEPARTMENT OF HUMAN SERVICES**

Vice Chairman Klein called on Ms. Krista Andrews, Department of Human Services legal counsel, for testimony regarding October 2001 rules of the department. A copy of Ms. Andrews' prepared testimony is attached as Appendix H.

### **BOARD OF COUNSELOR EXAMINERS**

Vice Chairman Klein called on Mr. Timothy J. Austin, Board of Counselor Examiners, for testimony relating to December 2001 rules of the board. A copy of Mr. Austin's prepared testimony is attached as Appendix I.

Senator Klein said the rules provide for a fee increase and asked whether the increase is attributable to the financial status of the board. Mr. Austin said the board is now solvent but members believe that an adequate reserve should be on hand to address disciplinary costs that may become necessary in the future. He said when disciplinary actions arise, the board would have no choice but to proceed and costs could be quite substantial.

Representative Nelson asked for information on the history of disciplinary action by the Board of Counselor Examiners and asked whether Mr. Austin believes additional revenue will be needed due to increased disciplinary action under the new rules. Mr. Austin said there has only been one disciplinary action against a licensee involving litigation in the last two or three years. He said the board does not expect violations but must be realistic and be prepared to respond to the need for disciplinary enforcement. He said the board also recognizes the need to have funds on hand for future rulemaking activity as rules of professional conduct develop and evolve on a national level.

Representative Grande said it appears that statutory provisions limit renewal fees to \$100 for Board of Counselor Examiners licensing. Mr. Austin said that is true and these rules impose additional fees for a specialty license as a clinical counselor, which is not limited by the statutory provisions.

### **AGRICULTURE COMMISSIONER**

Vice Chairman Klein called on Mr. Jeff Olson, Plant Industries Program Manager, Agriculture Department, for testimony relating to NDAC Section

60-03-02-01, as carried over from the previous committee meeting. A copy of Mr. Olson's prepared testimony is attached as Appendix J. He said he believes the concern regarding the rule has been resolved because the rule has been repealed. He said the section was determined repealed by the Legislative Council office because the statutory authority for adoption of the rules has been transferred to another agency, which is the Crop Protection Product Harmonization and Registration Board.

Representative Nelson asked whether the rules to be developed by the Crop Protection Product Harmonization and Registration Board would have the same limitations on use of funds as the Pesticide Control Board rules that have been repealed. Mr. Olson said he has been asked to work on a draft of rules for consideration by the Crop Protection Product Harmonization and Registration Board and the prior rules adopted by the Pesticide Control Board will probably be used as a basis for drafting those rules to begin the public hearing process.

### SEED COMMISSION

Vice Chairman Klein called on Mr. Ken Bertsch, Seed Commissioner, Seed Department, who had requested an opportunity to make a request for committee action. A copy of Mr. Bertsch's prepared remarks is attached as Appendix K.

Mr. Bertsch said the request to the committee arises under North Dakota Century Code (NDCC) Section 28-32-18.1, which allows an agency to initiate a request to the Administrative Rules Committee to amend a rule if the amendment eliminates a provision that is obsolete or no longer in compliance with the law. He said with respect to potato certification programs of the State Seed Department, a unique situation exists with regard to fee-setting authority. He said the Seed Commission is the fee-setting body but the Potato Growers Association has final approval or veto authority over fees its members will pay for services provided by the Seed Commission. He said NDCC Section 4-10-02 provides that fees for potato certification programs must be established by the Seed Commission with the approval of the Board of Directors of the North Dakota Seed Potato Growers Association. He said the Seed Commission has approved a motion to increase field inspection fees for potatoes from \$15 per acre to \$18 per acre. He said the increase has been considered by the Seed Potato Growers Association, which approved the fee increase for the 2002 certification season. He said the problem that exists is that the rule provides for a \$15 per acre inspection fee, which has the force and effect of law, while the commission and association have agreed upon an \$18 per acre fee, which also appears to have the force of law because it has been set in accordance with the statutory requirement. He said the Seed Commission is requesting agreement by the Administrative Rules Committee to amend

NDAC Section 74-04-01-04(6)(a) to increase field inspection fees to \$18 per acre. He said the alternatives have been discussed with legal counsel from the Attorney General's office and it appears the options are to proceed with rulemaking or seek authority from this committee to amend the rule as obsolete. He said all parties who would likely be affected by rulemaking have already considered and approved the rule change, so it appears no additional public input would be gained through a rulemaking proceeding.

In response to a question from Representative Grande, Mr. Bertsch said each member of the North Dakota Certified Seed Potato Growers Association receives notice of the proposed fee change and is asked to attend the annual association meeting to discuss the fee increase and other business of the association. He said the board of directors of the association at its most recent meeting approved a motion to approve the fee increase recommended by the Seed Commission.

Representative Devlin said he has some concerns with the Administrative Rules Committee becoming involved in the fee-setting process other than in a review capacity. He said he sympathizes with the Seed Commission but believes it would be within the discretion of the Legislative Assembly to change statutory provisions as necessary to eliminate potential conflicts between action by fee-setting groups and existing administrative rules. He said he believes that because these fees have been set by rule, there is a clear intent that the formal rulemaking process should apply to any fee changes.

Representative Nelson said he also sympathizes with the Seed Commission because this is really a user fee. He said in this case the commission is in a deficit situation and the funds must come from users who have had an opportunity to express their opinions and veto a fee increase.

Representative Devlin said the 2001 Legislative Assembly reviewed and killed a bill to eliminate the need for rulemaking on setting of these fees. He said to approve a fee change without rulemaking would be contrary to the apparent intent of that legislative action.

Vice Chairman Klein said absent a motion from the committee, the requested rules amendment could not be made. No motion was made.

### ADMINISTRATIVE RULE INTERPRETATION CHANGE

Vice Chairman Klein called on committee counsel for presentation of a memorandum entitled *Administrative Rule Interpretation Change - Necessity of Rulemaking Proceeding*. Committee counsel said the memorandum was requested to address the issue of whether an administrative agency changing its interpretation of its own rule must institute a rulemaking proceeding before implementing the change. He said the issue has not been addressed by the North

Dakota Supreme Court or North Dakota Attorney General. He said case law from some federal courts and state courts indicates that agencies may not escape notice and comment requirements of rule-making by labeling substantive changes as mere interpretations. He said the Supreme Court has recognized the principle of equity that an agency is not permitted to accomplish by indirection what cannot be accomplished directly. He said it appears that if the substantive effect of an interpretation is such that rulemaking would be required if it was a rule

change, the agency should conduct a formal rule-making proceeding.

Vice Chairman Klein adjourned the meeting at 2:00 p.m.

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John Walstad  
Code Revisor

ATTACH:11