LEGAL UPDATE

Legal Services Division

LSA LEGISLATIVE SERVICES AGENCY
Serving the Iowa Legislature

Ground Floor, State Capitol Building Des Moines, Iowa 50319 515.281.3566

ADMINISTRATIVE RULES REVIEW COMMITTEE MEETING — NOVEMBER 12, 2019

Purpose. *Legal updates are prepared by the nonpartisan Legal Services Division of the Legislative Services Agency. A legal update is intended to provide legislators, legislative staff, and other persons interested in legislative matters with summaries of recent meetings, court decisions, Attorney General Opinions, regulatory actions, federal actions, and other occurrences of a legal nature that may be pertinent to the General Assembly's consideration of a topic. Although an update may identify issues for consideration by the General Assembly, it should not be interpreted as advocating any particular course of action.*

DEPARTMENT OF AGRICULTURE AND LAND STEWARDSHIP, *Animal Welfare*, 10/9/19 IAB, ARC 4696C, NOTICE.

Background. The purpose of this rulemaking is to do all of the following: ensure that all dogs and cats handled by commercial establishments are provided with humane care and treatment; regulate the transportation, sale, purchase, housing, care, handling, and treatment of dogs and cats by persons engaged in transporting, buying, or selling them; require that all vertebrate animals consigned to pet shops are provided humane care and treatment by regulating the transportation, sale, purchase, housing care, handling, and treatment of such animals by pet shops; authorize the sale, trade, or adoption of only those animals which appear to be free of infectious or communicable diseases; protect the public from zoonotic disease; and establish subclassifications of licenses and further clarify requirements. The rulemaking does not apply to livestock as defined in Iowa Code section 717.1 or any other agricultural animal production as provided in Iowa Code chapter 717A.

Commentary. Mr. Maison Bleam, Legislative Liaison and Policy Advisor, and Dr. Katie Rumsey, Assistant State Veterinarian for Companion Animals, represented the department and responded to inquiries. Committee members thanked the department for its work on the rulemaking.

Members of the public representing dog daycares were present to speak against the following requirements: that the play area provide for a minimum of 75 square feet per dog, that a play area smaller than 1,125 square feet must have a sign placed at the entry of the play area stating the maximum number of dogs in the play area at any one time, that a dog daycare shall not establish a playgroup of more than 15 dogs, that there is a minimum of one person supervising a playgroup, and that at all times a person is supervising a play group he or she is maintaining direct supervision.

Ms. Karissa Schreurs, owner of Canine Country Club, a dog daycare and boarding center, stated that the current rule provides that supervision may be either audible or visual, whereas the proposed rule requires direct supervision. She stated a preference for the rule to remain the same. She also spoke in favor of play areas smaller than 1,125 square feet, explaining that such areas may be sufficient for small dogs and elaborating that a larger area necessarily requires a longer amount of time to reach a fight between two dogs and thus is more dangerous for the dogs.

Dr. Rumsey responded to Ms. Schreurs by stating that the 75-square-feet requirement and the 15-to-1 ratio are current law. She clarified that the rule does not require that many dogs per group, but merely allows it. Similarly, it does not require a space to be that large. Dr. Rumsey explained the importance of direct supervision—to quickly access dogs that have begun to engage in a fight and end the altercation before serious injury occurs. She explained that merely listening for signs of a fight may cause the fight to go undetected until serious injury has already been inflicted.

Ms. Sidney Sjaardema, owner of Bark Avenue, a dog daycare and boarding center, objected to the rulemaking's regulation of dog daycares, overnight lodging, and grooming in the same manner as rescue organizations and commercial breeders. She stated that while the 75-square-foot requirement may be current law, it was not previously strictly enforced; rather, inspectors previously "eyeballed" a room for approximate size and determination whether the animals appeared to be happy. The new sign posting requirement suggests that "eyeballing" will no longer be the standard and that the 75-square-footage requirement will be enforced. Ms. Sjaardema expressed displeasure and indicated that many dog daycares would go out of business. Personally, she stated that she is developing a $2.6 million facility that will not comply with that standard. She conceded that a minimum square footage should be prescribed, but indicated that 75 square feet was not the right number. She suggested that dog daycares were not a represented stakeholder in the drafting of this rulemaking and indicated a desire to be involved in a revision of the rulemaking.

Committee members inquired to Dr. Rumsey regarding the meaning of direct supervision. Dr. Rumsey stated that "direct supervision" was not defined in the rules; rather, the common dictionary understanding was intended. Committee members responded by referring to the different administrative rules governing various professions, specifically doctors, who supervise physician assistants, and veterinarians, who supervise veterinary technicians. With regard to veterinarian rules, committee members indicated veterinarians are only required to exercise direct supervision by being on the premises and being readily available. Dr. Rumsey indicated that the intent for the direct supervision in this rulemaking is for the person to be directly watching dogs with an ability to break up an altercation. She indicated a willingness to provide a definition in the rulemaking. Committee members expressed disagreement with Dr. Rumsey's desire to require perpetual supervision of the animals. She emphasized that dog fights must be quickly quelled in order to avoid life-threatening injuries. Committee members suggested that a certain level of risk in dog injury was inherent due to commingling, which may lead to dog fights; committee members suggested that perhaps focus would be better spent on ensuring facilities have proper insurance for damages incurred under their supervision.

Ms. Sjaardema responded to the direct supervision discussion including the threat of dog fight injuries by stating that her business has a .003 percent rate of injury and by noting that she has checked with similar businesses and found a comparable rate. She asserted that this is a regulation in search of a problem.

Committee members expressed concern regarding whether there was going to be a practice change among inspectors in the enforcement of the 75-square-foot rule. Committee members expressed support for dog daycare concerns being heard in the rulemaking process and deferral to dog daycare expertise in lieu of extensive regulation.

In response to comments from the public and inquiries from committee members, Mr. Bleam provided the following plan. He intended to file the adopted rulemaking on November 13, 2019, which meant that it would be scheduled for review at the December 10, 2019, Administrative Rules Review Committee (ARRC) meeting. The department would convene a stakeholder group, including dog daycares to evaluate the 15-to-1 ratio and the 75-square-foot requirement. He noted that these are not new in the proposed rulemaking; they are current law, which a review of inspection reports indicated have been enforced before, including against some businesses that spoke at the public hearing. He also indicated that he was hearing some concern with the direct supervision requirement and committee members were encouraging him to work with stakeholders on this issue and perhaps provide examples in the rulemaking. Furthermore, in light of Ms. Sjaardema's $2.6 million facility, committee members inquired about the waiver process for this rulemaking, which Mr. Bleam stated was the department's standard waiver and entails a case-by-case analysis. Mr. Bleam went on to state that the department intends to do extensive education on the rulemaking once it is effective and will delay enforcement of the rules by six to nine months; however, the rules which are already in effect will not be delayed. Mr. Bleam stated that roughly half of the 2,057 facilities statewide are inspected by the United States Department of Agriculture each year.

Ms. Alexandria Oldenburg, a certified professional dog trainer, discussed out-of-state, cage-free boarding entities that were interested in expanding into Iowa. She advised that regulation of such entities would be welcomed.

Mr. Dane Schumann, who represents dog daycares, thanked Mr. Bleam and the department for speaking with him in advance of the ARRC meeting and agreeing to convene a stakeholder group to address the concerns of dog daycares.

Ms. Emily Piper spoke on behalf of the Humane Society Legislative Fund of Iowa in support of the rulemaking, arguing in favor of letting the proposed rulemaking go forward and not letting the dispute over the current rules prevent the proposed rules from being implemented. Furthermore, she applauded the expectation of the same high quality of care for animals across all facilities, including dog daycares, required by the proposed rulemaking.

Action. No action taken.

UTILITIES BOARD, *Electric Vehicle Charging Service*, 10/23/19 IAB, ARC 4720C, ADOPTED.
Background. This rulemaking was initiated after truck stops challenged a tariff regulated by the board that prohibited certain electric utility customers from providing electric vehicle charging services on a per-kilowatt-hour basis. The rulemaking states that the provision of electricity sold for the purpose of electric vehicle charging at a commercial or public electric vehicle charging station constitutes neither the furnishing of electricity to the public nor the resale of electric service, for purposes of regulation as an electric utility. The rulemaking also states that a regulated electric utility cannot prohibit electric vehicle charging or restrict the method of sale of electric vehicle charging at a commercial or public electric vehicle charging station.

Commentary. Public comment opposed to the rulemaking was received from Mr. Denny Puckett on behalf of the Iowa Association of Electric Cooperatives, Mr. Tim Whipple on behalf of the Iowa Association of Municipal Utilities, Mr. Donald Kom on behalf of the city of Ames' electric services, and Mr. Arick Sears on behalf of MidAmerican Energy. The commenters generally expressed support for the expansion of electric vehicle charging infrastructure, but raised a number of concerns with the rulemaking. Commenters asserted that the rulemaking, by determining that the sale of electricity for electric vehicle charging is not considered furnishing electricity to the public, violates statutory requirements providing for exclusive service territories for utilities as well as precedent from the Iowa Supreme Court providing criteria for determining whether an entity is a utility. The commenters expressed concern that allowing such sales of electricity by entities other than electric utilities would make it difficult for electric utilities to recoup the cost of any additional infrastructure they would be legally obligated to construct in order to facilitate the provision of the necessary electricity. The commenters argued that the rulemaking should address the relationship between existing utilities and entities that would sell electric charging service, rather than solely addressing the relationship between such entities and their customers. The commenters further argued that the board, by not making any revisions to the previously noticed language, had not adequately considered suggested revisions to the rulemaking provided by the commenters that would have addressed these concerns. Mr. Matt Oetker, speaking on behalf of the board, responded that the statutes governing the board do not prohibit an entity from engaging in such sales of electricity. He further responded that while the rulemaking does not address the relationship between entities engaging in such sales and existing utilities, the board's existing adjudicatory framework could be used to address any questions in that regard and that such questions exist regardless of the rulemaking. He additionally responded that the board had considered the revisions to the rulemaking proposed by the commenters but disagreed with the proposals. He also noted that the board's own proposed revisions to the noticed language to address the commenters' concerns received negative feedback from the commenters, so the board did not pursue such revisions.

Public comment in support of the rulemaking was received from Mr. Bob Rafferty on behalf of Truckstops of Iowa and the Iowa 80 Truck Stop; Mr. Mark Schuling, the Consumer Advocate for the State of Iowa; Mr. Josh Mandelbaum on behalf of the Environmental Law and Policy Center; and Ms. Pam Maggie Taylor on behalf of the Sierra Club. The commenters generally asserted that the rulemaking is balanced

between the interests of utilities and entities who want to sell electric vehicle charging service and that the rulemaking is key to promoting the development of electric vehicle charging infrastructure in Iowa. The commenters further asserted that a business providing electric vehicle charging as an ancillary service should not be considered a utility, that the rulemaking is in keeping with statutory requirements and Iowa Supreme Court precedent, and that the question of the cost of paying for infrastructure to facilitate electric vehicle charging could be negotiated between utilities and entities selling such service rather than addressed in the rulemaking. Commenters emphasized the importance of such entities being able to sell electricity by the kilowatt hour, which they described as the most workable approach. Mr. Rafferty asserted that 28 states have taken the position that entities providing such sales are not utilities, while none had taken the position that they are utilities. Mr. Sears asserted that number is misleading, as it includes states that in fact had taken the position that such entities are utilities.

Committee members, Mr. Oetker, and commenters discussed current processes for the installation of electric vehicle charging infrastructure and various models for how related costs are borne, as well as how such processes and models might change under the rulemaking. Discussion included scenarios where a seller of electric vehicle charging service buys power from a utility, generates their own power, and buys power from a third party that is run through their local utility's lines. Committee members also discussed with Mr. Oetker the implications of imposing an objection on the rulemaking, including that the rulemaking would still become effective as normal and that a court might eventually invalidate the rulemaking.

Action. A motion for an objection to rule 199 IAC 20.20, as adopted in ARC 4720C, carried on a 6-3 record roll call vote with one member abstaining, citing a House of Representatives rule pertaining to direct financial interests different from other similarly situated members of the public.

Next Meeting. The next committee meeting will be held in room 116, at the Statehouse, on Tuesday, December 10, 2019, beginning at 10:00 a.m.

LSA Staff Contacts: Jack Ewing, 515.281.6048 or jack.ewing@legis.iowa.gov; and Amber Shanahan-Fricke, 515.725.7354 or amber.shanahan-fricke@legis.iowa.gov

Internet site: www.legis.iowa.gov/committees/committee?endYear=2019&groupID=705

1074224